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SUPREME COURT OF NORTH CAROLINA

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I. BEVERLY LAKE, SR.

ASSOCIATE JUSTICE
30 AUGUST 1965 - 31 AUGUST 1978

TABLE OF CONTENTS

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1. Appointed and sworn in 8 August 1997.
2. Appointed and sworn in 22 August 1997.
3. Appointed and sworn in 22 August 1997.
4. Appointed and sworn in 27 August 1997.
5. Deceased 27 April 1997.
6. Recalled to the Court of Appeals 1 September 1995.

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1. Appointed and sworn in 29 May 1997 to replace Patricia A. Timmons-Goodson who was appointed to the Court of Appeals.
2. Appointed and sworn in 12 August 1997.
3. Appointed and sworn in 28 February 1997.
4. Appointed and sworn in 14 March 1997.
5. Appointed and sworn in 12 August 1997.

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THOMAS B. WOOD
DAVID L. WOODARD
HARRIET F. WORLEY
WILLIAM D. WORLEY
DONALD M. WRIGHT
CLAUD R. YOUNG, JR.

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	FRANK R. PARRISH	Elizabeth City
2	MITCHELL D. NORTON	Washington
3A	THOMAS D. HAIGWOOD	Greenville
3B	W. DAVID MCFADYEN, JR.	New Bern
4	WILLIAM H. ANDREWS	Jacksonville
5	JOHN CARRIKER	Wilmington
6A	W. ROBERT CAUDLE II	Halifax
6B	DAVID H. BEARD, JR.	Murfreesboro
7	HOWARD S. BONEY, JR.	Tarboro
8	DONALD M. JACOBS	Goldsboro
9	DAVID R. WATERS	Oxford
9A	JOEL H. BREWER	Roxboro
10	C. COLON WILLOUGHBY, JR.	Raleigh
11	THOMAS H. LOCK	Smithfield
12	EDWARD W. GRANNIS, JR.	Fayetteville
13	REX GORE	Bolivia
14	JAMES E. HARDIN, JR.	Durham
15A	ROBERT F. JOHNSON	Graham
15B	CARL R. FOX	Chapel Hill
16A	JEAN E. POWELL	Raeford
16B	L. JOHNSON BRITT III	Lumberton
17A	BELINDA J. FOSTER	Wentworth
17B	CLIFFORD R. BOWMAN	Dobson
18	HORACE M. KIMEL, JR.	Greensboro
19A	MARK L. SPEAS	Concord
19B	GARLAND N. YATES	Asheboro
19C	WILLIAM D. KENERLY	Salisbury
20	KENNETH W. HONEYCUTT	Monroe
21	THOMAS J. KEITH	Winston-Salem
22	EUGENE T. MORRIS, JR.	Lexington
23	RANDY LYON	Wilkesboro
24	JAMES T. RUSHER	Boone
25	DAVID T. FLAHERTY, JR.	Lenoir
26	PETER S. GILCHRIST III	Charlotte
27A	MICHAEL K. LANDS	Gastonia
27B	WILLIAM CARLOS YOUNG	Shelby
28	RONALD L. MOORE	Asheville
29	JEFF HUNT	Rutherfordton
30	CHARLES W. HIPPS	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3A	ROBERT L. SHOFFNER, JR.	Greenville
3B	HENRY C. BOSHAMER	Beaufort
12	RON D. MCSWAIN	Fayetteville
14	ROBERT BROWN, JR.	Durham
15B	JAMES E. WILLIAMS, JR.	Carrboro
16A	J. GRAHAM KING	Laurinburg
16B	ANGUS B. THOMPSON	Lumberton
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27A	KELLUM MORRIS	Gastonia
28	J. ROBERT HUFSTADER	Asheville

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

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

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

PETITIONS TO REHEAR

G.S.	
32A-1	Whitford v. Gaskill, 475
32A-2(1)	Whitford v. Gaskill, 475
47-30(f)(11)(d)	Three Guys Real Estate v. Harnett County, 468
50-16.5	Cunningham v. Cunningham, 430
97-10.1	Richardson v. N.C. Dept. of Correction, 128
97-13(c)	Richardson v. N.C. Dept. of Correction, 128
97-19	Southerland v. B. V. Hedrick Gravel & Sand Co., 739
105-203	Fulton Corp. v. Faulkner, 419
105-215	Fulton Corp. v. Faulkner, 419
123-5	In re Spivey, 404
128-21(2)	Faulkenbury v. Teachers' and State Employees' Ret. Sys., 683
128-27(i)	Faulkenbury v. Teachers' and State Employees' Ret. Sys., 683
128-38	Faulkenbury v. Teachers' and State Employees' Ret. Sys., 683
130A-18	Act-Up Triangle v. Commission for Health Services, 699
130A-25	Act-Up Triangle v. Commission for Health Services, 699
130A-143	Act-Up Triangle v. Commission for Health Services, 699
135-1(2)	Faulkenbury v. Teachers' and State Employees' Ret. Sys., 683
135-1(10)	Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys., 734
135-3	Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys., 734
135-5(n)	Faulkenbury v. Teachers' and State Employees' Ret. Sys., 683
135-18.4	Faulkenbury v. Teachers' and State Employees' Ret. Sys., 683
150B-2(2)	Act-Up Triangle v. Commission for Health Services, 699
150B-20(d)	Act-Up Triangle v. Commission for Health Services, 699
150B-40	Act-Up Triangle v. Commission for Health Services, 699
153A-330	Three Guys Real Estate v. Harnett County, 468
153A-331	Three Guys Real Estate v. Harnett County, 468
153A-332	Three Guys Real Estate v. Harnett County, 468
153A-333	Three Guys Real Estate v. Harnett County, 468
153A-334	Three Guys Real Estate v. Harnett County, 468

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

UNITED STATES CONSTITUTION CITED AND CONSTRUED

NORTH CAROLINA CONSTITUTION CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 28th day of February, 1997, and said persons have been issued certificates of this Board:

JOHN F. DEL GIORNO . . . . . Cary
Applied from the State of Illinois

JOHN D. STONEBRAKER . . . . . Bettendorf, Iowa
Applied from the State of Iowa

HOWARD S. DALLOW . . . . . *Middletown, New York*
Applied from the State of New York

JOHN ANTHONY BUKAUSKAS . . . . . Jacksonville
Applied from the State of Texas

KENNETH L. WITTENAUER . . . . . Charlotte
Applied from the State of Ohio

ROBERT EDWARD HORNIK, JR. . . . . Fayetteville, New York
Applied from the State of New York

RONALD C. SMITH . . . . . Indianapolis, Indiana
Applied from the State of Indiana

DENNIS ADJEI-BRENYAH . . . . . New York, New York
Applied from the State of New York

MELBRA JANE GILES . . . . . Fayetteville
Applied from the District of Columbia

MARTHA JEAN DUVALL . . . . . Gettysburg, Pennsylvania
Applied from the State of Pennsylvania

CATHERINE WARD CRALLE JONES . . . . . Ayden
Applied from the State of Texas

HARVEY JOEL SLOVIS . . . . . Bronx, New York
Applied from the State of New York

LAURA EFFEL . . . . . Brooklyn, New York
Applied from the State of New York

THOMAS MAURO NARDOZZO, JR. . . . . Charlotte
Applied from the State of Pennsylvania

PATRICK ALAN GENZLER . . . . . Virginia Beach, Virginia
Applied from the State of Virginia

ANDREW J. HANLEY . . . . . Houston, Texas
Applied from the State of Texas

DIANE ROHLEDER HEIM . . . . . Matthews
Applied from the District of Columbia

STEVEN ALISTER ARMSTRONG . . . . . Greensboro
Applied from the State of New York

ROBERT C. RAPP . . . . . Marco Island, Florida
Applied from the State of New York

JULIE PALMER SCHRANK . . . . . Charlottesville, Virginia
Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 6th day of March, 1997.

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

I, FRED P. PARKER IIII, 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 March, 1997, and said persons have been issued certificates of this Board:

JOSEPH AMBROSE ADAMS ..... Charlotte
Applied from the State of New York

PATRICIA H. ANDERSON ..... Tryon
Applied from the District of Columbia

EDWARD STEPHEN BOOHER, JR. ..... Charlotte
Applied from the District of Columbia

ROBERT MICHAEL DONLON ..... Charlotte
Applied from the State of New York

MARGARET POINDEXTER FONDRY ..... Conyers, Georgia
Applied from the State of Tennessee

PETER P. FONDRY ..... Conyers, Georgia
Applied from the State of Tennessee

MARY MOORE HOAG ..... Raleigh
Applied from the State of Texas

ERIK C. LINCOLN ..... Charlotte
Applied from the State of Ohio

JANET ANN RIETHER PERROTTI ..... Charlotte
Applied from the State of Connecticut

ROBERT W. WATSON, JR. ..... Charlotte
Applied from the State of Pennsylvania

EDWARD W. WELLMAN, JR. ..... Charlotte
Applied from the State of Connecticut

RICHARD J. WERTHEIMER ..... Davidson
Applied from the District of Columbia

MICHAEL FRANCIS ZENDAN II ..... Charlotte
Applied from the State of Connecticut

Given over my hand and seal of the Board of Law Examiners this the 13th day of March, 1997.

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

I, FRED P. PARKER IIII, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly

passed the examinations of the Board of Law Examiners as of the 22nd day of March, 1997, and said persons have been issued license certificates.

FEBRUARY 1997 NORTH CAROLINA BAR EXAMINATION

EILEEN F. ADAMO ..... Raleigh
CHARLENE Y. ARMSTRONG ..... Winston-Salem
JAMES ANTHONY ATKINS ..... Charleston, South Carolina
BILLY JAY BAITY, JR. ..... Statesville
CRAIG ROBERT BALDAUF ..... Charlotte
ANDRE FRANCISCOS BARRETT ..... Sanford
JAMES EDWIN BAUM, JR. ..... Raleigh
LAWRENCE ELLIOTT BEHNING ..... Watchung, New Jersey
MONICA LATRICE BENTHAM ..... Greensboro
LEE CRAIG BIGGAR ..... Chapel Hill
BRIAN NEAL BISHOP ..... Jacksonville
HARRY RANDALL BIVENS ..... Raleigh
ANDREW CARTER BLUMENBERG ..... Charlotte
GAIL L. BRANNON ..... Pittsburgh, Pennsylvania
RICHARD V. BROADNAX ..... Reidsville
CHARLES A. BROOKS ..... Morristown, New Jersey
BRUCE R. BULLOCK ..... Raleigh
JILL QUATTLEBAUM BYRUM ..... Charlotte
MARISA STEFANIE CAMPBELL ..... Raleigh
RANDY A. CARPENTER ..... Newland
STACEY TREVA CARTER ..... Kernersville
BRIAN MARTIN CHMURA ..... Winston-Salem
DEBRA ANN CHURCH ..... Gastonia
MATTHEW STEVENS CHURCHILL ..... Davidson
SAMUEL R. CLAWSON ..... Mt. Pleasant, South Carolina
HAROLD WALKER COGDELL, JR. ..... Charlotte
MARIA FRANCES COHN ..... Raleigh
HOLLY ANN COLDIRON ..... Snow Camp
REBECCA HOPPER COZART ..... Raleigh
CLAUDIA ROSAMA CLARK CROOM ..... Raleigh
MICHELLE A. CUMMINS ..... Sanford
TONJA TENIR DAMON ..... Winston-Salem
BRET HARLAN DAVIS ..... Myrtle Beach, South Carolina
MARCIA J. DECKER ..... Chapel Hill
J. MATTHEW DOVE ..... Surfside Beach, South Carolina
JULIE M. DUCHOW ..... West Hartford, Connecticut
BRENDAN C. EDGE ..... Gastonia
BURT EDMOND EISENBERG ..... Cooper City, Florida
WILLIAM LEWIS ELLISON, JR. ..... Mount Pleasant, South Carolina
CAREY LOUISE EWING ..... Durham
LEWIS RICHARD FADELY ..... Siler City
RICHARD MORRIS FLEXNER ..... Raleigh
ANTHONY R. FOXX ..... Charlotte
FELICIA FREEMAN ..... Greensboro
BUNNIE BEN-KORI GAST ..... Charlotte
DONALD GAST ..... Green Mountain
M. BRYANT GATRELL ..... Charlotte

JAMES SAMUEL GIBBS, JR. . . . . Winston-Salem
MILLICENT YVETTE GOINS . . . . . Wilson
VIRGINIA RICKS GRADY . . . . . Darien, Connecticut
JAY BRIAN GREEN . . . . . Winston-Salem
ROYDERA DOLORES HACKWORTH . . . . . Greensboro
JEFFRIES MOCK HAMILTON . . . . . Raleigh
PATTI LEE HARTMAN . . . . . Greensboro
MACDUFF VICTOR HENRY . . . . . Durham
KARI PETERSON HEPBURN . . . . . Chapel Hill
PAUL W. HESPEL . . . . . Charlotte
LAURIE LEE HOHE . . . . . Cary
SUSANA E. HONEYWELL . . . . . Cary
C. DOCK HOOKS, JR. . . . . Durham
JEFFREY A. HOPKINS . . . . . Charlotte
BRIDGETT HURLEY-GOODWIN . . . . . Chapel Hill
KENNETH RAYMOND HUTCHINS II . . . . . Charlotte
CRAIG JAMES . . . . . Benson
MARGARET ANN JENNINGS . . . . . Wilmington
DEBRA HUNN JOHNSON . . . . . Gastonia
BRADLEY H. JOHNSON . . . . . Columbia, South Carolina
LAFONDA RENEE JONES . . . . . Stockton, California
JONATHAN C. JORDAN . . . . . Raleigh
JANE MOURY KANE . . . . . Winston-Salem
CHRIS KARRENSTEIN . . . . . Charlotte
KOBI J. KENNEDY . . . . . Charlotte
KENNETH P. KERR . . . . . Charlotte
JEREMY KYLE KINNER . . . . . Chapel Hill
SANDRA LEIGH KNOX . . . . . Charlotte
BENJAMIN R. KUHN . . . . . Raleigh
DAVID LINGER KYGER . . . . . Greensboro
COREY ANTHONY LAWRENCE . . . . . Charlotte
DAVID RANSOM LAWSON . . . . . Columbia, South Carolina
LANCE ALAN LAWSON . . . . . Charlotte
MICHAEL JAY LEVINE . . . . . Wilmington
CECELIA MONIQUE LEWIS-RHASIATRY . . . . . Charlotte
CYNTHIA CASS LOCKLEAR . . . . . Wilmington
ANDREW JAMES LOGAN . . . . . Winston-Salem
JOHN F. LOMAX, JR. . . . . Greenville, South Carolina
KAREN THERESA LOMINAC . . . . . North Myrtle Beach, South Carolina
STEPHANIE KRISTEN LYFORD . . . . . Raleigh
SANDY SIN-I MA . . . . . Raleigh
LESLEY SKYE MACLEOD . . . . . South Royalton, Vermont
CARLA MARINO . . . . . Charlotte
ARCANGELA M. MAZZARIELLO . . . . . Gastonia
THERESA J. MCCARTHY . . . . . Raleigh
JOHN G. MCDONALD . . . . . Charlotte
MARGARET CAMPBELL MCGEE . . . . . Columbia, South Carolina
DEBORAH L. MCKENNEY . . . . . Greensboro
REGGIE ERIC MCKNIGHT . . . . . Durham
BRIAN JOHN MCMILLAN . . . . . Greensboro
VICTOR NEAL MEIR . . . . . Cary

CHRISTOPHER BLOHME STAUBES III ..... Charleston, SC
MATTHEW JOSEPH STORY ..... Charleston, South Carolina
EMILY EAKES SUDERMANN ..... Greensboro
DEBRA FRANCES TAYLOR ..... Charlotte
ALICE TEJADA ..... Raleigh
DEVIN FERREE THOMAS ..... Wake Forest
MICHAEL R. THORNTON ..... Raleigh
KATHLEEN MEAGHER THORNTON ..... Raleigh
ERIC RION TOMCHIN ..... Arden
PAUL B. TREVARROW ..... Troy, Michigan
JAN D. VAN DE CARR ..... Raleigh
PHILIP SPEARS VAVALIDES ..... Greensboro
JOHN WESTON WELLMAN ..... Jamestown, New York
EDWARD TURIN WESTON ..... Charlotte
BRIAN DAVID WESTROM ..... Durham
VINCENT J. WILK ..... Charlotte
STEVEN MARK WILKINS ..... Torrance, California
LESLIE MEREDITH WILLIAMS ..... Shelby
WENDY HOLLAND WOLKOM ..... Charlotte
WILLIAM MICHAEL WORKMAN ..... Los Angeles, California
JENNIFER ANN YOUNGS ..... Charlotte
JEFF D. ZDENEK ..... New Hill
ERIC JAY ZOGRY ..... Raleigh

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 28th day of March, 1997, and said person has been issued certificate of this Board:

John Myles Hart ..... Emerald Isle, North Carolina
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 7th day of April, 1997.

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

I, FRED P. PARKER IIII, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 11th day of April, 1997, and said persons have been issued license certificates.

FEBRUARY 1997 NORTH CAROLINA BAR EXAMINATION

MASON G. ALEXANDER, JR. ..... Columbia, South Carolina
KENNETH RICHARD ASHFORD ..... Winston-Salem
JOHN FRANCIS BLOSS ..... Greensboro
BRET KENYON BOCOOK ..... Chapel Hill
R. KENNETH BOEHNER ..... Chapel Hill

JOHN J. BOWERS ..... Winston-Salem
BETTY JEAN BROWN ..... Greensboro
SCOTT P. CARROLL ..... Charlotte
LEONARD A. COLONNA ..... Greensboro
ROBERT S. CULPEPPER ..... Charlotte
CHRISTOPHER G. DANIEL ..... Winston-Salem
MICHAEL STUART DAVENPORT ..... Green Bay, Wisconsin
ALLAN CRAIGG DE LAINE ..... Winston-Salem
ANN ELLEN HEMMENS ..... Carrboro
LAURA P. JONES ..... Durham
MARK ANTHONY KEY ..... Holly Springs
JAMES WILLIAM LATSHAW ..... Wilmington
BARBARA R. LENTZ ..... Lewisville
NOEL B. MCDEVITT, JR. ..... Southern Pines
CHARLES KIRKWOOD MILLS ..... Mission Viejo, California
TRACY NEEL ..... Charlotte
ANNE K. O'CONNELL ..... Jacksonville
JONATHAN ERIC PERKEL ..... Charlotte
JESSE FRANKLIN PITTARD, JR. ..... Roanoke Rapids
ROBERT FRANCIS POMPER ..... Winston-Salem
DEBORAH ANN POPLE ..... Raleigh
WILLIAM L. RICHARDS ..... Bryson City
JOHN RODERICK RING ..... Raleigh
ROBERT W. RITSCH ..... Chapel Hill
JOANNE MICHELLE SCHLANGER ..... Asheville
VANDANA SHAH ..... Raleigh
STEVEN MARK SOBELL ..... Charlotte
ELIZABETH ANN STEELE ..... Dupo, Illinois
HUGO ALBERTO TETTAMANTI ..... Alexandria, Virginia
CHERYL JANINE THOMAS ..... Fayetteville
HOMER BERNARD TISDALE III ..... Greenville, South Carolina
STEVEN EDWARD WHITESELL ..... Chapel Hill
STEPHAN JOHN WILLEN ..... Charlotte
JOHN ANDREW WILLIAMS ..... Winston-Salem
VALERIE L. YODER ..... Charlotte

JULY 1996 NORTH CAROLINA BAR EXAMINATION

JOSEPH MICHAEL CALIANNO ..... Charlotte
THEODORE EDWARD KALO ..... Chapel Hill

Given over my hand and seal of the Board of Law Examiners this the 16th day of April, 1997.

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

I, FRED P. PARKER IIII, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed

the examinations of the Board of Law Examiners as of the 18th day of April, 1997, and said persons have been issued a license certificate.

FEBRUARY 1996 NORTH CAROLINA BAR EXAMINATION

MARGARET L. RAYNOR ..... New Bern

Given over my hand and seal of the Board of Law Examiners this the 21st day of April, 1997.

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

I, FRED P. PARKER IIII, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 25th day of April, 1997, and said persons have been issued certificates.

FEBRUARY 1997 NORTH CAROLINA BAR EXAMINATION

HEATHER MCGROTTY SHADE ..... Fairview
JOHN W. WATSON ..... Holly Springs

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 25th day of April, 1997, and said person has been issued certificate of this Board:

SHELLY BALLARD BOSTICK ..... Evanston, Illinois
Applied from the State of Illinois

Given over my hand and seal of the Board of Law Examiners this the 29th day of April, 1997.

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

I, FRED P. PARKER IIII, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 18th day of April, 1997, and said persons have been issued certificates.

FEBRUARY 1997 NORTH CAROLINA BAR EXAMINATION

SARAH A. JOHNSON ..... Pawleys Island, South Carolina
WILLIAM RAY MASSEY ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 5th day of May 1997.

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

I, FRED P. PARKER IIII, 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 2nd day of May, 1997, and said persons have been issued certificate of this Board:

ROBERT KEVIN BURGESS MCCONNELL ..... Camp Lejeune
Applied from the State of Ohio

Given over my hand and seal of the Board of Law Examiners this the 8th day of May, 1997.

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

I, FRED P. PARKER IIII, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 16th day of May, 1997, and said persons have been issued certificates.

JULY 1996 NORTH CAROLINA BAR EXAMINATION

PAUL F. HUFFMAN ..... Boone
STEVEN JOHN TALCOTT ..... Hunting Beach, California

Given over my hand and seal of the Board of Law Examiners this the 27th day of May 1997.

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

I, FRED P. PARKER IIII, 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 23rd day of May, 1997, and said persons have been issued certificates of this Board:

RANDALL M. WHITMEYER ..... Cary
Applied from the State of Illinois
JAMES DONALD DATI ..... Manlius, New York
Applied from the State of New York
KAREN ANNETTE JOHNSON ..... Burlington
Applied from the State of Pennsylvania

RONALD E. VONLEMBKE ..... Jacksonville
Applied from the State of Colorado
SUSAN R. FRANKLIN ..... Chapel Hill
Applied from the State of Illinois
SUSAN SCHWARCZ ..... Chapel Hill
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 2nd day of June, 1997.

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

I, FRED P. PARKER IIII, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 27th day of June, 1997, and said persons have been issued certificate.

FEBRUARY 1997 NORTH CAROLINA BAR EXAMINATION

HOPE MARIE HUTTO ..... Winston-Salem

Given over my hand and seal of the Board of Law Examiners this the 2nd day of July 1997.

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

I, FRED P. PARKER IIII, 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 25th day of July, 1997, and said persons have been issued certificates of this Board:

SCOTT ALAN CAMMARN ..... Charlotte
Applied from the State of Ohio
ALAN S. CARLSON ..... Charlotte
Applied from the State of Pennsylvania
JANE E. CROCK ..... Charlotte
Applied from the State of Iowa
LAWRENCE J. KUCY ..... Charlotte
Applied from the State of Pennsylvania
JAMES WARREN LOVELY ..... Charlotte
Applied from the State of New York
MATTHEW A. MARINO ..... Matthews
Applied from the State of New York
JOHN SLADEK O'CONNOR ..... Kitty Hawk
Applied from the State of New York
ANDREW S. O'HARA ..... Charlotte
Applied from the State of Pennsylvania

RICHARD E. STEINBRONN ..... Andrews
Applied from the State of Indiana

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 8th day of August, 1997 and said persons have been issued certificates of this Board:

ANDREW MARTIN ADAMS ..... Burke, Virginia
Applied from the State of Virginia
PAUL ARTHUR RAAF ..... Sanford
Applied from the State of Ohio
HARRIS FRANK TRESTMAN ..... Virginia Beach, Virginia
Applied from the State of Virginia
DAVID J. YOUNG ..... Columbus, Ohio
Applied from the State of Ohio
CYNTHIA KATKISH ..... Washington, District of Columbia
Applied from the District of Columbia
JUDITH ELLEN GROSS ..... New York, New York
Applied from the State of New York
MARGARET ANN GARNER ..... Springfield, Virginia
Applied from the District of Columbia
CARRO HINDERSTEIN ..... Houston, Texas
Applied from the State of Texas
PATRICK MICHAEL BROGAN ..... Norfolk, Virginia
Applied from the State of Virginia
JOSEPH DOOMIT CALDWELL ..... New Hartford, New York
Applied from the State of New York
KEVIN R. MCAULIFFE ..... Syracuse, New York
Applied from the State of New York
EUGENE DANIEL NAPIERSKI ..... Albany, New York
Applied from the State of New York
WILLARD JAMES MOODY, JR. ..... Portsmouth, Virginia
Applied from the State of Virginia
JENNIFER L. DEPPA ..... Cary
Applied from the State of New York
JOANNE M. DENISON ..... Chapel Hill
Applied from the State of Illinois
JACQUELYN DAVIS SABER ..... Raleigh
Applied from the State of Pennsylvania
MICHAEL P. SABER ..... Raleigh
Applied from the State of Pennsylvania
TODD MARCH RUBIN ..... Raleigh
Applied from the District of Columbia
RONALD S. MILSTEIN ..... Greensboro
Applied from the State of New York
MARK JACQUOT TEMPEST ..... Raleigh
Applied from the State of Texas
FREDERICK M. DODGE, II ..... Ava, New York
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 11th day of August, 1997.

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

I, FRED P. PARKER IIII, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 23rd day of August, 1997, and said persons have been issued license certificates.

JULY 1997 NORTH CAROLINA BAR EXAMINATION

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Given over my hand and seal of the Board of Law Examiners this the 5th day of September, 1997.

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

I, FRED P. PARKER IIII, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 12th day of September, 1997, and said persons have been issued license certificates.

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Given over my hand and seal of the Board of Law Examiners this the 15th day of September, 1997.

FRED P. PARKER III
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. CHARLES PHILLIPS BOND

No. 143A95

(Filed 6 December 1996)

1. Jury § 219 (NCI4th)— capital trial—death penalty for accessory—juror's inability to impose—excusal for cause

The trial court did not err by excusing for cause in a capital murder trial a prospective juror who stated that he could not impose the death penalty on a defendant who did not pull the trigger after the venire had been informed by the State that defendant was not present when the murder was committed but was an accessory since the juror indicated that he could not follow the law regarding the death penalty. N.C.G.S. §§ 15A-1212(8) and (9).

Am Jur 2d, Jury § 279.

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

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 ALR3d 172.

2. Jury § 123 (NCI4th)— ability to impose death sentence on accessory—not attempt to "stake-out" jurors

The prosecutor did not improperly attempt to "stake-out" jurors in a capital murder trial by inquiring during *voir dire* into

the ability of prospective jurors to impose a death sentence on a defendant who is an accessory to first-degree murder where the prosecutor informed the prospective jurors that the evidence would show that defendant did not pull the trigger but was an accessory before the fact, and evidence of defendant's status as an accessory was uncontroverted.

Am Jur 2d, Jury §§ 208, 267.

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

3. Jury § 158 (NCI4th)— capital trial—reopening examination of juror—inaccurate statement—good reason—peremptory challenge

The trial court did not err by reopening the jury *voir dire* in a capital trial to allow the prosecution to exercise a peremptory challenge of a prospective juror it had already accepted where the juror told the prosecutor that he had no personal feeling concerning the death penalty but later told defense counsel that he personally could not support a death sentence, since the prospective juror could reasonably have been deemed to have made at least one incorrect statement within the meaning of N.C.G.S. § 15A-1214(g); even assuming that equivocation as to capital punishment did not constitute inaccuracy, such equivocation itself qualified as "good reason" to reopen *voir dire* within the purview of § 15A-1214(g). Once the trial court reopened the examination of the juror, the parties had an absolute right to exercise any remaining peremptory challenges to excuse such juror.

Am Jur 2d, Jury § 279.

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

4. Jury § 260 (NCI4th)— peremptory challenge—*Batson* inquiry—third step reached by court

The trial court did not fail to reach the third step of the *Batson* inquiry requiring the court to determine whether defendant had carried his burden of proving purposeful discrimination in the State's use of a peremptory challenge where the court found that the State had presented neutral, nondiscriminatory

reasons for excusing the juror, overruled defendant's objection to the excusal, and denied defendant's motion.

Am Jur 2d, Criminal Law § 684; Jury §§ 244, 246.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-*Batson* state cases. 20 ALR5th 398.

5. Jury § 260 (NCI4th)— peremptory challenge—death penalty hesitancy—race-neutral reason

The trial court did not err in finding that the prosecutor's peremptory challenge of a black prospective juror was not purposeful discrimination where the prosecutor stated that the juror was excused because he expressed some hesitation and appeared to be concerned and worried when asked about the death penalty, and the prosecutor accepted eight African-American jurors who ultimately decided defendant's case and recommended the death penalty.

Am Jur 2d, Jury §§ 244, 246, 279.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-*Batson* state cases. 20 ALR5th 398.

6. Robbery § 77 (NCI4th)— armed robbery—intent to deprive owner of property—sufficient evidence

The State's evidence was sufficient to support a jury finding that defendant intended to permanently deprive the victim of his car so as to support defendant's conviction of armed robbery where the evidence tended to show that defendant and an accomplice kidnapped the victim and his sister in order to obtain the use of their car; during a period of eight hours, defendant forced the victim at gunpoint to drive his own car in two states, to stop at places where defendant wanted to stop, and to rob stores defendant told him to rob; although defendant told the hostages several times that he was going to let them go, he never did; defendant repeatedly ordered his accomplice to "waste" the vic-

tim and his sister "if they did anything wrong"; and when the victim attempted to disarm the accomplice, the accomplice, presumably following defendant's orders, shot and killed him.

Am Jur 2d, Robbery §§ 18, 65.

Necessity and sufficiency of showing, in kidnapping prosecution, that detention was with intent to "secretly" confine victim. 98 ALR3d 733.

7. Criminal Law § 45 (NCI4th Rev.); Homicide § 17 (NCI4th)— aiding and abetting—actual or constructive presence not required—accessory before fact as aider and abettor

Actual or constructive presence is no longer required to prove a defendant's guilt of a crime under an aiding and abetting theory. Thus, accessories before the fact, who do not actually commit the crime and may not have been present, can be convicted of first-degree murder under a theory of aiding and abetting. N.C.G.S. § 14-5.2.

Am Jur 2d, Homicide §§ 28, 507; Trial § 1256.

8. Homicide § 251 (NCI4th)— accessory before fact—intent to kill—conditional threat to kill—occurrence of condition

The State's evidence was sufficient to show that defendant had the *mens rea* necessary to commit premeditated and deliberate murder where it tended to show that defendant and his accomplice kidnapped the victim and his sister in order to obtain use of their car; defendant gave the accomplice a .380 semiautomatic pistol and told him to "waste" the hostages if they "messed up"; defendant repeated this command just before he left the car at a hospital to obtain treatment for an injured foot; and when the victim attempted to disarm the accomplice, the accomplice shot and killed the victim. A conditional threat to kill is proof of a specific intent to kill if the condition occurs, and the fact that defendant did not definitively know that the condition of the victim "messing up" would occur does not negate the specific intent defendant had for the accomplice to kill the victim if it did occur.

Am Jur 2d, Homicide § 52.

Deliberation or premeditation as question of fact in prosecution for murder in first degree. 96 ALR2d 1437.

Modern status of rules regarding malice aforethought, deliberation, or premeditation as elements of murder in the first degree. 18 ALR4th 961.

9. Appeal and Error § 408 (NCI4th); Criminal Law § 696 (NCI4th Rev.)— capital trial—unrecorded conferences—presence of defendant—silent record—error not presumed

Error will not be presumed from a silent record where defendant contends that he was absent during what he alleges were unrecorded charge conferences during two recesses at the end of the guilt-innocence and sentencing phases of his capital trial, the transcript shows that two recesses occurred, the transcript also shows that the trial judge conducted a complete jury instruction conference on the record in the presence of defendant at both phases of his trial, and the record is silent about what occurred at the recesses in question.

Am Jur 2d, Criminal Law § 649.

Federal constitutional right to confront witnesses—Supreme Court cases. 23 L. Ed. 2d 853.

Federal constitutional right to confront witnesses—Supreme Court cases. 98 L. Ed. 2d 1115.

10. Evidence and Witnesses § 308 (NCI4th)— prior robbery—obtaining pistol used in kidnapping-murder—admissibility

Evidence of defendant's prior robbery of a pawn shop during which he stole a pistol was admissible in defendant's kidnapping-murder trial to prove that defendant was the source of the weapon an accomplice used to shoot the kidnapping-murder victim. Further, testimony describing defendant's acts and statements during the pawn shop robbery was properly admitted to shed light on several probative issues in the case, including defendant's motive, *modus operandi*, identity as the instigator, and procurement of the murder weapon.

Am Jur 2d, Evidence §§ 341, 455.

11. Criminal Law § 1386 (NCI4th Rev.)— capital sentencing—statutory mitigating circumstance—accessory—minor participation—jury's failure to find not error

The jury's failure to find the N.C.G.S. § 15A-2000(f)(4) mitigating circumstance that "defendant was an accomplice in or an accessory to the capital felony committed by another person and

his participation was relatively minor" was not error where the evidence was undisputed that defendant was not present during the killing, but reasonable minds could disagree as to whether defendant's participation was minor.

Am Jur 2d, Homicide § 553; Trial §§ 572, 841, 1447, 1760.

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

12. Criminal Law § 1392 (NCI4th Rev.)— nonstatutory mitigating circumstances—jury's failure to find—death sentence not arbitrary

The jury's failure to find nonstatutory mitigating circumstances concerning defendant's family history and upbringing did not indicate that the death sentence was arbitrarily imposed in violation of defendant's constitutional rights where the trial court gave the jury peremptory instructions on six of the eleven nonstatutory circumstances but no juror found any mitigation; the jury could rationally have rejected these nonstatutory circumstances on the basis that they had no mitigating value; and the jury's responses on the Issues and Recommendations form show that it considered and rejected the mitigating circumstances.

Am Jur 2d, Criminal Law § 628; Trial §§ 841, 1760.

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

13. Criminal Law § 1392 (NCI4th Rev.)— nonstatutory mitigating circumstance—ambiguous evidence—failure to submit not error

The trial court did not err by failing to submit to the jury the requested nonstatutory mitigating circumstance that "defendant discontinued school at the age of 16" where testimony by defendant's witness was ambiguous as to whether defendant stopped going to school completely or was merely suspended temporarily but had not completely discontinued his schooling, and there was no other evidence which clarified this issue.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.

14. Criminal Law § 1392 (NCI4th Rev.)— mitigating circumstance—request—subsumption by submitted circumstance

The trial court did not err by failing to submit to the jury the requested nonstatutory mitigating circumstance that defendant was not present when his accomplice shot the victim where this circumstance was subsumed by the court's submission to the jury of the nonstatutory mitigating circumstance that defendant was in the hospital seeking treatment for a self-inflicted wound at the time his accomplice shot the victim.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1441.

15. Criminal Law § 1392 (NCI4th Rev.)— nonstatutory mitigating circumstances—requests combined into one—no error

Where defendant requested the submission of two nonstatutory mitigating circumstances (1) that defendant began his substance abuse at the age of nine, and (2) that defendant has been diagnosed as being dependent on a combination of alcohol, cocaine, and marijuana, the trial court did not err by combining these circumstances into the single circumstance that defendant began his substance abuse at the age of nine and has been diagnosed as being dependent on a combination of alcohol, cocaine, and marijuana.

Am Jur 2d, Criminal Law §§ 598, 599.

16. Criminal Law § 1340 (NCI4th Rev.)— capital sentencing—mitigating evidence—rebuttal by lay opinion testimony

Where two of defendant's teachers and a social worker testified in a capital sentencing hearing that defendant was mentally retarded, an officer was properly permitted to rebut this mitigating evidence by lay opinion testimony that, based on his personal experiences with defendant, he did not think defendant was retarded. The mental condition of another is an appropriate subject for lay opinion.

Am Jur 2d, Criminal Law §§ 40, 598; Homicide § 554; Jury § 206.

Expert testimony as to specific intent unnecessary for conviction. 16 ALR4th 666.

Propriety of imposing capital punishment on mentally retarded individuals. 20 ALR5th 177.

17. Criminal Law §§ 498, 1340 (NCI4th Rev.)— capital sentencing—jury view of vehicle—relevancy to show aggravating circumstance

The trial court did not abuse its discretion during a capital sentencing proceeding in permitting the jury to view the Volkswagen "beetle" in which defendant and his accomplice held the murder victim and his sister hostage for nearly eight hours before the victim was killed since this evidence was relevant on the issue of the especially heinous, atrocious, or cruel aggravating circumstance to show the circumstances of the crime and the nature of defendant's action in confining the victim in a small, cramped automobile for eight hours. This evidence was not rendered unreliable because the vehicle was wrecked after the murder where a sheriff testified that the majority of damage to the Volkswagen occurred when the accomplice ran into a roadblock and that there was no change to the interior of the vehicle.

Am Jur 2d, Homicide §§ 419, 553, 555; Trial § 572.

Presence of judge at view by jury in criminal case. 47 ALR2d 1227.

18. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—principal ineligible for death penalty—not mitigating circumstance

In a capital sentencing proceeding for a first-degree murder for which defendant was convicted as an accessory before the fact, evidence that the principal was ineligible for the death penalty was properly excluded from the jury's consideration as a mitigating circumstance.

Am Jur 2d, Criminal Law §§ 167, 172, 176.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor. 9 ALR4th 972.

19. Criminal Law § 1366 (NCI4th Rev.)- capital sentencing—aggravating circumstances—murder during felony—submission for three separate felonies

The trial court did not err by three times submitting in a capital sentencing proceeding the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed during the course of a felony based upon the kidnapping of the murder vic-

tim, the kidnapping of the murder victim's sister, and one count of armed robbery where the State presented distinct evidence that defendant committed each of these three felonies during the course of the murder.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 46, 554.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine. 50 ALR3d 397.

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.

20. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—closing argument—death penalty—biblical references—no impropriety

The trial court did not err in allowing the prosecutor to argue to the jury in a capital sentencing proceeding that "the Bible says that he that smiteth a man so that he dies shall surely be put to death" where the prosecutor was anticipating and rebutting an argument which she had reason to believe defense counsel would raise in reference to the death penalty.

Am Jur 2d, Trial §§ 572, 609.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases. 70 ALR4th 664.

21. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—closing argument—biblical reference—no impropriety

The trial court did not err in allowing the prosecutor to argue to the jury in a capital sentencing proceeding that "justice under the law has been upheld and supported by the Good Book" where, just before making this argument, the prosecutor cautioned the jury that this case was not being tried by biblical law, but by man's law, specifically referring to N.C.G.S. § 15A-2000.

Am Jur 2d, Trial §§ 572, 609.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases. 70 ALR4th 664.

22. Criminal Law § 453 (NCI4th Rev.)— capital sentencing—closing argument—victim impact statement

The prosecutor's closing argument in a capital sentencing proceeding asking if the jurors could imagine themselves in the position of the murder and kidnapping victims' parents was permissible as a type of victim impact statement; in any event, the argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

Am Jur 2d, Criminal Law § 291; Homicide § 560.

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

23. Criminal Law § 454 (NCI4th Rev.)— closing argument—victim's fear and emotions

The prosecutor's closing argument asking the jury in a capital sentencing proceeding to try to imagine the fear and emotions of a kidnapping victim while she and her brother, the murder victim, were held hostage for eight hours in a small Volkswagen and her brother was forced by defendant to commit armed robberies was not so grossly improper as to require the trial court to intervene in the absence of an objection by defendant.

Am Jur 2d, Trial §§ 664, 665.

24. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—mitigating circumstance—minor participation—peremptory instruction not required

The trial court did not err by failing to peremptorily instruct the jury in a capital sentencing proceeding on the N.C.G.S. § 15A-2000(f)(4) mitigating circumstance "that defendant was an accomplice in or an accessory to the felony murder committed by another person and his participation was relatively minor" where the evidence was uncontradicted that defendant was not present when the victim was killed by his accomplice but was at a hospital receiving treatment for an injured foot, but the State presented evidence that defendant was not a minor participant in the mur-

der in that he had orchestrated a robbery in Virginia that led to the kidnapping of the murder victim and his sister; defendant took control of the victims' car at gunpoint; defendant forced the murder victim to participate in several attempted robberies with the accomplice; defendant was twenty-nine years older than his teenaged accomplice; defendant equipped the accomplice with the murder weapon; and defendant gave all of the orders to the accomplice.

Am Jur 2d, Homicide § 554; Trial §§ 841, 1760.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor. 9 ALR4th 972.

25. Criminal Law § 1402 (NCI4th Rev.)— first-degree murder— death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant was convicted under the felony murder rule and on the basis of malice, premeditation and deliberation; defendant was also convicted of first-degree kidnapping of both the murder victim and his sister and of armed robbery; defendant orchestrated the killing of an unarmed victim whom defendant kept hostage after kidnapping him from his own home at gunpoint and forcing him to commit armed robbery for defendant's financial gain; defendant was in a position of control during the crimes at issue and subjected his sixteen-year-old accomplice to his dominance, ordering that the boy kill the victims if they "messed up"; the murder victim was shot and killed by the accomplice when he attempted to disarm the accomplice; defendant had previously been convicted of four violent felonies, including manslaughter, second-degree robbery, armed robbery, and aiding and abetting an armed robbery; the killing in this case was part of an armed robbery; the killing was done to eliminate a witness; and there were two victims, one of whom survived. Failure of the jury to find any mitigating circumstances did not indicate that the death sentence was arbitrarily imposed where eight of the mitigating circumstances submitted dealt with defendant's childhood up to age fourteen; defendant was forty-five years old at the time of the present crimes, and a jury could have rationally found that defendant's childhood circumstances did not have a mitigating effect on his violent criminal activity over thirty years later; and the jury could rationally have rejected

the submitted mitigating circumstance that defendant's participation in the crimes was minor.

Am Jur 2d, Criminal Law §§ 538, 628; Homicide § 556; Trial § 572.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-*Gregg* cases. 64 ALR4th 755.

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 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.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Grant (Cy A.), J., on 23 March 1995 in Superior Court, Bertie 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 first-degree kidnapping and robbery with a dangerous weapon was allowed 19 December 1995. Heard in the Supreme Court 13 September 1996.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine M. Crawley, Assistant Appellate Defender, for defendant-appellant.

MITCHELL, Chief Justice.

Defendant Charles Phillips Bond was convicted on 15 March 1995 of the first-degree murder of Wayne Leon Thomas, robbery with a dangerous weapon, and two counts of first-degree kidnapping. The

jury answered special issues as to the basis for its verdict, stating it found defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation as well as under the felony murder rule. The felonies which the jury relied upon for the felony murder verdict were the kidnapping of Wayne Leon Thomas, the kidnapping of Leslie Dawn Thomas, and robbery with a dangerous weapon. After a separate capital sentencing proceeding, the jury recommended a sentence of death, and the trial court sentenced defendant accordingly. The trial court also sentenced defendant to consecutive terms of forty years imprisonment for each of the felony convictions.

The State's evidence tended to show *inter alia* that on 24 March 1994, defendant, Theola Saunders, and two other men drove from North Carolina to Virginia to commit a robbery. The attempted robbery was interrupted by the police, and in fleeing, defendant shot himself in the foot. Defendant and Saunders kidnapped Wayne and Leslie Thomas in order to obtain use of their car. Defendant directed the Thomases, brother and sister, to drive defendant and Saunders back to North Carolina. During the course of the evening, defendant ordered Wayne to help Saunders rob various establishments, including convenience stores and restaurants, which they attempted to do. Each time, defendant told Saunders to kill Wayne if he did anything wrong. Defendant held Wayne and Leslie hostage for a total of eight hours, during which time defendant would occasionally tell the victims he was going to let them go. This he never did. After one robbery attempt was successful, defendant told Wayne to take him to the hospital so he could get medical care for his foot. At the hospital, defendant got out of the car and told Saunders and the victims to come back and pick him up in an hour or two. Defendant also told Saunders to "waste" the Thomases if they did anything wrong.

At some point while driving around, Wayne told Saunders that he needed to use the bathroom. Saunders directed them to a convenience store, and Leslie and Wayne went inside. Saunders waited outside. Wayne told Leslie they had to do something, that defendant and Saunders were not going to let them go, and that they were going to kill them anyway. The brother and sister returned to the car, and as Saunders was getting in the backseat, Wayne grabbed Saunders from behind and yelled, "run, Leslie." In the ensuing struggle, Saunders shot and fatally wounded Wayne Thomas. Saunders then fled and was soon apprehended. The evidence was undisputed that defendant was not actually present at the time of the shooting but that defendant had orchestrated the robbery, attempted robberies, and kidnappings and

had great influence over his young accomplice. Defendant was arrested at the hospital.

[1] By his first assignment of error, defendant contends that the trial court erred in excusing prospective juror Joseph White. During the *voir dire*, the prosecutor asked prospective juror White if he would be able to recommend the death penalty for someone who did not actually "pull the trigger." Mr. White stated that he could not and that if a person did not actually commit the murder himself, he did not see why that person should die. The trial court then allowed the State's motion to excuse Mr. White for cause. Defendant argues that prospective juror White's statement was an insufficient basis for exclusion under *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985). We disagree.

The pertinent colloquy between the prosecutor and Mr. White is as follows:

> The evidence will show [the defendant] did not pull the trigger. Would any of you feel like simply because he did not pull the trigger, you could not consider the death penalty and follow the law concerning the death penalty?
>
> All of you understand what I'm saying?
>
> MR. WHITE: I think it would be kind of hard, you know, to give somebody the death penalty if they didn't commit the murder theirself.
>
> Q. Okay. And that's why I'm asking the question. His Honor will tell you what the law is. He'll go through the law with you.
>
> . . . .
>
> And what I'm asking you, Mr. White, . . . if, because of your belief, you would not be able to follow the law concerning this, then I would need to know that now.
>
> Is that how you feel?
>
> A. I don't think it's right to give someone the death penalty if they didn't actually commit the crime themselves.
>
> Q. So regardless of what the circumstances might be concerning the crime, the facts might be concerning the crime, you do not

> feel that you could recommend the death penalty if that person did not actually pull the trigger; is that correct?
>
> A. Yes, because I feel the person that done—that committed the murder; he brought it on himself. . . .
>
> . . . .
>
> Q. . . . So if I understand you correctly, regardless of the facts and circumstances concerning the case, you could not recommend the death penalty for anyone unless it was the person who pulled the trigger—
>
> A. Yes.

The prosecutor challenged Mr. White for cause, and defendant objected. After a brief bench conference, the prosecutor rephrased his last question as follows:

> Q. Mr. White, let me just ask the question again. Regardless of what the facts and circumstances would be in the case and what the law might be in this case, you would not, because of your own personal feelings concerning the death penalty, would not be able to recommend the death penalty regardless of the law and regardless of the facts unless it was the person who actually did the murder, committed the crime?
>
> A. Yes, I mean, I don't—if he didn't commit the murder, actually commit the murder, I don't see why he should die. That would be kind of hard for me to do.

Over defendant's objection, the prospective juror was excused for cause. Defendant contends that Mr. White was not excludable under *Witherspoon*, 391 U.S. 510, 20 L. Ed. 2d 776, and *Witt*, 469 U.S. 412, 83 L. Ed. 2d 841. The appropriate analysis, however, does not reach either of these landmark decisions, because Mr. White stated that he could not follow the law regarding the death penalty.

We have held that it is error not to excuse a juror whose answers show that he could not follow the law. *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992); *see also State v. Abraham*, 338 N.C. 315, 342, 451 S.E.2d 131, 145 (1994) (a juror who stated she would require the defendant to testify was properly excused for cause); *State v. Cunningham*, 333 N.C. 744, 754, 429 S.E.2d 718, 720 (1993) (a juror who stated she would require the defendant to prove his innocence should have been excused for cause). N.C.G.S.

§ 15A-1212(8) provides that a challenge for cause to an individual juror may be made by any party on the ground that the juror as a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina. N.C.G.S. § 15A-1212(8) (1988). Subsection (9) of the statute is a catchall category, allowing a challenge for cause where a juror "for any other cause is unable to render a fair and impartial verdict." Based on Mr. White's responses indicating that he could not impose the death penalty on a defendant who did not pull the trigger and given that the venire had been informed by the State that defendant was not present when the murder was committed, the excusal for cause of Mr. White should have been allowed under both subsections (8) and (9) of N.C.G.S. § 15A-1212. Mr. White's answers indicating that he could not impose the death penalty on an accessory show that he could not follow the law.

[2] Defendant further contends that the prosecutor employed improper "stake-out" tactics with prospective juror White during the *voir dire* and that this improper line of questioning resulted in Mr. White's being excused for cause. Defendant's contention is misplaced. It is proper for counsel to ask a juror if he will accept and follow the law as given to the jury. However, as this Court noted in *State v. Vinson*, 287 N.C. 326, 215 S.E.2d 60 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976), those questions that attempt to elicit in advance what a juror would decide under hypothetical circumstances are improper.

> [S]uch questions tend to "stake out" the juror and cause him to pledge himself to a future course of action. This the law neither contemplates nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.

Id. at 336, 215 S.E.2d at 68. In *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), we held impermissible the following question: "Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether or not to impose the death penalty?" *Id.* at 621, 386 S.E.2d at 425. We noted in *Davis* that no evidence of the defendant's criminal history had been introduced during *voir dire*. We found it was an improper hypothetical question which the trial court could view as

"an attempt to indoctrinate a prospective juror regarding the existence of a mitigating circumstance." *Id.*

The facts of the instant case distinguish it from *Davis*. First, the prosecutor had informed the pool of prospective jurors that defendant was an accessory, a fact that the State, the party with the burden of proof, had conceded. Second, this was a question consisting of facts alleged to be proved, rather than a question consisting of a hypothetical set of circumstances. In this case, the State informed the prospective jurors that the trial judge might instruct them concerning an accessory before the fact and told them that an accessory is one who encourages or procures or counsels an illegal act. The State then told the prospective jurors that an accessory can be found guilty of first-degree murder. Next, the prosecutor told them that the evidence would show that defendant did not pull the trigger and asked the prospective jurors whether they believed they could consider the death penalty in such a case. Thus, the fact that defendant was not charged nor going to be tried as a principal was uncontroverted. The State, which had the burden of establishing defendant's guilt, sought to show that defendant was an accessory by informing the prospective jurors that the evidence would show that defendant did not pull the trigger. This was not an improper staking out of any prospective juror, including Mr. White. We conclude that the trial court did not abuse its discretion in reopening the *voir dire* of prospective juror White and that under these circumstances, where evidence of defendant's status as an accessory was uncontroverted, it was not an abuse of discretion for the trial court to allow the State to inquire during *voir dire* into the ability of prospective jurors to impose a death sentence on a defendant who is an accessory to first-degree murder.

The nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the trial court. *State v. Brown*, 315 N.C. 40, 53, 337 S.E.2d 808, 820 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). When a prospective juror's answer during *voir dire* is equivocal, the trial court has discretion to question the juror further in order to clarify his or her position and excuse the juror for cause. Here, prospective juror White's answers indicated some degree of equivocation; thus, the trial court was entitled to use its discretion. The defendant has shown no abuse of discretion in the present case. This assignment of error is overruled.

By another assignment of error, defendant argues that the trial court erred by not intervening *ex mero motu* to prohibit the State from asking the remainder of the prospective jurors whether they would be willing to recommend death for defendant if he was only an accessory. Defendant contends that this series of questions tended to stake out the jurors, violating defendant's constitutional rights to due process, to a fair and impartial jury, and to a fair and reliable sentencing hearing under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, 24, and 27 of the North Carolina Constitution, thus entitling him to a new trial. We find no merit to this argument. As discussed previously, the question of whether prospective jurors could consider the death penalty for an accessory is not an improper stake-out question where, as here, it was uncontroverted that defendant was only an accessory. Given the peculiar posture of this case, where defendant's status as an accessory was all but stipulated to and where the State conceded that defendant did not pull the trigger, it was not improper for the State to inquire whether prospective jurors could consider recommending the death penalty. The trial court did not commit error in failing to intervene *ex mero motu* to prevent the prosecutor from pursuing this line of questioning. This assignment of error is overruled.

[3] By another assignment of error, defendant argues that the trial court improperly reopened the jury *voir dire* to allow the prosecution to exercise a peremptory challenge against prospective juror Kenneth Robbins, whom the prosecutor had already accepted. Defendant argues that according to N.C.G.S. § 15A-1214, a trial court may allow reexamination of a prospective juror upon two circumstances: if it is discovered that the juror has made an incorrect statement during *voir dire* or if some other good reason exists. Defendant contends that neither situation had occurred and that nothing warranted this action by the trial court.

The prosecution asked prospective juror Robbins a series of "death-qualifying" questions. The next day, defense counsel examined Mr. Robbins in an effort to determine whether he could consider a life sentence. The exchange was as follows:

> Q. You [Mr. Robbins] indicated to us earlier that you felt like that under the appropriate circumstances, you could support the death sentence; is that correct?
>
> A. By law I could, but personally, as me having, you know, for myself, I couldn't. But by law I could.

Q. So you wouldn't say that your support of the death penalty is so strong that you could not consider life imprisonment. In other words, you feel like you could consider both the death sentence and life imprisonment?

A. Yes.

The prosecutor, concerned about this response, asked the court to question Mr. Robbins further. The colloquy between the court and prospective juror Robbins was as follows:

THE COURT: I want to inquire or ask you whether you have changed your mind about your views on the death penalty from yesterday when Mr. Beard was asking you questions?

A. No, basically I still feel that, you know, it depends on the situation. But personally, I wouldn't want to be put in a predicament to have to, you know, make the decision.

THE COURT: But you do understand that if you're selected as a juror, there's a possibility that you will be placed in that predicament?

A. Yes.

THE COURT: Could you follow the law and if the law indicated that the appropriate punishment was death, could you vote for death?

A. I feel like I could by law.

At the prosecutor's request, the court reopened examination of Mr. Robbins the following day, whereupon the State exercised a peremptory challenge excusing Mr. Robbins. Defendant contends that Mr. Robbins was a qualified juror and that it was error for the trial court to reopen *voir dire*. We disagree.

This Court has previously interpreted the language of N.C.G.S. § 15A-1214(g) and found that the decision to reopen *voir dire* rests in the trial court's discretion. *State v. Parton*, 303 N.C. 55, 70-71, 277 S.E.2d 410, 421 (1981). We clarified this decision later in *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985), and held that once the trial court has reopened the examination of a juror, the parties have an "absolute right to exercise any remaining peremptory challenges" to excuse such a juror. *Id.* at 438, 333 S.E.2d at 747. Thus, absent a showing of abuse of discretion, the trial court's decision to reopen the examination of prospective juror Robbins will not be disturbed.

Prospective juror Robbins told the prosecutor that he had no personal feeling concerning the death penalty and later told defense counsel that he personally could not support a death sentence. This indicated that Mr. Robbins might have changed his mind about whether he could impose the death penalty. N.C.G.S. § 15A-1214 allows a trial court, in its discretion, to reopen *voir dire* "[i]f at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists." N.C.G.S. § 15A-1214(g) (1988). Prospective juror Robbins made equivocal statements concerning his views on the death penalty. Given his ambivalent responses, Mr. Robbins could reasonably be deemed to have made at least one incorrect statement. Even assuming, *arguendo*, that equivocation as to capital punishment does not equal inaccuracy, we conclude that such equivocation itself qualifies as a "good reason" to reopen *voir dire*.

Upon request by the prosecutor, the trial court in this case reopened the *voir dire*, examined Mr. Robbins in an effort to determine whether a basis for a challenge for cause existed, and found that it did not. Thereafter, counsel was free to exercise any remaining peremptory challenges. This assignment of error is overruled.

By another assignment of error, defendant contends that his right to be tried by a jury selected without regard to race was violated by the prosecutor's discriminatory use of peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

In *Batson*, the United States Supreme Court created a three-pronged test to determine whether a prosecutor impermissibly excused prospective jurors on the basis of their race. First, a criminal defendant must establish a *prima facie* case of intentional discrimination by the prosecutor. Finding a *prima facie* case shifts the burden to the State, which must give race-neutral explanations for peremptorily challenging a juror of a cognizable group. The reason does not have to be plausible. *Purkett v. Elem*, —— U.S. ——, ——, 131 L. Ed. 2d 834, 839 (1995). What is at issue in the second step is the " 'facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' " *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 114 L. Ed. 2d 395, 406 (1991)). Once the State gives an explanation for its peremptory challenges, the trial court then determines "whether the defendant has carried his burden of

proving purposeful discrimination." *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). Factors the trial court considers include: the susceptibility of the case to racial discrimination, the prosecutor's demeanor, and the explanation itself. *State v. Porter*, 326 N.C. 489, 391 S.E.2d 144 (1990). However, *Batson* admonishes a reviewing court to remember that the trial court's findings will, in large measure, hinge on credibility and to give those findings great deference. *Batson*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21.

[4] Defendant contends that the reasons the prosecutor gave the court upon excusing prospective juror Corris Jenkins, a black male, were pretextual and race-based and that the trial court erred in failing to reach the third step of the *Batson* inquiry. Defendant made a *Batson* motion in opposition to the State's peremptory challenge of Mr. Jenkins, stating his grounds for a *prima facie* case: "I think this is the ninth juror that he has dismissed and of those, eight were black." The prosecutor, upon request by the court to give an explanation for excusing Mr. Jenkins, stated that the juror expressed some hesitation and that he appeared to be concerned and worried when asked about the death penalty. The trial court found that the State had presented neutral, nondiscriminatory reasons for excusing Mr. Jenkins; overruled defendant's objection to the excusal; and denied defendant's *Batson* motion. These findings indicate that the trial judge completed the third step in the *Batson* analysis. Thus, defendant's contention that the trial court failed to reach step three of the *Batson* inquiry is without merit.

[5] Defendant also contends that the trial court erred in finding that the prosecutor's excusal of prospective juror Jenkins was not purposeful discrimination. He argues that hesitancy in answering death-qualification questions is an "essentially unreviewable, elusive reason for striking a juror." This Court has upheld trial court decisions finding that juror hesitancy on answering questions about the death penalty is a race-neutral reason for excusing a juror. *See, e.g., State v. Best*, 342 N.C. 502, 512-13, 467 S.E.2d 45, 52, *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 65 U.S.L.W. 3262 (1996); *State v. Kandies*, 342 N.C. 419, 435-36, 467 S.E.2d 67, 76, *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 65 U.S.L.W. 3264 (1996). We accorded the trial courts' findings on the *Batson* issue in those cases much deference, and we accord the trial court's findings in the instant case the same deference. In doing so, we reiterate our statement in *State v. Floyd*, 343 N.C. 101, 104, 468 S.E.2d 46, 48, *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 65 U.S.L.W. 3264 (1996), with respect to deference.

> Whether the prosecutor intended to discriminate against the members of a race is a question of fact, the trial court's ruling on which must be accorded great deference by a reviewing court. This is so because often there will be little evidence except the statement of the prosecutor, and the demeanor of the prosecutor can be the determining factor. The presiding judge is best able to determine the credibility of the prosecutor.

In the instant case, the trial court was in the best position to observe firsthand the prosecutor's demeanor and countenance during the *voir dire*, and we accord its decision to allow the State to excuse Mr. Jenkins due deference. Moreover, we note that the record reflects that the prosecutor accepted every one of the eight African-American jurors who ultimately decided defendant's case and recommended the death penalty. We find no indication of discrimination in the prosecutor's use of peremptory challenges during the *voir dire*. This assignment of error is overruled.

By another assignment of error, defendant contends the evidence was insufficient to show that defendant committed robbery with a dangerous weapon, and that it was insufficient to prove the existence of the aggravating circumstance that the killing occurred during the course of a robbery, and that the trial court erred by denying his motions to dismiss the robbery charge. We disagree.

[6] Defendant argues that the State's evidence was deficient in two respects: there was no showing that defendant had the specific intent necessary to commit a robbery, and there was no evidence that defendant was actually or constructively present when Theola Saunders took possession of Wayne Thomas's automobile, as required under either of the two theories of robbery submitted to the jury. We address each contention in turn.

When considering a motion to dismiss for insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). The reviewing tribunal considers the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991).

Robbery, a common law offense not defined by statute in North Carolina, is an aggravated form of larceny. *State v. Smith*, 268 N.C.

167, 150 S.E.2d 194 (1966). More precisely, robbery is " 'the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation.' " *State v. Lunsford*, 229 N.C. 229, 231, 49 S.E.2d 410, 412 (1948) (quoting Justine Miller, *Handbook of Criminal Law* § 123 (1934)), *quoted in Smith*, 268 N.C. at 169, 150 S.E.2d at 198. The evidence, when considered in the light most favorable to the State, is sufficient to permit a rational trier of fact to find that defendant possessed the intent to permanently deprive Wayne Thomas of his car. The State's evidence tended to show that defendant placed the car under his control by forcing Wayne at gunpoint to drive it where defendant wanted to go.

The fact that defendant later relinquished control of the car when he demanded that Wayne take defendant to the hospital is not dispositive of the intent issue. As we indicated in *Smith*, felonious intent to permanently deprive the owner of his property is not disproved when a defendant abandons the property. 268 N.C. at 172, 150 S.E.2d at 200. We stated the law in *Smith* as follows:

> When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal (*animus furandi*).

Id. at 173, 150 S.E.2d at 200. In the course of one evening, encompassing approximately eight hours, defendant forced Wayne at gunpoint to drive his own vehicle in two states, to stop at places where defendant wanted him to stop, and to rob stores defendant told him to rob. Although defendant told Leslie Thomas several times in response to her inquiries that he was going to let them go, he never did, even after they got back to North Carolina. Defendant repeatedly ordered his accomplice to "waste [Wayne and Leslie] if they do anything wrong." When Wayne attempted to disarm Saunders, Saunders, presumably following his orders from defendant, shot and killed Wayne Thomas. Such evidence was sufficient to indicate defendant's total indifference to Wayne's rights and indicates that defendant took Wayne's car with the intent to steal.

[7] We find defendant's contention that actual or constructive presence is required for a conviction of aiding and abetting to be unpersuasive. Although several of our cases decided before 1981 state that

actual or constructive presence is required to prove a crime under an aiding and abetting theory, this is no longer required. Our legislature abolished all distinctions between accessories before the fact and principals in the commission of felonies by enacting N.C.G.S. § 14-5.2, effective 1 July 1981. Thus, accessories before the fact, who do not actually commit the crime, and indeed may not have been present, can be convicted of first-degree murder under a theory of aiding and abetting. A showing of defendant's presence or lack thereof is no longer required.

In *State v. Francis*, 341 N.C. 156, 459 S.E.2d 269 (1995), we upheld the trial court's instruction on aiding and abetting in which it stated that the jury must find three things in order to convict the defendant of first-degree murder on that theory: (1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person. *Id.* at 161, 459 S.E.2d at 272. Accordingly, the pattern jury instructions stating the elements of aiding and abetting do not require a showing of a defendant's presence or lack thereof during the commission of the crime. *See, e.g.*, N.C.P.I.—Crim. 202.20A (1989). In the instant case, the trial court instructed the jury using this pattern jury instruction, and in accordance with the requirements delineated in *Francis*. The trial court was not required to instruct the jury on defendant's absence; thus, defendant's contention is without merit. This assignment of error is overruled.

By another assignment of error, defendant argues that the evidence was insufficient to convict defendant of premeditated and deliberate murder. He contends that his conviction for first-degree murder on the basis of premeditation and deliberation was obtained in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Article I, Sections 19 and 23 of the North Carolina Constitution and that the conviction must be vacated. We disagree.

Defendant contends that the State's evidence was insufficient to show that he was actually or constructively present at the time of the murder. As discussed previously in this opinion, a showing of a defendant's presence during the commission of a crime is no longer required in order to establish that a defendant aided and abetted another in committing a crime. This contention is without merit.

[8] Defendant also contends that the State's evidence was insufficient to prove that defendant had the *mens rea* necessary to commit premeditated and deliberate murder. He argues that telling Saunders to "waste them if they mess up" was not a fixed design, but was a conditional threat, insufficient to prove specific intent.

In reviewing the sufficiency of the evidence, we consider the evidence in the light most favorable to the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The State's evidence tended to show that Leslie Thomas believed defendant's statement to Saunders to "waste" them to mean that defendant intended for Saunders to kill them. Leslie testified that during the brief period when the Thomases were alone just before Wayne was shot, Wayne told Leslie that they had to try to do something because defendant and the boy were going to kill them anyway. The State's evidence also tended to show that defendant gave Saunders the means to kill the victims, in the form of a .380 semiautomatic pistol. Just before defendant got out of the car at the hospital, he repeated his command to Saunders to "waste" the hostages if they did anything wrong. We agree with the State's contention that a conditional threat to kill is proof of specific intent to kill if the condition occurs. The fact that defendant did not definitively know that the condition of the victims' "messing up" would occur does not negate the specific intent defendant had for Saunders to kill the Thomases if it did occur. Looking at the evidence in the light most favorable to the State, we conclude that there was sufficient evidence that the jury could have found that defendant had the specific intent that the victim who "messed up," Wayne Thomas in this case, be killed. There was substantial evidence that defendant possessed the elements of first-degree murder by malice, premeditation, and deliberation. This assignment of error is overruled.

[9] By another assignment of error, defendant contends that the trial court conducted several unrecorded charge conferences in his absence, at both the guilt-innocence phase and the capital sentencing proceeding, and that this violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, 24, and 27 of the North Carolina Constitution. Defendant further argues that on the facts of this case, such error was not harmless beyond a reasonable doubt and that he is therefore entitled to a new trial or new capital sentencing proceeding. We disagree.

Defendant contends that because he was absent during what he alleges were unrecorded charge conferences, he was convicted on a theory of aiding and abetting, which connotes greater culpability, rather than on a theory of accessory before the fact, which defendant argues better fit the facts of this case. The transcript in this case reveals that there were two recesses lasting about three hours each, one after the close of the evidence at the guilt-innocence phase, and the other after the close of the evidence at the capital sentencing proceeding. The record does not reveal what occurred during the two recesses in question. Just before the first recess, the trial court addressed the jury as follows:

> Members of the jury, you have heard all the evidence in this case. The State has rested and the defendant has informed the court that the defendant has elected not to put on any evidence. The next thing that will occur will be jury instructions between myself and the attorneys. And that will take maybe one or two hours.

The next thing that occurred, according to the transcript, was a formal charge conference with defendant and all counsel present. Just after the second recess at issue in this case, during the capital sentencing proceeding, the trial court again conducted a formal charge conference in the presence of defendant and all counsel. Thus, the transcript reveals that the trial judge conducted a complete jury instruction conference on the record in the presence of defendant at both the guilt-innocence and sentencing phases of the trial. The record is silent about what took place during the two recesses in question. As we stated in *State v. Adams*, 335 N.C. 401, 439 S.E.2d 760 (1994), we will not presume error from a silent record. This assignment of error is overruled.

[10] By another assignment of error, defendant contends that the trial court erred in admitting evidence regarding defendant's participation in a prior robbery. Defendant argues that evidence of this prior robbery was inadmissible character evidence which unfairly prejudiced him in this case. We disagree.

The State's evidence, consisting of the testimony of two witnesses, tended to show the following: Defendant, armed with a sawed-off shotgun, and an unarmed man went into Bunny's Pawn Shop. Defendant pointed the gun at the pawn store clerk and ordered her to sit down. Defendant saw a .380 semiautomatic pistol under the

counter, picked it up, and put it in his pocket. This weapon was later identified at trial in the instant case as the gun that defendant gave to Theola Saunders and that Saunders used to shoot the victim in this case. Defendant told his robbery accomplice to put the jewelry in a bag, and the two men left after taking all the jewelry. In the opinions of both witnesses, defendant was the one in charge and did all the talking, while the other, unarmed man never spoke.

Defendant contends that the admission of the evidence of his prior robbery of Bunny's Pawn Shop was erroneous because it was not probative of any genuine question of fact at issue in the case. He also argues that if the evidence was relevant, its probative value was outweighed by the danger of unfair prejudice. Finally, defendant argues that the State's evidence of the Bunny's Pawn Shop robbery was more expansive than necessary. We address each contention in turn.

We conclude that the evidence of the Bunny's Pawn Shop robbery was probative, as it tended to prove defendant was the source of the weapon Saunders used to shoot Wayne Thomas. In *State v. Rannels*, 333 N.C. 644, 430 S.E.2d 254 (1993), we found admissible under North Carolina Rule of Evidence 404(b) evidence that the defendant had stolen the weapon he used to commit the murder for the purpose of proving that he possessed it as well as to prove the circumstances under which it was acquired. *Id.* at 658, 430 S.E.2d at 262. We noted in *Rannels* that this type of evidence is generally admissible in a homicide prosecution as tending to establish the guilt of the accused. "Only when the evidence of other crimes or wrongs has no other probative value than to show the bad character of the accused in order to prove his 'propensity or disposition to commit an offense of the nature of the crime charged' should the evidence be excluded." *Id.* at 657, 430 S.E.2d at 261 (quoting *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990)). Further, we note that the State's evidence, including testimony describing defendant's acts and statements during the pawn shop robbery, shed light on several probative issues in the case, including defendant's similar motive, *modus operandi*, identity as the instigator, and procuring of the murder weapon.

We find it unnecessary to engage in a balancing act to determine whether the prejudicial effect of the pawn shop robbery outweighed its probative value. The evidence in the case tended to describe at least three different armed robberies in which defendant had previously participated. It is unlikely that evidence of defendant's armed

robbery of Bunny's Pawn Shop was prejudicial in view of the evidence of defendant's other armed robberies offered at trial. This assignment of error is overruled.

By another assignment of error, defendant contends that the jury's failure to find any mitigating circumstance, either statutory or nonstatutory, indicates that the jury arbitrarily recommended the death sentence in violation of defendant's constitutional rights. We disagree.

[11] In particular, defendant contends that the jury's failure to find the N.C.G.S. § 15A-2000(f)(4) mitigating circumstance, that "defendant was an accomplice in or an accessory to the capital felony committed by another person and his participation was relatively minor," was supported by uncontradicted evidence. Defendant argues that since he was not present when Saunders shot the victim, the jury should have found him to be a minor participant and should have found the (f)(4) mitigator. Defendant's contention is misplaced. Although the evidence was undisputed that defendant was not present during the killing, reasonable minds could disagree as to whether defendant's participation was minor. The jury is free to decide, upon consideration of the surrounding circumstances presented to it, whether it believes the evidence warrants finding a mitigating or aggravating circumstance to exist. *State v. Alston*, 341 N.C. 198, 256-57, 461 S.E.2d 687, 720 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 100 (1996).

[12] Defendant further contends that the jury's failure to find nonstatutory mitigating circumstances concerning defendant's family history and upbringing indicate that the death sentence was arbitrarily imposed in violation of defendant's constitutional rights. The trial court gave the jury peremptory instructions on six of the eleven nonstatutory circumstances, yet no juror found any mitigation. We note that defendant made no objection to the trial court's instructions. In *Alston*, we said that the jury may determine that a nonstatutory mitigating circumstance has no value even if that circumstance is found to exist. *Id.* at 257, 461 S.E.2d at 720. The jury could rationally have rejected these nonstatutory mitigating circumstances on the basis that they had no mitigating value. We believe that the jury's written responses on the Issues and Recommendations form submitted to it show that it considered and rejected the mitigating circumstances. It is not our role to second-guess the jury under these circumstances. In the absence of contradictory evidence, we must assume that the jury

comprehended the trial court's instructions and the Issues and Recommendations form. The fact that the jury in this case considered and rejected all of the mitigating circumstances submitted to it does not indicate a violation of defendant's constitutional rights. This assignment of error is overruled.

By another assignment of error, defendant contends that the trial court erred by failing to submit to the jury two nonstatutory mitigating circumstances which defendant requested. These were: (1) that "defendant discontinued school at the age of 16," and (2) that "defendant was not present when Theolas [sic] Saunders shot Wayne Thomas." We address each contention in turn.

[13] We find no error in the trial court's failure to submit the proposed mitigating circumstance that "defendant discontinued school at the age of 16." In order for defendant to succeed on this assignment of error, 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. *State v. Benson*, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988). We conclude that defendant has not made such a showing. The evidence presented was ambiguous as to whether defendant stopped going to school completely or was merely suspended temporarily but had not completely discontinued his schooling. Dr. Glenn Rohrer testified at trial that defendant was a highschool dropout and that this decision adversely affected defendant's self-esteem, industriousness, and employment opportunities. However, he also testified that "there was some question about exactly when he quit." In light of this ambiguity and the absence of additional evidence which might have clarified the issue, it was not error for the trial court to fail to submit this mitigating circumstance.

[14] Defendant further contends that the trial court erroneously failed to submit a second mitigating circumstance, that "defendant was not present when Theolas [sic] Saunders shot Wayne Thomas." Looking at the record and transcript, we find that this nonstatutory mitigating circumstance was in fact submitted to the jury, albeit in a different form than defendant requested. The tenth nonstatutory mitigating circumstance which the trial court submitted to the jury was "[t]hat at the time Theolas [sic] Saunders shot Wayne Thomas[,] Charles Bond was in the hospital seeking treatment for a self-inflicted wound." Thus, the circumstance actually submitted to the jury

embodied the notion requested by defendant. This Court has found harmless error where a proposed nonstatutory mitigating circumstance was subsumed by the submission of another nonstatutory mitigating circumstance. *State v. Benson*, 323 N.C. 318, 326-27, 372 S.E.2d 517, 522 (1988). We conclude that defendant's proposed nonstatutory mitigating circumstance was subsumed by the submission to the jury of another nonstatutory mitigating circumstance, and any error here was harmless. This assignment of error is overruled.

[15] By another assignment of error, defendant contends that the trial court erroneously combined two of defendant's requested nonstatutory mitigating circumstances into one where, defendant argues, each requested mitigating circumstance directed the jury to distinct mitigating evidence. Defendant requested the following two circumstances: (1) that defendant began his substance abuse at the age of nine; and (2) that defendant has been diagnosed as being dependent on a combination of alcohol, cocaine, and marijuana. The trial court combined these two factors into one and submitted the following circumstance: "The defendant began his substance abuse at the age of nine, and has been diagnosed as being dependant [sic] on a combination of alcohol, cocaine, and marijuana." In addition, the trial court submitted the catchall, "any other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value." Defendant argues that combining these aspects of his character into a single circumstance may have precluded full consideration of mitigating evidence. We disagree.

As stated previously, this Court has found harmless error where a proposed nonstatutory mitigating circumstance was subsumed by the submission of another nonstatutory mitigating circumstance. *Id.* Defendant's argument is based on the notion that the jury would have been more impressed with the mitigating value of the proffered evidence if it had been separated into two mitigating circumstances, rather than consolidated into one. We find this argument unpersuasive. As we stated in *State v. Greene*, 324 N.C. 1, 21, 376 S.E.2d 430, 442 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), we reject the mechanical, mathematical approach to capital sentencing.

Here, the jury was not precluded from considering evidence of defendant's early introduction to alcohol and drugs, nor was it prevented from considering evidence of defendant's present substance abuse problem. The jury heard and considered testimony from a cer-

tified substance-abuse counselor regarding defendant's involvement with alcohol at the age of nine and his continued drug and alcohol abuse. In addition, the court submitted the "catchall" mitigating circumstance for the jury's consideration. The trial court's refusal to submit the requested nonstatutory mitigating circumstances separately was not error. We find no merit in this assignment of error, and it is overruled.

[16] By another assignment of error, defendant contends that the trial court erred by permitting a lay witness to testify as to defendant's lack of mental retardation. Defendant argues that this was unreliable and irrelevant opinion testimony and that its admission violated defendant's constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution. Defendant contends he must be resentenced. We disagree.

The North Carolina Rules of Evidence do not apply to sentencing hearings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). Any competent, relevant evidence which wil substantially support the imposition of the death penalty may be introduced at this stage. *State v. Daughtry*, 340 N.C. 488, 517, 459 S.E.2d 747, 762 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 739 (1996). Two of defendant's former teachers and a certified social worker who had examined him testified that he was mentally retarded. The State presented evidence to rebut this mitigating evidence. Officer Gregory Bonner testified that based on personal experiences with defendant, he did not think defendant was mentally retarded. Defendant objected, and the trial court overruled the objection.

Although the Rules of Evidence do not apply in sentencing proceedings, they may be helpful as a guide to reliability and relevance. *See Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980). Under those rules, a lay witness may testify in the form of an opinion if the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701 (1986). We have held that the mental condition of another is an appropriate subject for lay opinion. In *State v. Strickland*, 321 N.C. 31, 361 S.E.2d 882 (1987), we noted that " '[a] lay witness, from observation, may form an opinion as to one's mental condition and testify thereto before the jury.' " *Id.* at 38, 361 S.E.2d at 886 (quoting *State v. Moore*, 268 N.C. 124, 127, 150 S.E.2d 47, 49 (1966)).

Evidence introduced at a capital sentencing proceeding must be relevant, be competent, and have probative value. Officer Bonner's testimony, based on his firsthand observation of defendant, met this test, and we conclude that it was not error to allow him to testify as to his opinion of defendant's mental condition. This assignment of error is overruled.

[17] By another assignment of error, defendant argues that the trial court erred by permitting the jury to view the Volkswagen vehicle in which defendant, Saunders, and the victims traveled for nearly eight hours. At the close of the State's sentencing evidence, the prosecutor requested that the jury be allowed to view the Volkswagen in order to show the small size of the interior of the twenty-year-old vehicle and to show that the murder was especially heinous, atrocious, or cruel. Defendant objected on the grounds that it was not proper and that the condition of the vehicle had changed because Saunders had wrecked the vehicle after the crimes at issue were committed. Over defendant's objection and upon a showing by the State that a witness could testify as to the changed condition of the car, the trial court allowed the jury view. Defendant contends that the trial court abused its discretion by allowing the jury view of the Volkswagen because (1) this evidence was irrelevant to establish the especially heinous, atrocious, or cruel aggravating circumstance; and (2) it was unreliable because the condition of the car had changed because Saunders had wrecked the car when he ran into a roadblock just before he was arrested. We address each contention in turn.

Defendant first argues that the evidence was outside the scope of the especially heinous, atrocious, or cruel aggravating circumstance because this circumstance is limited to the manner of the killing itself. Defendant contends that the cramped and uncomfortable eight-hour ride which the victims suffered at the direction of defendant may have aggravated the kidnappings, but did not aggravate the murder. We stated in *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), that the especially heinous, atrocious, or cruel circumstance is focused upon acts done to the victim during the commission of the capital felony itself. *Id.* at 25, 257 S.E.2d at 593. We conclude that this evidence was relevant to show the circumstances of the crime and the nature of defendant's acts in confining the victims in a small, cramped automobile for nearly eight hours. The jury view was probative because many jurors may not have owned, ridden in, or had any knowledge of a Volkswagen "beetle" and therefore might not have known the size of the interior. Thus, we conclude that the trial court

properly exercised its discretion in permitting the jury view of the Volkswagen vehicle.

Defendant next contends that the evidence was rendered unreliable by the fact that the vehicle was wrecked after the crimes took place. We disagree. The jury was informed of the changed condition of the exterior by a witness for the State, Sheriff Perry. Sheriff Perry testified that he first saw the vehicle being driven by Theola Saunders immediately after the murder and that he did not see any damage. He also testified that the majority of the damage now seen on the Volkswagen occurred at the wreck when Theola Saunders ran into the roadblock after the murder. On redirect, Sheriff Perry stated that there was no change to the interior of the Volkswagen. Thus, we conclude that on these facts, the evidence was not rendered unreliable. This assignment of error is overruled.

[18] By another assignment of error, defendant argues that the trial court erred by failing to admit evidence at defendant's sentencing hearing that showed that the principal, Theola Saunders, was ineligible for the death penalty. Defendant contends that because he was an accessory and not a coconspirator acting in concert, the fact that Saunders could not have received the death penalty was mitigating evidence. We disagree.

The basic thrust of defendant's argument is that although most of the common law distinctions between principals and accessories have been abrogated by statute, a derivative relationship remains between the principal and an accessory to a crime. Defendant contends that the derivative relationship between the culpability of the principal and the culpability of an accessory makes any leniency afforded the principal a "circumstance of the offense," citing *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), for such a proposition. Such leniency, defendant contends, is relevant to the determination of the accessory's sentence. We are unpersuaded.

The pertinent text of *Lockett* to which defendant refers states that the Constitution requires that the sentencer "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 57 L. Ed. 2d at 990. As this Court noted in *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), the Court in *Lockett* went on to say that "evidence irrelevant to these factors may be properly excluded by the trial court." *Id.* at 104, 282 S.E.2d at 447 (citing *Lockett*, 438 U.S. at 604

n.12, 57 L. Ed. 2d at 990 n.12). In *Irwin*, we held that evidence of a plea bargain and sentencing agreement between the State and a codefendant was not admissible as a mitigating circumstance because such evidence did not pertain to "defendant's character, record, or the nature of his participation in the offense." *Id.* We reaffirmed this holding 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), saying:

> 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, 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.

Williams, 305 N.C. at 687, 292 S.E.2d at 261-62. We conclude that the codefendant's death-sentence ineligibility in this case was properly excluded from the jury's consideration as a mitigating circumstance. This assignment of error is overruled.

[19] By another assignment of error, defendant contends that the trial court erred by three times submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that this murder was committed during the course of a felony. Defendant contends that the legislature did not intend for the (e)(5) aggravating circumstance to be submitted more than once when a defendant engaged in multiple felonies while committing a murder. Having previously interpreted this statute otherwise, we disagree.

We have interpreted N.C.G.S. § 15A-2000(e) to permit the submission of separate aggravating circumstances pursuant to the same statutory subsection if the evidence supporting each is distinct and separate. *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995). In *Moseley*, where the defendant was convicted of committing two separate offenses against the same victim, the defendant argued that the submission of two aggravating circumstances based on the same course of conduct was redundant. *Id.* at 54, 449 S.E.2d at 444. This Court found in *Moseley* that each crime the defendant had committed was supported by distinct evidence; the only overlap between the two convictions was the

fact that the defendant in *Moseley* committed both crimes against one victim. We concluded that this overlap did not rise to the level of redundancy and that it was proper for the trial court to submit the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance twice. *Id.* at 55, 449 S.E.2d at 444. We reiterated in later cases that it is proper for a trial court to allow such multiple submission of the (e)(5) aggravating circumstance. *See, e.g., State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 793 (1996); *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996).

In the present case, defendant was convicted of the first-degree murder of Wayne Thomas, the first-degree kidnappings of Wayne and Leslie Thomas, and one count of robbery with a dangerous weapon. Thus, there were three separate felonies submitted by the trial court as separate circumstances which the jury could find aggravated the murder. The State presented distinct evidence that defendant committed each of these three felonies against the two victims during the course of the murder. As we stated in *Moseley*, where each crime is supported by distinct evidence, such evidence supports the submission of multiple aggravating circumstances. We hold that it was proper for the trial court to submit the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance three times based on three separate and distinct felonies committed by defendant during the course of the murder. This assignment of error is overruled.

By another assignment of error, defendant contends that the trial court erred in permitting the prosecutors to engage in improper argument during the capital sentencing proceeding of defendant's trial. He contends that the prosecutors made two improper arguments to the jury, to wit: (1) implying that our capital sentencing structure was derived from biblical law, and (2) asking the jurors to put themselves in the place of the victims and their family members. We address each contention in turn.

Defendant first argues that the trial court erred in allowing the first prosecutor to use biblical references to support her closing argument at sentencing. The prosecutor argued that "the Bible says that he that smiteth a man so that he dies shall surely be put to death" and later that "lynch mob activity has always been condemned by the Good Book, but justice under the law has always been upheld and supported by the Good Book." Defendant objected to both of these arguments, and his objections were overruled by the trial court. Defendant argues that these references to the Bible told the jury that

the State's authority comes from the Bible, in violation of this Court's decision in *State v. Laws*, 325 N.C. 81, 120, 381 S.E.2d 609, 632 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). We disagree.

[20] The trial court properly overruled defendant's first objection to the argument that in the Bible it says that "he that smiteth a man so that he die shall surely be put to death." The prosecutor was anticipating and rebutting an argument which she had reason to believe defense counsel would raise in reference to the propriety of the death penalty. Just before making the argument to which defendant objected, the prosecutor said:

> Ladies and Gentlemen of the jury, they may come and say to you thou shalt not kill. That's what everybody says in opposition to the death penalty. It kind of gets you—thou shalt not kill. But ladies and gentlemen of the jury, that is a commandment as to how we are to conduct ourselves one with another in society, how [defendant] is supposed to conduct himself with people like Wayne Thomas.

The prosecutor was quoting the rest of the biblical passage which she anticipated defense counsel would quote during closing arguments. We have noted that "more often than not," we have concluded that such biblical arguments are within permissible margins given counsel in arguing "hotly contested cases." *State v. Artis*, 325 N.C. 278, 331, 384 S.E.2d 470, 500 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

[21] The trial court also overruled defendant's second objection to the prosecutor's argument that "justice under the law has been upheld and supported by the Good Book." Looking at the transcript, we note that just before making this argument, the prosecutor told the jury, "we are not trying this case by Biblical law. We are trying this case by man's law, North Carolina General Statute 15A-2000." In *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 794 (1996), we stated that an argument which "clearly informed the jury that it was to make its sentencing decision based upon N.C.G.S. § 15A-2000, and not the Bible . . . was not improper." *Id.* at 61, 463 S.E.2d at 770. In reviewing this issue in *State v. Rose*, 339 N.C. 172, 451 S.E.2d 211 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 818 (1995), we reaffirmed our prior holdings. In the present case, the prosecutor's biblical references appeared in only four pages of a thirty-five page closing argument. Moreover, the pros-

ecutor cautioned the jury that this case was not being tried by biblical law, but by man's law, specifically referencing N.C.G.S. § 15A-2000. We find no error in the trial court's overruling defendant's objections to the biblical references made by the prosecutor.

[22] Defendant next argues that the references to the victims or their family members made by a second prosecutor during the closing arguments of the capital sentencing proceeding were so improper that the trial court had a duty to intervene *ex mero motu* to cure the error. The defendant contends that on two separate occasions the prosecutor told the jurors to put themselves in the place of the victims or the victims' family members. After carefully reviewing the transcript, we find that the prosecutor did not tell the jurors to put themselves in these positions. Rather, the prosecutor asked if the jurors could *imagine* themselves in the position of the victims' parents and then later asked if they could *imagine* themselves as Leslie Thomas. The pertinent part of the prosecutor's argument was:

> What on earth, ladies and gentlemen of the jury—you raise somebody up, get ready to get them married, and what happens? They're taken away from you not through God, not through disease or illness, but because someone is so mean and doesn't want to work, doesn't care, doesn't care. And he doesn't shed a tear for them and he doesn't care.

We have held that such an argument is permissible as a type of victim-impact argument. *State v. Conaway*, 339 N.C. 487, 528, 453 S.E.2d 824, 850, *cert. denied*, — U.S. —, 133 L. Ed. 2d 153 (1995). As we stated in *Conaway*, "this argument merely served to remind the jury that the victims were sentient beings with close family ties before they were murdered by defendant." *Id.* at 528, 453 S.E.2d at 850. In any event, the argument at issue here was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[23] The next argument the prosecutor made, about which defendant complains, referred to the victim, Leslie Thomas:

> Can you imagine if this had happened to yourself; the horror of being in that Volkswagen eight hours with this man holding that little gun and the kid holding the shotgun and switching them back and forth? And having your own brother rob a store and not knowing whether he was going to come back dead or not, whether the police may kill him? And being pregnant at the same time in that tiny car and this defendant asking those questions . . .

> you're not coming back until I get my money . . . and if I don't get my money before daylight, you're dead. And going through that; is that not momentous? Does that not count?

This Court has repeatedly found no impropriety in a prosecutor's argument asking the jury to try to *imagine* the fear and emotions of a victim. *State v. Campbell*, 340 N.C. 612, 636, 460 S.E.2d 144, 157 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 871 (1996); *Gregory*, 340 N.C. at 426, 459 S.E.2d at 674. In *State v. Garner*, 340 N.C. 573, 459 S.E.2d 718 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 872 (1996), we found no gross impropriety in the prosecutor's argument explicitly asking the jurors to place themselves in the position of the victims of the murders. *Id.* at 596-97, 459 S.E.2d at 730-31. As defendant failed to object to the prosecutor's arguments of which he now complains, our review on appeal is limited to the question of whether the arguments were so grossly improper as to require the trial court to intervene *ex mero motu*. *McCollum*, 334 N.C. at 225, 433 S.E.2d at 153. We conclude that these arguments were not so grossly improper as to require the trial court to intervene in the absence of an objection by defendant. This assignment of error is overruled.

[24] By another assignment of error, defendant contends the trial court erred by failing to give a peremptory instruction on the N.C.G.S. § 15A-2000(f)(4) statutory mitigating circumstance. Defendant argues that the evidence was uncontradicted that defendant was not present when Wayne Thomas was killed, but was in the hospital receiving treatment for an injured foot. He contends that it was incumbent upon the trial court to peremptorily instruct the jury to find "that defendant was an accomplice in or an accessory to the felony murder committed by another person and his participation was relatively minor." Defendant argues that the fact that the jury did not find the existence of the (f)(4) mitigator shows that the trial court committed error in failing to give the jury a peremptory instruction. We disagree.

Upon careful review of the transcript, we find that the evidence was not uncontroverted as to each aspect of the (f)(4) mitigating circumstance. Part of the State's argument was that defendant was not a minor participant in this crime, but that defendant had orchestrated the robbery, attempted robberies, and kidnappings and had great influence over his young accomplice. The State's evidence tended to show that defendant was twenty-nine years older than his accomplice, that defendant planned the scheme of going to Virginia to com-

mit armed robbery, that defendant equipped Theola Saunders with the murder weapon Saunders ultimately used to kill Wayne Thomas, that defendant took control of the car from the Thomases at gunpoint, and that defendant gave all the orders to Saunders. Defendant sought to challenge this evidence at all stages. Thus, the evidence as to the (f)(4) mitigator was hotly contested, and we hold that the trial court properly denied defendant's request for a peremptory instruction on this proposed mitigating circumstance. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant also raises for "preservation" the following six issues: (1) the trial court erred by permitting the bailiff to have *ex parte* contact with prospective jurors, (2) the trial court erred by denying defendant's motion to examine jurors about defendant's parole eligibility, (3) the trial court erred by declining to impose judgment and sentence for defendant's noncapital convictions prior to the sentencing hearing, (4) the trial court erred by placing the burden of proof on defendant with respect to mitigating circumstances and by declining to instruct the jury on the preponderance of the evidence standard, (5) the trial court erred by failing to instruct in accordance with defendant's request to prohibit jurors from rejecting submitted mitigation on the basis that it had no mitigating value, and (6) the trial court erred by failing to clearly instruct the jury that the jury should answer "no" to Issues Three and Four unless the jury unanimously decided that the answer to these issues was "yes." We have considered the defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule each of these assignments of error.

PROPORTIONALITY REVIEW

Having concluded that defendant's trial and separate capital sentencing proceeding were free of prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. It is our duty in this regard to ascertain (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988) (amended 1984). After thor-

oughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

[25] In the present case, defendant was convicted of premeditated and deliberate first-degree murder. The jury found the following aggravating circumstances: that defendant had been previously convicted of a violent felony, N.C.G.S. § 15A-2000(e)(3); that defendant killed the victim while he was an aider and abettor in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); that defendant killed the victim while he was an aider and abettor in the commission of the first-degree kidnapping of Leslie Thomas, N.C.G.S. § 15A-2000(e)(5); that defendant killed the victim while he was an aider and abettor in the commission of the first-degree kidnapping of Wayne Thomas, N.C.G.S. § 15A-2000(e)(5); and that the murder was committed as part of a course of conduct including other violent crimes, N.C.G.S. § 15A-2000(e)(11). Of the thirteen mitigating circumstances submitted, including one statutory mitigator as well as the catchall, the jury did not find any mitigating circumstances to exist. Defendant argues that the death penalty in this case was arbitrary based on the fact that the jury did not find any mitigating circumstances. We find this contention to be without merit.

Eight of the mitigating circumstances submitted and not found dealt with defendant's childhood up to age fourteen. Defendant was forty-five years old at the time he committed the crimes in this case. A jury could rationally have found that defendant's childhood circumstances did not warrant a mitigating effect on his violent criminal activity over thirty years later. Further, the jury could rationally have rejected the submitted mitigating circumstance that defendant's participation in the crimes was relatively minor. The State's evidence tended to show that defendant exerted dominance over his sixteen-year-old accomplice and was in charge of their crime spree. The evidence that defendant set up the murder, gave the juvenile the weapon, and instructed him what to do with it could rationally have persuaded the jury that defendant's participation was not minor. We conclude that the fact that the jury did not find the existence of any mitigating circumstances does not indicate that the death sentence was arbitrarily imposed.

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162. We have found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. 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). We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. This case has several features which distinguish it from the cases in which we have found the death penalty to be disproportionate. They are: (1) defendant orchestrated the killing of an unarmed victim whom defendant kept hostage after kidnapping him from his own home at gunpoint and forcing him against his will to commit armed robbery for defendant's financial gain; (2) defendant was in a position of control during the crimes at issue and subjected a sixteen-year-old boy to his dominance, ordering that the boy kill the victims if they "messed up"; (3) defendant had previously been convicted of four violent felonies, including manslaughter, second-degree robbery, armed robbery, and aiding and abetting an armed robbery. We find it significant that in none of the cases in which this Court has found the death penalty disproportionate were there multiple victims or multiple major felonies committed during the crime. Moreover, none of the defendants in those cases had previously been convicted of multiple violent felonies.

Of the seven cases in which this Court has found the death penalty disproportionate, only two, *Bondurant* and *Young*, contained multiple aggravating circumstances. The instant case contains five aggravating circumstances, all supported by competent evidence. Three of the aggravating circumstances submitted and found by the jury in this case were that defendant had previously been convicted of three violent felonies. We have noted that a jury's finding of this aggravating circumstance is significant in finding a death sentence proportionate. *State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 752 (1995). In a recent case, we determined that none of the cases in which the death sentence was found to be disproportionate have included this aggravating circumstance. *State v. Rose*, 335 N.C. 301, 351, 439 S.E.2d 518, 546, *cert. denied*, — U.S. —, 129 L. Ed. 2d 883 (1994).

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Features of this case which are present in cases where this Court has found a death sentence proportionate include: the killing was part of an armed robbery; the killing was done to eliminate a witness; and there were two victims, one of whom survived. These features were present in *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995), and in *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

Another distinguishing feature of this case which makes the death penalty proportionate is the fact that the jury convicted defendant of first-degree murder under the felony murder rule and based on malice, premeditation, and deliberation. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Artis*, 325 N.C. at 341, 384 S.E.2d at 506; *see State v. Lee*, 335 N.C. 244, 297, 439 S.E.2d 547, 575, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994).

As to defendant's character, we find morally reprehensible the fact that defendant enlisted the help and directed the criminal course of conduct of a teenager, Theola Saunders, for defendant's financial gain. Both the circumstances of the crime and the character of the defendant demonstrate that the death penalty is proportionate for this defendant. Accordingly, we conclude that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

For the foregoing reasons, we conclude that defendant received a fair trial, free of prejudicial error, and that the sentence of death entered in the present case must be and is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. DONNA SUE WESTBROOKS

No. 428A94

(Filed 6 December 1996)

1. **Criminal Law § 1131 (NCI4th Rev.)— Fair Sentencing Act—same evidence not used twice—second finding in explanation of first**

The trial court did not use the same evidence to prove more than one aggravating factor when sentencing defendant for conspiracy to murder and solicitation to murder under the Fair Sentencing Act where the trial judge marked the box which provided that "defendant took advantage of a position of trust or confidence to commit the offense" and the box for additional factors, typing in that defendant took advantage of a position of trust in the husband-wife relationship with information about insurance coverage and where the victim would be when the attack occurred. The language inserted in the form in the second finding is explanatory of the first and was not treated as a separate factor in aggravation. This case is distinguishable from *State v. Morston*, 336 N.C. 381, in that there is no discrepancy between the sentencing form and the transcript.

Am Jur 2d, Criminal Law §§ 525 et seq.

Validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes. 100 ALR3d 431.

2. **Homicide § 73 (NCI4th)— solicitation to commit murder—lesser included offense of accessory before the fact**

Solicitation to commit murder is a lesser included offense of murder as an accessory before the fact because solicitation to commit murder contains no element that is not also present in the offense of being an accessory before the fact to murder. Although there is a possibility under particular facts that a defendant may have solicited someone to commit a crime without being an accessory before the fact to that crime or that a defendant was an accessory before the fact to the crime but did not solicit the crime, North Carolina case law is clear that the determination of whether one offense is a lesser included offense of another is made on a definitional basis as opposed to a factual basis. Applying the definitional approach to these two crimes leads to

the result that solicitation to commit murder merges into the offense of being an accessory before the fact to the same murder.

Am Jur 2d, Homicide § 564.

Solicitation to commit crime against more than one person or property, made in single conversation as single or multiple crimes. 24 ALR4th 1324.

3. Indictment, Information, and Criminal Pleadings § 19 (NCI4th); Homicide § 138 (NCI4th)— indictment for murder— acting in concert theory—conviction as accessory—indictment sufficient

An indictment for acting in concert to commit murder supported a verdict of first-degree murder on an accessory-before-the-fact theory. An indictment must allege all of the essential elements of the crime sought to be charged but allegations beyond the essential elements are irrelevant and may be treated as surplusage. Moreover, the purposes of an indictment include giving notice of the charge against defendants so that they may prepare their defense and be in a position to plead double jeopardy. Here, acting in concert was an allegation beyond the essential elements of the crime charged and defendant had notice of the first-degree murder charge against her and presented her defense accordingly, testifying that she did not hire anyone to murder her husband.

Am Jur 2d, Indictments and Informations §§ 103-106.

4. Evidence and Witnesses § 959 (NCI4th)— murder—statements to witnesses by victim—state of mind

The trial court did not err in a prosecution for first-degree murder by admitting testimony repeating statements made to witnesses by the victim before his death about his feelings towards his marriage to the defendant and that he was depressed, lonely, and upset about finances. These statements reflect a man concerned about his marriage and his wife's handling of their finances and expressed his state of mind. The statements were not merely a recitation of facts and the inconsistencies present in the hearsay evidence in *State v. Hardy*, 339 N.C. 207, are not present here. These statements also corroborate a motive for the murder—that defendant was in debt and could not repay her obligations. Moreover, there was no prejudice because other witnesses testified to the same affect. N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Homicide §§ 536-540.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed. 170.

5. Evidence and Witnesses § 959 (NCI4th)— murder—statements by victim—state of mind

A first-degree murder victim's statements to witnesses concerning telephone calls and bills from creditors he knew nothing about and concerning defendant's role in his financial situation were admissible as statements of the declarant's then existing state of mind. Although defendant argued that these statements were a recitation of facts rather than state of mind, these statements were made contemporaneously with and in explanation of the victim's statements that he was concerned and upset about his finances, which were held admissible elsewhere in this opinion. Moreover, there was no prejudice because other witnesses testified to the same affect.

Am Jur 2d, Homicide §§ 536-540.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed. 170.

6. Evidence and Witnesses § 2750.1 (NCI4th)— murder—statement of victim about marriage—admissible to contradict defendant

A first-degree murder victim's statements to witnesses concerning the status of the marriage between the victim and defendant were admissible to contradict defendant's contention at trial that she and the victim had no marital problems. Moreover, there was no prejudice because other witnesses testified to the same affect.

Am Jur 2d, Witnesses §§ 717, 718.

7. Evidence and Witnesses § 761 (NCI4th)— murder—statements to victim about defendant—no prejudice

There was no prejudicial error in a first-degree murder prosecution in the admission of statements to the victim by witnesses

about defendant. Given the overwhelming evidence against defendant, there is no reasonable possibility that a different result would have been reached had this evidence not been admitted.

Am Jur 2d, Appellate Review §§ 753, 759.

8. Constitutional Law § 356 (NCI4th)— first-degree murder—defendant's prearrest silence—right to remain silent not invoked

There was no error in a first-degree murder prosecution in which defendant was charged with murdering her husband in the admission of statements made by defendant to a detective before her arrest, in the cross-examination of defendant about those statements, and in the argument of the prosecutor about the statements. The record reveals that defendant never invoked or relied upon her right to remain silent, frequently talked with investigators, and was not induced to remain silent before her arrest. Use of her prearrest silence does not violate her Fifth Amendment rights.

Am Jur 2d, Criminal Law §§ 791-797.

Admissibility of pretrial confession in criminal case—Supreme Court cases. 16 L. Ed. 2d 1294.

Admissibility of pretrial confession in criminal case—Supreme Court cases. 22 L. Ed. 2d 872.

9. Evidence and Witnesses § 1092 (NCI4th)— first-degree murder—defendant's prearrest silence—impeachment

There was no error in a first-degree murder prosecution in which defendant was charged with murdering her husband in the admission of statements made by defendant to a detective before and after her arrest, in the cross-examination of defendant about those statements, and in the argument of the prosecutor about the statements. Under common law rules, it would have been natural for defendant to have told officers about a conversation in which she was told the identity of the person who killed her husband. Her silence about this conversation was evidence of an inconsistent statement and it was not error to allow the prosecutor's cross-examination of defendant on this issue. Assuming that it would not have been natural for defendant to have told officers

about the facts set out in the statement, any error was not prejudicial given the overwhelming evidence against defendant.

Am Jur 2d, Criminal Law §§ 791-797.

Impeachment of defendant in criminal case by showing defendant's prearrest silence—state cases. 35 ALR4th 731.

10. Evidence and Witnesses § 1092 (NCI4th)— first-degree murder—defendant's postarrest silence—used for impeachment purposes

The trial court did not err in a first-degree murder prosecution by using defendant's post-arrest, post-*Miranda* silence for impeachment where the record discloses that defendant was not induced to remain silent, executed a waiver and voluntarily gave a statement to investigating officers. Any references to omissions or inconsistencies in statements defendant made after receiving her *Miranda* warnings were proper.

Am Jur 2d, Criminal Law §§ 791-797.

Impeachment of defendant in criminal case by showing defendant's prearrest silence—state cases. 35 ALR4th 731.

11. Evidence and Witnesses § 1092 (NCI4th)— first-degree murder—defendant's silence—no prejudice from use

The use of a first-degree murder defendant's silence before and after arrest for substantive purposes was not prejudicial, assuming error, given the overwhelming evidence against defendant.

Am Jur 2d, Criminal Law §§ 791-797.

Impeachment of defendant in criminal case by showing defendant's prearrest silence—state cases. 35 ALR4th 731.

12. Criminal Law § 432 (NCI4th Rev.)— murder—prosecutor's closing argument—defendant's pre- and post-arrest silence

There was no error in the trial court not intervening *ex mero motu* in the prosecutor's closing argument in a first-degree murder prosecution where defendant contended that the argument plainly urged the jury to draw meaning from defendant's pre- and post-arrest silence but defendant did not object to this portion of the closing argument and the argument was made to impeach defendant's trial testimony. Based on defendant's trial testimony, the natural tendency would be for defendant to have mentioned

certain information prior to taking the stand and it was proper to raise this question.

Am Jur 2d, Trial § 648.

13. Evidence and Witnesses § 2865 (NCI4th)— murder—cross-examination of State's witnesses—plea bargains—before jury—other testimony

The trial court did not abuse its discretion in a first-degree murder prosecution where defendant contends that the trial court erred by limiting her right to confront, cross-examine, and impeach State's witnesses, thereby precluding inquiry about their parole eligibility under their guilty pleas. Both witnesses testified that they were motivated to testify for the State because of a plea arrangement and the fact that these witnesses had made arrangements for charge reductions in exchange for their testimony was clearly before the jury.

Am Jur 2d, Witnesses § 804.

14. Evidence and Witnesses § 2641 (NCI4th)— plea bargain—offer of proof—attorney's testimony—privilege invoked

There was no prejudicial error in a first-degree murder prosecution where defendant contended that the trial court erroneously allowed the attorney for a State's witness to invoke the attorney-client privilege during an offer of proof concerning parole eligibility information. Assuming that the client waived the privilege, defendant cannot show prejudice because the client had testified that the State permitted her to plead guilty to conspiracy to commit murder and second-degree murder in exchange for her testimony and read to the jury terms of her plea agreement. Any testimony by the attorney to the effect that the State's witness and the attorney had discussed the possible advantages of a plea arrangement would have been cumulative.

Am Jur 2d, Witnesses §§ 350-353.

Party's waiver of privilege as to communications with counsel by taking stand and testifying. 51 ALR2d 521.

15. Jury § 132 (NCI4th)— first-degree murder—jury selection questions—disposition of codefendant's cases—ability to ignore

The trial court did not err in a first-degree murder prosecution by overruling defendant's objection to asking a prospective juror "Can you decide this case without comparing it with the dis-

position of the co-defendants' cases, if you're told about that?" The trial court did not abuse its discretion in denying the objection based on the grounds for defendant's objection at trial because defendant was allowed to ask her own questions regarding the disposition of the codefendants' cases. As to the grounds raised for the first time on appeal, the questions sought to identify those jurors who would be unable to decide defendant's case based solely on the evidence produced at trial and did not have the effect of urging the jurors to ignore the State's witnesses' potential interest or bias; defendant raised the agreements of the witnesses with the State during jury selection, during trial, during closing argument, and during sentencing; the trial court instructed the jury with regard to the testimony of the witnesses as well as to the disposition of their cases; and, while the prosecutor did not misstate the law, any such misstatement would have been cured by the trial court's proper instructions to the jury.

Am Jur 2d, Jury §§ 100-158.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

16. Criminal Law § 475 (NCI4th)— first-degree murder—argument of counsel—defense contention regarding evidence—disallowed, then allowed—proper instruction

There was no prejudicial error in a first-degree murder prosecution where defendant contended that the trial court erroneously disallowed the defense argument that a State's witness had talked in jail to a defense witness (who testified that the State's witness had confessed to her) and that the trial court erroneously allowed the prosecutor's argument that the defense witness was not in jail when the conversation allegedly occurred. Defense counsel made the same contention after the objection was sustained without objection and without intervention from the court, and the trial court correctly instructed the jurors to take their own recollection of the evidence.

Am Jur 2d, Trial §§ 1544 et seq.

17. Homicide § 552 (NCI4th)— first-degree murder—second-degree murder as accessory not submitted—no error

The trial court did not err in a first-degree murder prosecution by not submitting the possible verdict of second-degree mur-

der as an accessory before the fact where there was substantial evidence to prove each element of first-degree murder and evidence of second-degree murder was totally lacking.

Am Jur 2d, Homicide §§ 223 et seq.

18. Homicide § 393 (NCI4th)— first-degree murder—alcohol consumption by accomplice—no evidence of effect of alcohol

There was no merit in a prosecution for first-degree murder and conspiracy to defendant's argument that an accomplice's alcohol consumption prior to the killing negated premeditation and deliberation. There was no evidence relating to the effect of alcohol on the accomplice at the time of the killing and the accomplice admitted on cross-examination that the murder was premeditated and deliberated.

Am Jur 2d, Homicide § 448.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Cornelius, J., at the 1 November 1993 Criminal Session of Superior Court, Guilford County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments for conspiracy to commit murder and solicitation to commit murder was allowed 27 January 1995. Heard in the Supreme Court 14 November 1995.

Michael F. Easley, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant, Donna Sue Westbrooks, was tried capitally for first-degree murder, conspiracy to commit murder, solicitation to commit murder, two counts of forgery of an endorsement, and two counts of uttering an instrument containing a forged endorsement. During the trial the State dismissed the forgery and uttering charges. The jury

found defendant guilty of first-degree murder, conspiracy to commit murder, and solicitation to commit murder. Defendant was sentenced to life imprisonment for the first-degree murder conviction, thirty years' imprisonment for conspiracy to commit murder, and thirty years' imprisonment for solicitation to commit murder, all sentences to be served consecutively.

At trial the State's evidence tended to show that in June 1991 defendant bought a Greensboro bar named the Bench Tavern. Defendant was married to the victim, James Alvin Westbrooks. Defendant purchased the bar by obtaining a home equity loan on the victim's home. At the time defendant purchased the bar, the victim was employed as a salesman for a Greensboro beer distributor. In November 1991 the victim injured his back in a work-related accident and was disabled. The victim remained at home and began receiving workers' compensation benefits.

Zachary Neal Davis, Jr. was in the floor-covering business in Greensboro. Davis became acquainted with defendant and installed a vinyl floor in the Westbrookses' home. When the Bench Tavern was doing poorly in July 1991, Davis loaned defendant $3,000. In September 1991 Davis loaned defendant an additional $3,500. In early 1992 Davis and Betty W. Cashwell purchased a bar in Greensboro named the Winner's Circle.

Defendant approached Davis and told him that she wanted to have her husband killed. She asked if he thought it could be done for $10,000. According to Carita Jones, a bartender at the Bench Tavern, Davis told her that defendant had offered him $10,000 to kill her husband. Sometime after this initial conversation, defendant confronted Davis again and said that she "wanted to do away with Jimmy" because "he had just gotten out of the hospital and his health was bad, and she didn't like seeing him suffer." Davis agreed to arrange the killing for $15,000, which was to come out of the victim's life insurance proceeds.

Davis asked his friend James Copeland if he knew anyone who could carry out the killing, but he did not. Davis then talked to his brother, Johnny Davis. Johnny testified that his brother approached him at the Winner's Circle bar and asked if he "knew anybody that would get rid of another person." Davis then told Johnny defendant was paying $15,000 to get rid of her husband because she wanted to collect his life insurance proceeds. Johnny would have nothing to do with his brother's plan. Finally, Davis

approached his business partner, Betty Cashwell, and elicited her help in the murder.

In January 1992 the victim had back surgery related to his work injury; he was still out of work with his injury in March 1992. Prior to the murder defendant told the victim that Davis was going to come to the house on 13 March 1992 to repair a portion of the flooring Davis had previously installed. Davis and Cashwell drove to the victim's home at approximately 2:00 p.m. on the thirteenth; after the victim let them in, Davis began inspecting the flooring. Cashwell then went into the bedroom and got a knife from a location previously disclosed to her by defendant. Cashwell attacked the victim with a knife, and a struggle ensued. Davis and Cashwell testified that the victim put up a "hell of a fight." Davis testified that Cashwell stabbed the victim repeatedly and that Davis then stabbed the victim "once or twice" more. Cashwell gave a similar account of the murder except that in her testimony Davis did the stabbing. By the end of the struggle, defendant was dead on his carport floor.

After determining that the victim was dead, Davis and Cashwell left the victim's home, threw the knife out the window, changed clothes, washed blood off the front of Cashwell's car, and hid the bloodied clothes. They then removed the license tags from Cashwell's car, threw them in a pond, and went to a bar in the country to abandon the automobile. Davis flattened the right rear tire and then kicked dust on the car to make it look like it had been left for some time. The two then rode back to the Winner's Circle bar in another car.

Dr. Deborah L. Radisch, associate chief medical examiner of the State of North Carolina, performed an autopsy on the victim. According to Dr. Radisch the victim had numerous abrasions and twenty-three stab wounds. The victim bled to death from these wounds.

Defendant testified on her own behalf and contended that she had no part in the murder of her husband. Defendant's testimony tended to show that in December 1991 Davis said he needed money to purchase a bar and demanded several times that the loans be repaid. Davis asked whether defendant could borrow from either her or her husband's insurance policies, and she told him she could not. In January 1992 defendant's financial condition was poor. Defendant testified that she was losing money at the bar, but then "started making a little money," and "it wasn't so bad that [she] couldn't take care of everything." On 13 May 1992, Davis told defendant that Cashwell had

killed the victim and that he had been present. According to defendant Davis indicated that Cashwell killed the victim because she needed money to pay off a debt and she believed there was money at the Westbrookses' home.

Angle Maberson testified that she and Cashwell were in the Guilford County jail together in early September 1993, that Cashwell was upset, and that Cashwell said then that "she was looking at a lot of time" and was going to have to tell a story that was not true because she "had to tell what the DA wanted to hear." Maberson testified that she saw Cashwell again after Cashwell testified in court. Cashwell was hysterical and said, "[I] did it, and [I] know that the lady didn't do it, but [I] had to, because [I] was looking at a lot of time" and "the DA wasn't going to give [me] the kind of plea bargain that [I] wanted."

Defendant also introduced into evidence portions of the victim's medical records from a July 1991 hospitalization for depression. The records disclosed that the victim reported his marriage as good, that he was very close with his wife, that he denied any marital problems, and that he felt his marriage was "very positive."

On rebuttal Sheila Hanes, the records clerk supervisor at the Guilford County jail, testified that Betty Cashwell and Angle Maberson were never housed together or adjacent to one another in such a way that they could carry on a conversation while in the jail.

Zachary Davis and Betty Cashwell pled guilty to conspiracy to commit murder and second-degree murder pursuant to a plea arrangement. Johnny Davis and James Copeland testified under a grant of immunity.

[1] In her first two assignments of error, defendant contends that the trial court used the same item of evidence to prove more than one aggravating factor in both the conspiracy and solicitation cases. In the conspiracy case the court marked box number 14 on the "Felony Judgment Findings of Factors in Aggravation and Mitigation of Punishment" form (herein sentencing form), which provides: "The defendant took advantage of a position of trust or confidence to commit the offense." Box number 16 on the sentencing form represents "[a]dditional written findings of factors in aggravation." The trial court marked this box as well, and the following statement was typewritten:

> The defendant took advantage of a position of trust in the husband/wife relationship with the information obtained about insurance coverage and where he would be on a certain date when the attack occurred and provided this to the victim's assailant.

Defendant argues that two separate factors in aggravation were found based on the same evidence.

The Fair Sentencing Act prohibits the use of the same item of evidence to prove more than one factor in aggravation. N.C.G.S. § 15A-1340.4(a)(1) (1988)[1]. After a review of the record, we find that the trial court found only one aggravating factor and based its ruling on this single factor. The trial court made the following finding for the conspiracy conviction:

> The Court would find as *an aggravating factor* that the defendant took advantage of a position of trust in the husband and wife relationship, and with information obtained about the insurance coverage and where he would be on a certain date that the attack occurred was provided to his assailants.

(Emphasis added.) The trial court then set out the mitigating factors and finally concluded that "the *factor* in aggravation outweighs the mitigating factors, the reason for the deviation from the presumptive." (Emphasis added.) We conclude that the trial judge marked an additional box on the sentencing form in order to explain the single statutory finding. The language inserted on the form in finding number 16 is explanatory of finding number 14 and was not treated as a separate factor in aggravation. The court thus did not find two factors in aggravation based on the same evidence. *See State v. Laney*, 74 N.C. App. 571, 328 S.E.2d 586 (1985).

We are mindful of our recent decision in *State v. Morston*, 336 N.C. 381, 445 S.E.2d 1 (1994), in which we held that a discrepancy between the sentencing form and the transcript entitled defendant to a new sentencing hearing. In *Morston* the sentencing form indicated that the trial court found two aggravating factors: the offense was committed to disrupt the lawful exercise of a governmental function or the enforcement of laws, and the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of

1. The Fair Sentencing Act, as contained in N.C.G.S. § 15A-1340.1 through -1340.7, was repealed effective 1 October 1994, when the Structured Sentencing Act became effective for offenses occurring on or after that date. The Fair Sentencing Act applies in this case.

laws. The State contended in *Morston* the sentencing form contained a clerical error and that the transcript revealed that the trial court actually found only one of the aggravating factors. We stated in *Morston* that "the better course is to err on the side of caution and resolve in the defendant's favor the discrepancy between the trial court's statement in open court, as revealed by the transcript, and the sentencing form." *Id.* at 410, 445 S.E.2d at 17.

The instant case is distinguishable from *Morston* in that there is no discrepancy between the sentencing form and the transcript. Rather, the transcript is consistent with the sentencing form and supports the conclusion that the trial judge marked an additional box on the sentencing form in order to explain the single statutory finding. The record shows that defendant was properly sentenced to the maximum penalty on her conspiracy conviction. Thus, this assignment of error as to the conspiracy to commit murder count is overruled. For the reasons discussed hereinafter, we do not address the assignments of error related to application of the Fair Sentencing Act to the solicitation to commit murder count.

[2] Defendant next contends that the conviction for solicitation to commit murder should be vacated because her conviction for solicitation to commit murder and either her first-degree murder conviction as an accessory before the fact or her conspiracy to commit murder conviction constitute unconstitutional multiple punishment for the same offense. Defendant asserts that her double jeopardy rights were violated because she was punished for both a lesser included offense as well as the greater offense.

The issue of whether solicitation to commit murder is a lesser included offense of murder as an accessory before the fact is one of first impression in this state. The determination of whether one offense is a lesser included offense of another is made on a definitional as opposed to a factual basis. *State v. Weaver,* 306 N.C. 629, 635, 295 S.E.2d 375, 378 (1982), *overruled on other grounds by State v. Collins,* 334 N.C. 54, 431 S.E.2d 188 (1993). "[A]ll of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *Id.* at 635, 295 S.E.2d at 379. We agree with defendant's contention that solicitation to commit murder is a lesser included offense of murder as an accessory before the fact.

The essential elements of accessory before the fact to murder are (i) the defendant must have counseled, procured, commanded, encouraged, or aided the principal in the commission of the murder; (ii) the principal must have committed the murder; and (iii) the 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 gravamen of the crime of solicitation is counseling, enticing, or inducing another to commit a crime. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977). From these definitions it appears that the crime of solicitation to commit murder contains no element that is not also present in the offense of being an accessory before the fact to murder. Thus, evidence that defendant was an accessory before the fact to murder would support a conviction of solicitation to commit murder. Applying the "definitional" approach to these two crimes leads to the result that solicitation to commit murder merges into the offense of being an accessory before the fact to the same murder. This same result was reached by Maryland's highest court in *Lewis v. State*, 285 Md. 705, 404 A.2d 1073 (1979); *see also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 649-50 (3d ed. 1982) ("If the [solicitee] commits the crime the [solicitor] is also guilty of that crime although at common law his guilt would be as an accessory before the fact if [the crime] was a felony and he was not present at the time. The solicitation is so far merged in the resulting offense that the solicitor cannot be punished for both.") (footnotes omitted); 4 Charles E. Torcia, *Wharton's Criminal Law* § 719, at 521 (14th ed. 1981) ("[A] person may not be convicted, 'on the basis of the same course of conduct', of both solicitation and the offense solicited.") (footnote omitted).

Under the factual approach there is a possibility that under a particular set of facts, a defendant may have solicited someone to commit a crime without being an accessory before the fact to that crime or that a defendant was an accessory before the fact to the crime but did not solicit the crime. Our case law is clear, however, that we use a "definitional" approach when making such an inquiry. "We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime." *Weaver*, 306 N.C. at 635, 295 S.E.2d at 378. Defendant's conviction for solicitation to commit murder must be vacated.

Defendant also contends that solicitation to commit murder is a lesser included offense of conspiracy to commit murder. Having

determined that solicitation to commit murder is a lesser included offense of murder as an accessory before the fact and that the solicitation conviction must be vacated, we are not required to reach this issue.

In defendant's next assignments of error, she asks this Court to reconsider its previous holdings that conspiracy to commit murder is not a lesser included offense of first-degree murder as an accessory before the fact. *See, e.g., State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978). Defendant offers no argument meriting reconsideration of our position on this issue. Thus, these assignments of error are overruled.

[3] Defendant next contends that her murder conviction must be vacated because there is insufficient evidence that she committed the offense as charged in the indictment. Indictment number 92CRS43698 charged that defendant "unlawfully, willfully and feloniously did *acting in concert* with Betty Cashwell and Zachary Davis, . . . of malice aforethought kill and murder James Alvin Westbrooks." (Emphasis added.) Defendant contends that because there was no evidence that she was present at the scene of the murder, a required element of acting in concert, she cannot be found guilty of murder under this indictment. Defendant's argument is that because the indictment stated acting in concert as the specific theory of murder, the allegations against defendant were limited to that theory, and her conviction for first-degree murder on an accessory-before-the-fact theory must be vacated. We do not agree.

A criminal indictment is sufficient if it expresses "the charge against the defendant in a plain, intelligible, and explicit manner." N.C.G.S. § 15-153 (1983). Specifically, the indictment must allege all of the essential elements of the crime sought to be charged. *State v. Courtney*, 248 N.C. 447, 103 S.E.2d 861 (1958). "Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). Acting in concert is not an essential element of first-degree murder, and the prosecution was not required to prove this fact in order to prove that defendant was guilty of first-degree murder. Thus, the allegation of the indictment that defendant acted in concert with Zachary Davis and Betty Cashwell is an allegation beyond the essential elements of the crime charged and is, therefore, surplusage. *See State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

The purposes of an indictment include giving a defendant notice of the charge against him so that he may prepare his defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense. *Id.* In the instant case defendant had notice of the first-degree murder charge against her and presented her defense accordingly. Defendant testified in her own defense that she did not hire Davis or Cashwell or anyone else to murder her husband. Defendant was found guilty of first-degree murder on an accessory-before-the-fact theory. The indictment and the evidence supported this verdict. This assignment of error is overruled.

[4] By her next two assignments of error, defendant argues that testimony by two witnesses repeating statements made to them by the victim before his death was inadmissible and irrelevant hearsay. Defendant contends that the trial court erred by admitting testimony of statements made by the victim.

James Alvin Westbrooks, Sr., the victim's father, testified that he and the victim talked about the victim's financial and marital problems on 12 March 1992. Mr. Westbrooks testified that during this conversation, he told the victim he would hire an attorney to handle his financial and marital problems; in response the victim stated, "All she's done to me, I still don't want to hurt her."

Deborah Westbrooks Blair, the victim's sister, testified that the victim told her that he was upset about his finances, "that he was in terrible financial shape, that he was really concerned about it. He was very depressed. He was very lonely." She testified that the victim told her he had been getting calls and bills from creditors which he knew nothing about and that defendant was responsible.

The trial court found that these statements were admissible under Rule 803(3) of the North Carolina Rules of Evidence. Rule 803(3) provides that "[a] statement of the declarant's then existing state of mind" is not excluded by the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1992). Defendant argues that our recent decision in *State v. Hardy*, 339 N.C. 207, 451 S.E.2d 600 (1994), precludes the admission of these statements for two reasons. First, defendant contends that these statements were of "facts" rather than state of mind. Second, defendant contends that the victim's state of mind is not relevant under the *Hardy* standard.

The victim's statements to his sister that he was depressed, lonely, and upset about his finances were statements indicating his

mental condition at the time they were made and were not merely a recitation of facts. Similarly, the victim's statements to his father about his feelings towards his marriage to the defendant expressed the victim's state of mind. *See State v. Lambert*, 341 N.C. 36, 460 S.E.2d 123 (1995) (victim's statements that his marriage "wasn't getting along like it should" and that he was leaving were statements of victim's then-existing state of mind).

"Evidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand." *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991). In the instant case evidence of the victim's state of mind is relevant in that it bears directly on the victim's relationship with the defendant at the time he was killed. *See id.*; *State v. McLemore*, 343 N.C. 240, 470 S.E.2d 2 (1996). Defendant contends *Hardy* holds that hearsay evidence showing a victim's state of mind is not admissible unless the State demonstrates with particularity why that state of mind is relevant "beyond the nature of the relationship." In *Hardy* the State introduced portions of the victim's diary to show that the victim feared the defendant, her husband. However, there were many inconsistencies in the material in the diary, and some of the diary entries suggested that the victim was not afraid of her husband. In *Hardy* we found that the State failed to "clarify" what the nature of the relation was between the victim and the defendant. *Hardy*, 339 N.C. at 230, 451 S.E.2d at 613. The inconsistencies present in the hearsay evidence in *Hardy* are not present in this case. The statements made to Mr. Westbrooks and Ms. Blair reflect a man concerned about his marriage and his wife's handling of their finances. These statements also corroborate a motive for the murder—that defendant was in debt and could not repay her obligations. *See Stager*, 329 N.C. at 315, 406 S.E.2d at 897. Thus, these statements are admissible as statements of the declarant's then-existing state of mind.

[5] The victim's statements about the telephone calls and bills from creditors he knew nothing about and defendant's role in his financial situation are also admissible. In *Stager*, 329 N.C. 278, 406 S.E.2d 876, we held admissible an audiotape made by the victim before he was murdered by his wife. On the tape the victim described his financial troubles, which were caused by his wife. For example, the victim stated on the tape that he had to get a post office box after bills started disappearing, that the police had come to the house to serve warrants on his wife for her unpaid bills, that his wife spent the money he gave her to make the car payments, and that without his

knowledge she borrowed money that they could not repay. We held the tape in *Stager* admissible under the state of mind exception to the hearsay rule because the statement "[bore] directly on [the victim's] relationship with the defendant at about the time she was alleged to have killed him." *Id.* at 314, 406 S.E.2d at 897. Likewise, in the instant case the victim's statements bear directly on the victim's relationship with defendant at the time the victim was killed. Defendant again argues that these statements are recitations of facts rather than state of mind. However, under the facts of this case, we find that these statements were made contemporaneously with and in explanation of the victim's statements that he was concerned and upset about his finances. Thus, these statements are admissible as statements of the declarant's then-existing state of mind.

[6] In addition, statements concerning the status of the marriage between the victim and defendant were admissible to contradict defendant's contention at trial that she and the victim had no marital problems. Defendant's testimony about the positive state of her marriage opened the door to rebuttal evidence. *See Lambert*, 341 N.C. at 49, 460 S.E.2d at 131. " 'Discrediting a witness by proving, through other evidence, that the facts were otherwise than [s]he testified, is an obvious and customary process that needs little comment. If the challenged fact is material, the contradicting evidence is just as much substantive evidence as the testimony under attack, and no special rules are required.' " *Id.* (quoting 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 160 (4th ed. 1993)). The evidence of the victim's statements was relevant to refute the assertion by defendant that there were no marital problems. *See id.*; *Stager*, 329 N.C. at 314, 406 S.E.2d at 897.

Regardless of whether it was error to admit the statements challenged by defendant, defendant has not shown that she was prejudiced by their admission. The failure of a trial court to exclude evidence tending to show a declarant's state of mind "will not result in the granting of a new trial absent a showing by defendant that a reasonable possibility exists that a different result would have been reached absent the error." *State v. Weeks*, 322 N.C. 152, 170, 367 S.E.2d 895, 906 (1988). Several witnesses testified about the Westbrookses' financial problems. Lisa Webster, a credit bureau research specialist, testified to defendant's uncollectible debt. Diane Bush, a bartender at the Bench Tavern, testified that defendant could not meet her bills at the bar. Karen Furr, another bartender at the Bench Tavern, testified that "[she] never knew when [she] was getting

paid" and that she "always had excuses from Donna, about her accountant being out of town or on vacation." Karen Furr also testified that she "always heard Donna complaining that she didn't have any money." Both Diane Bush and Karen Furr testified that beer distributors would not accept defendant's checks and that beer deliveries had to be paid for in cash.

Defendant herself testified that in early 1992, the state of her personal finances was "poor." Defendant further testified that she had lost money at the bar and that she had "talked to some of [her] creditors[] and . . . had made arrangements" with some retail creditors about her debts. Thus, any statements admitted about the Westbrookses' poor financial condition were not prejudicial.

Similarly, witnesses testified about personal problems between defendant and the victim. Diane Bush testified that defendant made comments "a time or two" that she hated her husband. In addition, Karen Furr testified that defendant "complain[ed] about having to go home to [her husband]." Thus, any statements admitted about the status of the Westbrookses' marriage were not prejudicial. For all of the above reasons, these assignments of error are overruled.

[7] By further assignments of error, defendant contends that the trial court erred by admitting testimony from James Alvin Westbrooks, Sr. and Deborah Westbrooks Blair about statements they made to the victim prior to the murder. Mr. Westbrooks testified that he told the victim not to marry defendant because she could not handle finances and money and not to buy a life insurance policy. Mr. Westbrooks also testified that he told the victim he would hire an attorney to handle the victim's financial and marital problems; that he would give the victim money to help him with his financial problems, but that he would not give him money for defendant to spend; and that he told the victim's bank to freeze the victim's assets after he died and told the insurance company to reissue checks to the victim's estate.

Deborah Blair testified that she told the victim he "needed to try and do something about [defendant] coming home drunk every night" and that the victim would never be happy until he got an attorney and a divorce.

Assuming *arguendo* that admission of this testimony was error, we do not find this error to be prejudicial. Given the overwhelming evidence against defendant in this case, there is no reasonable possibility that, had this evidence not been admitted, a different result

would have been reached. N.C.G.S. § 15A-1443(a) (1988). These assignments of error are overruled.

[8] Defendant's next assignments of error concern the admission of evidence about statements she made to Detective David DeBerry before and after her arrest. Defendant contends that the admission of testimony by DeBerry regarding those statements and the prosecutor's subsequent cross-examination and argument about those statements violated her right to silence under the Fifth Amendment to the Constitution of the United States and Article I, Section 23 of the Constitution of North Carolina. Defendant argues that her rights were violated by the use of her pre- and postarrest silence for both impeachment and substantive purposes.

At trial DeBerry read to the jury defendant's post-*Miranda* statement made on 16 May 1992. In the 16 May statement defendant recalled a conversation with Davis which took place "[a]round the first of the year" in which defendant was telling Davis about problems at home and that the victim was not pleased with anything she did. Defendant stated that during this conversation, she made the comment that she "wished [the victim] was dead." The statement also referred to a conversation defendant had with Davis "[a]pproximately a month later" in which she told Davis that the victim had a $50,000 life insurance policy with her as the beneficiary. The statement also contained a recollection by defendant that Davis was tentatively scheduled to fix the vinyl flooring in her house about the time the victim died and that "[a] couple of times since Jimmy's death," Davis had asked her about the $6,500 and about the money from the insurance company.

Immediately after DeBerry read the statement, the prosecutor asked DeBerry a series of questions about whether defendant ever told him before her arrest about the facts she told him on 16 May. DeBerry testified that defendant had not previously revealed these facts to him. The 16 May statement did not make mention of any conversation between defendant and Davis on 13 May 1992.

Defendant testified on her own behalf and recounted a conversation she had with Davis on 13 May 1992. According to defendant, on 13 May Davis told defendant that Cashwell killed the victim. This information was not contained in the 16 May statement. On cross-examination the prosecutor questioned defendant about why she did not tell DeBerry, either before or after her 16 May arrest, about the 13 May conversation with Davis and why she did not tell DeBerry

about facts she first revealed in her 16 May statement. Defendant asserted that she never gave this information to DeBerry because she did not have her lawyer present and because DeBerry by his continuous questioning never gave her a chance to give him this information. On rebuttal for the State, DeBerry confirmed that defendant did not tell him about Davis' conversation with her on 13 May. In closing argument the prosecutor stated:

> And then she went on to tell you five separate times that she met with Detective DeBerry, that she never once told him who the killer of her husband was. Is that the act of a grieving widow? Or is that the act of a co-conspirator?

We first address defendant's contention that her rights were violated by the use of her prearrest silence for impeachment purposes. A criminal defendant's exercise of his right to remain silent cannot be used against him to impeach an explanation subsequently offered at trial. *Doyle v. Ohio,* 426 U.S. 610, 49 L. Ed. 2d 91 (1976). Although the rule set forth in *Doyle* is well established, certain limitations to *Doyle* have developed in the case law of the United States Supreme Court and have been applied by this Court.

In *Jenkins v. Anderson,* 447 U.S. 231, 65 L. Ed. 2d 86 (1980), the Supreme Court held that use of a defendant's prearrest silence to impeach his credibility on cross-examination does not violate the Fifth or Fourteenth Amendment. The *Jenkins* Court held that a prosecutor could cross-examine the defendant about his failure prior to his arrest to tell anyone he was acting in self-defense on the night of the murder and that the prosecutor could mention this failure in his closing argument. The Court emphasized the fact that "no governmental action induced petitioner to remain silent before arrest." *Id.* at 240, 65 L. Ed. 2d at 96.

Similarly, in the instant case defendant was not induced to remain silent before her arrest, and use of her prearrest silence does not violate defendant's Fifth Amendment rights. The record reveals that defendant never invoked or relied upon her right to remain silent. On the contrary defendant frequently talked with the investigators in her husband's case. Defendant testified at trial that she talked with members of the Sheriff's Department about the circumstances surrounding her husband's death every day up until the time she was arrested.

[9] However, the fact that the Fifth Amendment is not violated by the use of prearrest silence to impeach a defendant's credibility does not

mean that admission of this testimony was proper under our common law rules. In *Jenkins* the Court noted that

> [c]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative.

Id. at 239, 65 L. Ed. 2d at 95 (citation omitted). To analyze defendant's contention that her constitutional rights were violated by the use of any prearrest silence, pursuant to the rules of evidence formulated by our jurisdiction, we look to our opinion in *State v. Lane*, 301 N.C. 382, 271 S.E.2d 273 (1980).

In *Lane* this Court addressed the issue of allowing the prosecutor to use evidence of defendant's pre-*Miranda* silence to impeach the defendant during cross-examination. The defendant stated prior to receiving any *Miranda* warnings, "Hell, I sold heroin before, but I didn't sell heroin to this person." *Id.* at 382, 271 S.E.2d at 274. The defendant testified at trial that he had an alibi for the crime for which he was being tried. On cross-examination the prosecutor asked defendant why he had not told the police about this alibi prior to trial. In determining whether the cross-examination was permissible, we noted:

> "Prior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. Even so, such prior inconsistent statements are admissible for the purpose of impeachment. . . .
>
> " '. . . [I]f the former statement fails to mention a material circumstance presently testified to, *which it would have been natural to mention in the prior statement,* the prior statement is sufficiently inconsistent,' . . . . [Citations omitted.] [Emphasis added.]"

Id. at 386, 271 S.E.2d at 276 (quoting *State v. Mack*, 282 N.C. 334, 339-40, 193 S.E.2d 71, 75 (1972)) (citations omitted) (alterations in original). We held in *Lane* that "[t]he crux of this case is whether it would have been natural for defendant to have mentioned his alibi defense at the time he voluntarily stated [to the police] that he 'did not sell heroin to this person.' " *Id.*

Under the *Lane* analysis the question now before this Court is whether defendant's failure to mention her conversation with Davis on 13 May 1992 during her daily conversations with police officers amounts to an inconsistent statement. We must likewise determine whether defendant's failure to mention facts set out in her 16 May statement during prior discussions with police officers amounts to an inconsistent statement.

We conclude that it would have been natural for defendant to have told officers about the conversation with Davis on 13 May 1992 in light of the fact that during this conversation, Davis told her who killed her husband. We conclude defendant's silence about this conversation was evidence of an inconsistent statement in this particular case and that it was not error for the court to allow the prosecutor's cross-examination of defendant on this issue.

Assuming *arguendo* that it would not have been natural for defendant to have told officers about the facts set out in her 16 May statement—information about defendant's statement that she "wished [the victim] was dead," information about defendant's conversations with Davis about insurance and money, and information that Davis was tentatively scheduled to fix the vinyl flooring about the time the victim died—we conclude that given the overwhelming evidence against defendant, any error was not prejudicial.

[10] To analyze defendant's contention that her constitutional rights were violated by use of her postarrest, post-*Miranda* silence for impeachment, we turn to the United States Supreme Court decision in *Anderson v. Charles*, 447 U.S. 404, 65 L. Ed. 2d 222 (1980) (per curiam). In *Anderson* the Supreme Court declined to apply *Doyle* to a prosecutor's cross-examination that inquired into prior inconsistent statements of the defendant. The Court stated:

> Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Id. at 408, 65 L. Ed. 2d at 226. We applied the limitation established by *Anderson* in *State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986). In *Mitchell* the defendant was charged with rape, armed robbery, kidnapping, and larceny. The investigating officer testified that he escorted the defendant back to North Carolina from Tennessee. Prior to the start of the car ride, the officer gave the defendant his *Miranda* warnings. The officer testified that during the trip, the defendant

informed the officer that the victim's car had been stolen from him when he stopped at a truck stop. At trial the defendant testified that he had entered into a plan with the victim to burn her car so that she could collect insurance proceeds and that they had engaged in consensual sexual intercourse. The prosecutor asked defendant on cross-examination why he did not originally tell the investigating officer about the planned insurance fraud. The defendant contended on appeal that the prosecutor impermissibly used his silence for impeachment purposes in violation of *Doyle*.

This Court, in determining that this cross-examination was permissible in *Mitchell*, held that the rule set forth in *Doyle* was inapplicable to the facts:

> Here, the defendant did not exercise his right to remain silent after receiving *Miranda* warnings. He voluntarily engaged in conversation with [the police officer] and said that after he had taken the victim's car it had been stolen from him. The prosecutor did not attempt to capitalize on the defendant's reliance on the implicit assurances of the *Miranda* warnings, the concern embodied in the *Doyle* decision.

Id. at 667, 346 S.E.2d at 461-62.

The record in this case discloses that defendant was similarly not induced to remain silent. Upon her arrest on 16 May 1992 and after receiving the required *Miranda* warnings, defendant executed a waiver and voluntarily gave a statement to the investigating officers regarding the charges against her. "As to the subject matter of [her] statements, the defendant did not remain silent at all." *Id.* at 667, 346 S.E.2d at 462. Therefore, any references to omissions or inconsistencies in statements defendant made after receiving her *Miranda* warnings, were proper.

[11] Defendant also contends that her rights were violated by the use of her pre- and postarrest silence for substantive purposes based on the testimony of DeBerry in the case-in-chief and on rebuttal. Assuming *arguendo* that it was error to allow DeBerry to testify as to what defendant failed to tell him, given the overwhelming evidence against defendant, we conclude that this error was harmless beyond a reasonable doubt.

[12] Finally, defendant contends that the prosecutor's closing argument was improper because the argument "plainly urged the jury to draw meaning from [defendant's] post and pre-arrest silence" as to

the 13 May conversation with Davis. First, we note that defendant did not object to this portion of the closing argument. Where there is no objection, "the standard of review to determine whether the trial court should have intervened *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper as to interfere with defendant's right to a fair trial." *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995). We conclude that in this case, the prosecutor's closing argument on defendant's failure to tell the police the identity of her husband's murderer was made to impeach defendant's trial testimony. The prosecutor raised the question during closing argument that if in fact Davis had told defendant on 13 May 1992 that Cashwell killed the victim, why did defendant not reveal this information to the police prior to her trial. Based on defendant's trial testimony, the natural tendency would be for defendant to have mentioned the 13 May conversation prior to taking the stand; thus, it was proper to raise this question in order to impeach defendant's testimony at trial. *See State v. Buckner*, 342 N.C. 198, 464 S.E.2d 414 (1995), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 65 U.S.L.W. 3258 (1996). These assignments of error are overruled.

[13] By her next assignment of error, defendant contends that the trial court erred by limiting her right to confront, cross-examine, and impeach State's witnesses Zachary Davis and Betty Cashwell thereby precluding her from inquiring about their parole eligibility under their guilty pleas.

Section 15A-1055 of the North Carolina General Statutes provides that "[n]otwithstanding any other rule of evidence to the contrary, any party may examine a witness testifying . . . pursuant to [a plea arrangement] with respect to that . . . arrangement." N.C.G.S. § 15A-1055 (1988). Our case law also holds that "cross-examination is a proper method of testing a witness as to bias concerning . . . his just expectation of reward, pardon, or parole as the result of his testifying for the State." *State v. Wilson*, 322 N.C. 117, 135, 367 S.E.2d 589, 600 (1988).

However, we have also held that where a question concerning plea arrangements calls for legal knowledge on the part of a lay witness, the State's objection is properly sustained. *Id.*; *accord State v. Mason*, 295 N.C. 584, 248 S.E.2d 241 (1978) (holding that it is within the discretion of the trial judge to sustain the State's objection where questions to a witness go to his understanding of the law concerning parole and call for the legal knowledge of a lay witness), *cert. denied*, 440 U.S. 984, 60 L. Ed. 2d 246 (1979).

In *Wilson* defense counsel attempted to question the witness about his understanding of the laws concerning sentencing and parole eligibility. We held that "[i]t was not an abuse of discretion to prohibit the witness from answering since the witness had already stated that he was motivated to testify for the State because of a plea bargain arrangement." 322 N.C. at 135-36, 367 S.E.2d at 600.

In the instant case both witnesses testified that they were motivated to testify for the State because of a plea arrangement. This type of testimony is "more probative of bias than the legal distinction asked of [them] by the defense." *Wilson*, 322 N.C. at 136, 367 S.E.2d at 600. The fact that these witnesses had made arrangements for charge reductions in exchange for their testimony was clearly before the jury, and defendant has demonstrated no abuse of the trial court's discretion. This assignment of error is overruled.

[14] By her next assignment of error, defendant contends that the trial court erroneously allowed the attorney for Betty Cashwell to invoke the attorney-client privilege during an offer of proof concerning parole eligibility information. Defendant contends that Betty Cashwell's previous testimony about parole eligibility constituted a waiver of the privilege with regard to the details of her discussions with her attorney.

Assuming *arguendo* that Betty Cashwell waived this privilege, defendant cannot show prejudicial error by this ruling. Betty Cashwell had already testified during cross-examination that the State permitted her to plead guilty to conspiracy to commit murder and second-degree murder in exchange for her testimony. Betty Cashwell read to the jury terms of her plea arrangement, which stated that if she fulfilled the terms and conditions of the agreement, the State agreed not to convict her of first-degree murder and not to seek the death penalty against her. Given Betty Cashwell's testimony as to her plea arrangement, any testimony by the attorney to the effect that Betty Cashwell and she had discussed the possible advantages of a plea arrangement would have been cumulative evidence. *See Morston*, 336 N.C. 381, 445 S.E.2d 1. Any error in allowing the attorney to invoke the attorney-client privilege was not prejudicial. This assignment of error is overruled.

[15] By her next assignments of error, defendant contends that the trial court erred by overruling her objection to a question of prospective jurors. Defendant objected to the following question of a

prospective juror: "Can you decide this case without comparing it with the disposition of the co-defendants' cases, if you're told about that?" Defendant contends that this questioning was improper because it misstated the law and staked out jurors to disregard the codefendants' interest in this case.

It is well established that "while counsel may diligently inquire into a juror's fitness to serve, the extent and manner of that inquiry rests within the trial court's discretion." *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). To show reversible error on the basis of improper jury *voir dire*, defendant must demonstrate prejudice as well as a clear abuse of discretion. *Id.*

In the case before us, defendant has shown neither prejudice nor abuse of discretion. Defendant objected to one question of a prospective juror: "Can you decide this case without comparing it with the disposition of the co-defendants' cases, if you're told about that?" Defendant's basis for her objection was that the disposition of the codefendants' cases might be the subject of a mitigating circumstance during the sentencing proceeding and that if it was so submitted to the jurors, then it would be their duty to consider the outcome of the codefendants' cases. The trial court then told defense counsel that "they would be allowed to ask questions in that vein, if they wished to do so." Defendant thereafter posed no further objections to the same question of other jurors and posed her own questions to the jury regarding the disposition of the codefendants' cases.

Based on the grounds for defendant's objection at trial, the trial court did not abuse its discretion in denying this objection. Defendant contends for the first time on appeal that the question to the jurors "misstated the law and improperly staked jurors out to disregard a vital factor going to the co-defendants' credibility." We do not agree. The prosecutor's questions did not have the effect of urging the jurors to ignore Davis' and Cashwell's potential interest or bias; rather, the questions sought to identify those jurors who would be unable to decide defendant's case based solely on the evidence produced at trial. The trial judge did not abuse his discretion by allowing such questions.

Nor can defendant show any prejudice by the trial court's actions. Defendant raised the agreements of Davis and Cashwell with the State during jury selection, during trial, during closing argument, and in the submission of mitigating circumstances during sentencing. In addition, the trial court instructed the jury with regard to the testi-

mony of Davis and Cashwell as well as to the disposition of their cases.

Finally, we do not find that the prosecutor misstated any law. However, had there been a misstatement of the law by the prosecutor, any such misstatement would have been cured by the trial court's proper instructions to the jury. *State v. Buckner*, 342 N.C. 198, 464 S.E.2d 414. These assignments of error are overruled.

[16] By her next assignments of error, defendant contends that the trial court's rulings during closing arguments resulted in prejudicial error. The jury argument under review centers around the testimony of defense witness Angle Maberson, who claimed to have conversed with Betty Cashwell in the jail before and after Cashwell pled guilty. Defendant contends that the trial court erroneously disallowed her argument that Maberson and Cashwell talked and "[g]ot together" in the county jail. When defense counsel contended in his closing argument that "people talk, people get together," the prosecutor objected on the ground that "[t]he evidence was they were separated." The trial court sustained this objection. Defendant also contends the trial court "erroneously allowed the prosecutor's closing argument that Maberson was not in the jail on September 7, 1993, that Cashwell entered her guilty plea on September 9, and that Maberson testified that she and Cashwell were together on September 9.

"Trial counsel are granted wide latitude in the scope of jury argument, and control of closing arguments is in the discretion of the trial court." *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). Assuming *arguendo* that it was error to sustain the prosecutor's objection to defense counsel's contention during closing arguments that "people talk, people get together," we do not find that any such error was prejudicial. After the objection was sustained, defense counsel made the very same contention that Maberson and Cashwell had talked in the jail; and the contention was made without objection and without any intervention from the court.

Similarly, we do not find that the court's handling of the prosecutor's closing argument was prejudicial. "[F]or an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial error.' " *Id.* at 60, 418 S.E.2d at 487-88 (quoting *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977)). The prosecutor stated in closing that the evidence showed that Maberson was not in the jail on the date she claimed to have talked with Cashwell. Upon defendant's objection to this statement, the trial court

instructed the jurors to "[t]ake [their] own recollection of the evidence." The trial court correctly instructed the jurors to be guided by the evidence based on their own recollections. Defendant was not prejudiced by the trial court's actions during closing arguments. These assignments of error are overruled.

[17] By her next assignment of error, defendant contends that the trial court erroneously refused to submit the possible verdict of second-degree murder as an accessory before the fact to the jury. The governing principle is that

> [i]f the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *modified in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

This Court addressed the trial court's failure to submit second-degree murder as a possible verdict under similar facts in *State v. Larrimore*, 340 N.C. 119, 456 S.E.2d 789 (1995). In *Larrimore* the evidence showed the defendant hired Daniel McMillian to kill the victim. McMillian pled guilty to second-degree murder and conspiracy to commit murder and testified against the defendant. In contrast, the defendant denied any involvement in the crime, denied knowing McMillian, and contended that the victim's estranged wife arranged for the murder of her husband. The Court in *Larrimore* held that "[i]f the jury believed the State's evidence, it had to find the defendant guilty of first-degree murder. If it believed the defendant's evidence, it would have had to find him not guilty. It thus would have been error to have submitted second-degree murder." *Id.* at 157-58, 456 S.E.2d at 809-10.

In the present case there was substantial evidence to prove each element of first-degree murder. The State's evidence tended to show that defendant hired Zachary Davis to kill her husband for $15,000 to be paid from the proceeds of a life insurance policy. Davis and Cashwell drove to the victim's home, where defendant had placed a

box of knives in a prearranged place, specifically to kill the victim; they accomplished the murder by stabbing the victim twenty-three times. If the jury believed the State's evidence, it had to find defendant guilty of first-degree murder. In addition, we find evidence of second-degree murder totally lacking. The defendant's defense and her evidence, if believed, tended to show that Zachary Davis and Betty Cashwell stabbed and killed the victim and that the defendant had absolutely no role in the killing. If the jury believed the defendant's evidence, it would have to find her not guilty. Thus, to have submitted second-degree murder would have been error.

[18] We also find no merit to defendant's argument that Davis' alcohol consumption prior to the killing negated premeditation and deliberation. There is no evidence in the record relating to the effect of alcohol on Davis at the time of the killing. Further, Davis admitted on cross-examination that the murder was premeditated and deliberated. This assignment of error is overruled.

Finally, defendant requests that this Court examine sealed mental health records of Zachary Davis and Betty Cashwell and determine if they contain any relevant and impeaching evidence against them which was not contained in the materials disclosed by the trial court after an *in camera* review of these records. After examining the medical records on appeal, we conclude that the records do not contain any relevant evidence as to the State's witnesses. These assignments of error are overruled.

NO. 92CRS43698, FIRST-DEGREE MURDER: NO ERROR.

NO. 92CRS20473, COUNT 1, CONSPIRACY TO COMMIT MURDER: NO ERROR.

NO. 92CRS20473, COUNT 2, SOLICITATION TO COMMIT MURDER: JUDGMENT ARRESTED.

STATE v. GEDDIE

[345 N.C. 73 (1996)]

STATE OF NORTH CAROLINA v. MALCOLM GEDDIE, JR.

No. 561A94

(Filed 6 December 1996)

1. Criminal Law § 401 (NCI4th Rev.)— capital murder—jury selection—statement of court regarding law—no error

There was no error in jury selection in a capital first-degree murder prosecution where the trial court instructed the venire members prior to jury selection that the court would instruct the jury on the law and that counsel should not question the venire members about the law except to ask whether they would accept and follow the law. Defendant contends that there is a risk that the instruction led the jurors to mistrust defense counsel, who asked about the jurors' views on capital punishment, but questioning jurors about the law clearly differs from asking jurors their views and opinions about capital punishment. Defendant complains of the theoretical potential for prejudice created by a correct statement of the respective roles of the judge, jury and counsel but does not even suggest abuse of discretion by the trial court. Moreover, both prosecutors and defense counsel were allowed ample opportunity to question jurors' beliefs about the death penalty.

Am Jur 2d, Jury § 279; Trial § 302.

2. Jury § 141 (NCI4th)— capital murder—jury selection—questions about parole—denied

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to question venire members about their understanding of the parole eligibility of persons sentenced to life imprisonment.

Am Jur 2d, Jury § 205.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed. 35 ALR2d 769.

Prejudicial effect of statement or instruction of court as to possibility of parole or pardon. 12 ALR3d 832.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.

3. Jury § 92 (NCI4th)— capital murder—jury selection—only one attorney allowed to question juror

There was no abuse of discretion in a capital first-degree murder prosecution where the trial court informed the parties that only one attorney for each side would be permitted to address the court on any given issue; a defense attorney was conducting *voir dire* of a prospective juror when the attorneys discovered that the other defense attorney had represented DSS in a proceeding in which the juror's granddaughter was removed from the custody of the juror's daughter; the trial court denied the defense request that the second attorney examine the juror; and the juror indicated that she did not harbor any animosity toward the second defense attorney. The N.C. Supreme Court has repeatedly found no abuse of discretion when a defendant has failed to show that further questioning of prospective jurors would likely have produced different answers or testimony and the stated purpose of the request here was to save time, not to elicit different testimony. Moreover, a full and searching *voir dire* was not hampered by the court's denial of the request, nor did the court prohibit defense counsel from communicating with and prompting each other during the *voir dire*. The decision to peremptorily challenge Dupree was a fully informed tactical decision.

Am Jur 2d, Jury §§ 193, 194.

Right of counsel in criminal case personally to conduct the voir dire examination of prospective jurors. 73 ALR2d 1187.

Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors—Supreme Court cases. 114 L. Ed. 2d 763.

4. Jury § 215 (NCI4th)— capital murder—jury selection—juror's belief in capital punishment—challenge for cause denied

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by refusing to dismiss a potential juror for cause where the juror candidly admitted her strong belief in the death penalty, but also stated that she would not impose the death penalty automatically but would consider what she learned during trial. The juror did not demonstrate an inability or unwillingness to consider everything

that was presented and to follow the court's instructions regarding the law.

Am Jur 2d, Jury § 279.

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

5. Jury § 34 (NCI4th)— capital murder—special venire summoned—excusals on statutory grounds—defendant's presence

There was no error in a capital first-degree murder prosecution where the trial court instructed the clerk to summon additional jurors after trial commenced; summonses were issued to forty additional persons; a third summons subsequently was issued to sixty additional persons; and prospective jurors from the first two jury selection listings appeared before various district court judges pursuant to N.C.G.S. § 9-6 to seek excusals or deferrals on statutory grounds. Nothing in the record supports defendant's contention that the special venire members knew they were being summoned specifically for this case and, assuming that the venire was a special venire but that the regular form summons was used, there is no authority for the proposition that the commencement of defendant's trial dates back to the date a summons for a special venire was issued. Error has been found in excusing members of a special venire outside of a defendant's presence only when the excusals occurred after the case had been called for trial and the record here indicates that all excusals and deferrals occurred pretrial or in defendant's presence after the trial began.

Am Jur 2d, Jury §§ 159, 188.

6. Criminal Law § 388 (NCI4th Rev.)— capital murder—judge's question—clarification of street slang

The trial court did not err in a capital prosecution for first-degree murder by denying defendant's motion for a mistrial where a State's witness testified that defendant bought a "ten-cent" piece of crack after the shooting and the trial court asked whether a ten-cent piece of crack cost ten cents. The question called for clarification of potentially confusing street vernacular and was within the scope of the discretion afforded under N.C.G.S. § 8C-1, Rule 614(b).

Am Jur 2d, Trial §§ 274, 275.

7. Homicide § 287 (NCI4th)— capital murder—instruction on second-degree murder denied—evidence of provocation—insufficient to negate premeditation

The trial court did not err in a capital first-degree murder prosecution by denying defendant's request for an instruction on second-degree murder where defendant argued that any evidence of premeditation and deliberation was negated by evidence of provocation in that the State's own evidence showed that the victim and defendant were engaged in an extended argument, but the testimony indicated that the argument involved no more than raised voices and that defendant fired a warning shot, ordered the victim to remove his shoes and socks, and ignored the victim's pleas for his life. There is ample evidence to support a finding that defendant premeditated and deliberated the murder and that his ability to reason was not overcome by his argument with the victim.

Am Jur 2d, Homicide § 439.

8. Homicide § 393 (NCI4th)— capital murder—instruction on second-degree murder denied—evidence of intoxication insufficient

The trial court did not err in a capital first-degree murder prosecution by denying defendant's request for an instruction on second-degree murder where defendant argued that testimony that he had drunk two pints of "white lightning" raised a reasonable inference of voluntary intoxication sufficient to negate the specific intent to kill. The evidence showed only that defendant drank some liquor and there was no evidence indicating that defendant was so intoxicated as to be utterly incapable of forming the intent to kill.

Am Jur 2d, Homicide § 439.

Modern status of the rules as to voluntary intoxication as defense to criminal charge. 8 ALR3d 1236.

9. Evidence and Witnesses § 694 (NCI4th)— capital sentencing hearing—evidence excluded—no offer of proof

The trial court did not err in a capital sentencing hearing by excluding evidence about the death of one of defendant's siblings or by sustaining the prosecutor's objection to a question asked of defendant's psychologist. Defendant made no offer of proof and did not rephrase the question to the psychologist when

offered the opportunity, and the content and relevance of the excluded testimony are not evident from the context of the questioning.

Am Jur 2d, Trial §§ 440-443.

10. Criminal Law § 1340 (NCI4th Rev.)— capital sentencing hearing—evidence excluded—offer of proof necessary

There was no error in a capital first-degree murder prosecution in the exclusion of evidence where defendant made no offer of proof but argued on appeal that *Lockett v. Ohio,* 438 U.S. 586 confers on a defendant in a capital case an affirmative right to place relevant mitigating evidence before the sentencer and that an offer of proof was unnecessary. Absent an offer of proof, defendant cannot show that the excluded evidence was relevant to any mitigating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 440-443.

Comment Note.—Ruling on offer of proof as error. 89 ALR2d 279.

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

11. Criminal Law § 1340 (NCI4th Rev.)— capital sentencing hearing—statements of accidental shooting excluded—no error

The trial court did not err in a capital sentencing hearing by excluding statements made by defendant at the time of his arrest in which defendant claimed that the gun went off accidentally. Defendant does not specify the relevance to any mitigating circumstance and, given that the jury had rejected any notion of accidental shooting by its guilty verdict, the statements would appear to implicate defendant in an attempt to deceive police officers and avoid responsibility for the crime and thus would not be mitigating.

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.

12. Criminal Law § 440 (NCI4th Rev.)— capital sentencing—prosecutor's argument—no gross impropriety

There was no gross impropriety in a capital sentencing hearing in the prosecutor's argument which defendant contended sought to confuse the jury into believing that defendant had previously been convicted of armed robbery, rather than attempted robbery, in the District of Columbia. The prosecutor's statements were correct representations of the evidence before the jury and did not imply that defendant had been convicted of any crime other than attempted robbery in the District of Columbia.

Am Jur 2d, Trial §§ 611, 626.

13. Criminal Law § 447 (NCI4th Rev.)— capital sentencing—prosecutor's argument—portrayal of evidence—no gross impropriety

There was no gross impropriety in a capital sentencing hearing in the prosecutor's argument which defendant contended misrepresented the testimony of defendant's expert psychologist. Viewing the prosecutor's argument in the context of all the arguments and the court's curative instruction, it is clear that the impact of the prosecutor's inaccurate portrayal of the psychologist's testimony was slight and did not amount to a gross impropriety.

Am Jur 2d, Trial §§ 611, 695.

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases. 88 ALR4th 209.

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.

14. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—incomplete statement of law—no error

The trial court did not err in a capital sentencing hearing by not intervening *ex mero motu* where the prosecutor argued that the jurors, in order to impose a sentence of death, had to find that one or more aggravating factors were present, that any mitigating circumstances found did not outweigh the aggravating circum-

stances, and that the aggravating circumstance or circumstances were sufficient to justify the death penalty. Although defendant complains that the prosecutor failed to mention that the findings must be unanimous, it is the role of the court to instruct the jury on application of the law. The prosecutor's statement was a correct, if incomplete, representation of the law.

Am Jur 2d, Trial §§ 572, 643.

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.

15. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—impoverished and abusive upbringing—no gross impropriety

There was no gross impropriety requiring intervention *ex mero motu* in a prosecutor's argument in a capital sentencing hearing where defendant contended that the prosecutor misstated the function of mitigating evidence when he argued that many people grow up impoverished and in abusive conditions but that not all of them rob and kill others. Rather than misstating the function of mitigating evidence, the prosecutor argued that the jury should not give great weight to defendant's background and upbringing. Such an argument is within the bounds of propriety for a prosecutor.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 572.

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.

16. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument —mitigating circumstances as excuses

There was no gross impropriety requiring intervention *ex mero motu* in a capital sentencing hearing where defendant contended that the prosecutor misstated the law when he argued that a synonym for defendant's mitigating circumstance was "excuses." Although mitigating circumstances are not legal excuses for committing crimes and the argument was incorrect,

defense counsel clarified this aspect of the law during final arguments and the trial court instructed the jury correctly as to how mitigating circumstances are to be found and weighed.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 572.

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.

17. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—value of impaired capacity mitigating circumstance

There was no gross impropriety requiring intervention *ex mero motu* in a capital sentencing hearing where defendant contended that the prosecutor argued that the statutory mitigating circumstance of impaired capacity has no mitigating value. Such a statement would be incorrect, but it is clear from the context that the prosecutor was urging the jury to give little weight to the mitigating circumstance. Such arguments are proper advocacy and are not tantamount to arguing that the statutory mitigating circumstances have no value as a matter of law.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 572.

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.

18. Criminal Law § 461 (NCI4th Rev.)— capital sentencing—prosecutor's argument—death as deterrent

The trial court did not err by not intervening *ex mero motu* in a capital sentencing hearing where the prosecutor argued that sentencing defendant to death was the only way to insure that he would not kill again.

Am Jur 2d, Criminal Law §§ 598, 599.

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.

19. Criminal Law § 475 (NCI4th Rev.)— capital sentencing—prosecutor's argument—biblical reference

There was no error requiring intervention *ex mero motu* in a capital sentencing hearing where the prosecutor stated that defendant killed the victim for less than "thirty pieces of silver." Disapproved biblical references have been to the effect that the law enforcement powers of the State come from God and that to resist those powers is to resist God. While some of the jurors in this case may have recognized that these words were biblical, the reference was slight and did not warrant *ex mero motu* intervention.

Am Jur 2d, Criminal Law §§ 557, 648.

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.

20. Criminal Law § 453 (NCI4th Rev.)— capital sentencing—prosecutor's argument—rights of defendant versus rights of victim

An argument by the prosecutor in a capital sentencing proceeding contending that defendant was the beneficiary of all the constitutional protections of our criminal justice system and asking what right defendant gave the victim was not grossly improper.

Am Jur 2d, Criminal Law §§ 664-667.

21. Criminal Law § 1382 (NCI4th Rev.)— capital sentencing—mitigating circumstances—lack of prior criminal activity—prior violent felonies

The trial court did not err in a capital sentencing proceeding by submitting to the jury the mitigating circumstance that defendant had no significant history of prior criminal activity where his record included three violent assaults. The first two convictions occurred ten and fifteen years before the trial and the third was five years old and was for the inchoate crime of attempted robbery. A rational juror could have found that defendant did not have a significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1441.

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

22. Criminal Law § 1384 (NCI4th Rev.)— capital sentencing—mitigating circumstances—impaired capacity rather than emotional disturbance

The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance that defendant was under the influence of a mental or emotional disturbance at the time of the offense. Defendant's psychologist diagnosed defendant as a substance abuser and antisocial person, characteristics which relate to diminished capacity, and never testified to any mental disorder or emotional disturbance at the time of the killing. The court properly submitted the impaired capacity circumstance. N.C.G.S. § 15A-2000(f)(2).

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1441.

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

23. Criminal Law § 1385 (NCI4th Rev.)— capital sentencing—mitigating circumstances—impaired capacity—intoxication

The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance of mental or emotional disturbance based on voluntary intoxication. To the extent that voluntary intoxication affects a defendant's ability to control or understand his actions, voluntary intoxication is properly considered under the impaired capacity circumstance. Defendant's evidence of impaired capacity was properly submitted to the jury.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1441.

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

24. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—instructions—nonstatutory mitigating circumstances

The trial court did not err in a capital sentencing proceeding by instructing the jury not to consider nonstatutory mitigating circumstances unless it found that those circumstances had mitigat-

ing value. Jurors are not required to agree with a defendant that the evidence proffered in mitigation is in fact mitigating unless the legislature has declared it to be mitigating as a matter of law by including it among the statutory mitigating circumstances.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1441.

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

25. Criminal Law § 1349 (NCI4th Rev.)— capital sentencing—instructions—weighing aggravating against mitigating circumstances

The trial court did not err in a capital sentencing proceeding in its instructions on Issues Three and Four, which involve weighing the aggravating circumstances against the mitigating circumstances. The precise instructions given have been approved in other cases, were correct, and properly informed the jurors of their duty to weigh the mitigating circumstances against the aggravating circumstances.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1441.

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

26. Criminal Law § 1402 (NCI4th Rev.)— capital sentencing—death sentence not disproportionate

The record in a capital murder prosecution fully supported the sentencing jury's finding of aggravating circumstances and did not suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. The distinguishing characteristics of the case compel the conclusion that this case is not similar to any in which the death penalty was found to be disproportionate and is similar to many in which it was found to be proportionate.

Am Jur 2d, Criminal Law § 628.

Appeal 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 September 1994 Criminal Session of Superior Court, Johnston County, upon a jury verdict finding defendant guilty of first-degree

murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for robbery with a dangerous weapon was allowed 23 January 1996. Heard in the Supreme Court 10 September 1996.

Michael F. Easley, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Marshall Dayan, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was tried capitally for the first-degree murder and robbery with a firearm of Reginald Dale Emory. The jury found defendant guilty on both charges and recommended a sentence of death for the first-degree murder. The trial court sentenced defendant to death for the murder and to a consecutive forty-year term of imprisonment for the robbery. Defendant appeals from his convictions and sentences. We hold that defendant received a fair trial, free of prejudicial error, and that the sentence of death is not disproportionate.

The State's evidence tended to show that on the evening of 25 November 1992 defendant, Reginald Dale Emory, Paul Stanley Sanders, Frankie Boderick, and Thomas "Junior" Boderick met in the home of Eloise Speed, which was known as an illegal liquor house. Defendant was drinking "white lightning." Defendant, Emory, and Thomas Boderick asked Frankie Boderick and Sanders if they would drive them to Smithfield. Frankie Boderick responded by handing the keys to his car to Sanders and asking him to drive the other men to Finney Drive. Frankie Boderick and Sanders had an understanding that Sanders would drive the three men to Finney Drive so they could get some Thanksgiving money and five dollars for gas for Boderick's car.

Defendant, Sanders, Emory, and Thomas Boderick (Boderick) then left Speed's house, and Sanders drove them to the Forbes Manor apartment complex on Finney Drive in Smithfield. After parking, all four men stopped briefly at one apartment and then walked to the apartment of Deborah Bethea. While there, defendant and Emory began to argue over money. Bethea asked the men to leave after they became very loud. All four men left the apartment.

Thomas Boderick testified that after the men left the apartment and began walking toward the car, defendant asked Emory to

pay for the gas for the drive to Smithfield. Defendant said to Emory, "You owe me some money. When are you going to pay me?" Emory responded, "I don't owe you nothing." Sanders testified that when defendant reached the car, he told Emory that he could not get into the car until he paid defendant five dollars. Defendant ordered Emory to take off his shoes and put all his money on the ground. Defendant then fired one shot into the ground. At that point, Sanders ran from the scene. Boderick observed as defendant ordered Emory to "[e]mpty your pockets" and Emory complied. After Emory removed his shoes and socks, defendant pointed the gun at Emory's chest, and Emory begged three times, "Please don't shoot me." Boderick testified that five to ten seconds after Emory's last plea for his life, defendant shot Emory and then bent down to pick up some change that Emory had dropped on the ground. Immediately after the gunshot, Boderick called to Sanders, saying, "Come on, Stanley, let's go." Sanders ran back to the car and drove off with Thomas Boderick and defendant.

At approximately 12:53 a.m. on 26 November 1992, Officer Thomas H. Graham of the Smithfield Police Department, responding to a call, found Emory lying in the parking lot and three to four individuals standing on the sidewalk. Officer Graham went to Emory, who was lying on his back, and discovered blood coming from his head. Emory was unconscious, had a wound to the back of his head, and was gasping for air. Officer Graham also observed that Emory was wearing a T-shirt and pants, which were down to his ankles, and that the victim's shoes and socks were off his feet, lying approximately one to two feet from his body. A wallet was at the victim's feet. Officers subsequently searched the wallet and found a North Carolina identification card and a pay stub, but no money.

Approximately five minutes after Officer Graham arrived on the scene, emergency medical personnel arrived, wrapped Emory's head, and transported him to the hospital. Emory subsequently died from a gunshot wound to the head.

Meanwhile, after leaving the scene of the shooting, defendant, Sanders, and Boderick proceeded to Maggie Pearl's, a nightclub and pool room. At Maggie Pearl's, defendant purchased ten dollars worth of crack cocaine from a man in the parking lot. The men then returned to Eloise Speed's house. Sanders testified that on the drive back to Speed's house, defendant said, "I shot this here MF— [sic] in the head." Boderick testified that he asked defendant whether he had

killed Emory, and defendant replied, "Yeah, I killed him." When they got to Speed's house, defendant asked his nephew to dispose of defendant's gun. Several hours later, Sanders and Boderick made statements to the police. Both stated that defendant shot Reginald Emory.

During the sentencing phase, the State presented evidence of three prior violent assaults defendant had committed. Charles Edward Atkinson testified that on the evening of 28 October 1979, he and defendant became involved in a "tussle," and defendant shot him three times in the leg. As a result, Atkinson's leg had to be amputated. James McIver, a deputy with the Johnston County Sheriff's Department, testified that he investigated an assault with a deadly weapon inflicting serious injury upon James Lemon on 17 June 1984. Lemon had a small round wound on his left shoulder. Deputy McIver concluded that defendant inflicted the wound using a small firearm. The State also offered evidence of defendant's conviction of attempted robbery in the District of Columbia on 11 July 1989.

Defendant offered evidence that he came from a broken home and had been abused as a child. His mother was a bootlegger and ran an illegal liquor house. Defendant's family was very poor and lived in a one-bedroom house with no bathroom or running water. Two of defendant's fourteen brothers and sisters died as children. When defendant was a teenager, his mother and her live-in boyfriend went to prison for abusing defendant and three other children; defendant and his siblings were placed into foster care at that time. After defendant's mother was released from prison, defendant and several of his brothers and sisters lived with her again. Defendant left his mother's home at age fifteen after an incident in which his mother beat him with a broomstick and injured his eye.

Defendant also introduced expert testimony regarding his mental state and his addiction to drugs and alcohol. Robert Brewington, an expert in clinical psychology and substance-abuse diagnosis and counseling, testified that defendant was a victim of child abuse and has limited intellectual and coping skills and a highly addictive personality. Brewington testified that defendant understands the difference between right and wrong; however, he opined that because defendant was taught to use violence to settle conflicts, he does not have the basic coping skills to deal with situations in which he is under pressure. Brewington characterized defendant as a substance abuser and an antisocial person.

During the sentencing proceeding, the jury found as aggravating circumstances that defendant had been previously convicted of a violent felony and that the first-degree murder was committed while defendant was engaged in a robbery with a firearm. Three statutory mitigating circumstances were submitted but not found by the jury: that defendant had no significant history of prior criminal activity, that defendant's capacity to appreciate his criminality or to conform his conduct to the law was impaired, and the catchall circumstance. The jury found six of nineteen nonstatutory mitigators. Based upon its findings, the jury recommended a sentence of death for the first-degree murder.

[1] Defendant first assigns as error the following instruction, which the trial court gave to venire members prior to jury selection:

> Now, after all of the evidence has been presented, and after you have listened to the arguments of counsel, I will instruct you as to all the law that you are to apply to evidence in this case. It is your duty to apply the law as I will give it to you and not as you think the law is, nor as you might like the law to be. . . . Obviously at this point, you're not expected to know the law. *Counsel should not question you about the law, except to ask whether you will accept and follow the law as given to you by this court.*

(Emphasis added.) Although defendant did not object to the instruction, he now argues that the trial court committed plain error in giving it. Defendant contends that the emphasized portion informed the venire members that *voir dire* questions about their views on capital punishment were inappropriate. Thus, he argues, there is a risk that the instruction led the jurors to mistrust the defense counsel, who did in fact ask about the jurors' views on capital punishment, and that this mistrust infected the jurors' views of the defense throughout the trial and during the capital sentencing proceeding and decision.

The extent of the inquiry of a prospective juror rests within the trial court's discretion, and we will not find reversible error unless an abuse of discretion is shown. *State v. Huffstetler*, 312 N.C. 92, 103, 322 S.E.2d 110, 118 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). In this instance, defendant does not even suggest abuse of discretion by the trial court. Instead, he complains of the theoretical potential for prejudice created by a correct statement of the respective roles of the judge, jury, and counsel with regard to applying the law in a criminal case. The trial court simply advised the jurors that they were not expected to know the law and that neither the prose-

cution nor the defense should probe their knowledge of the law. Questioning jurors about the law clearly differs from asking jurors their views and opinions about capital punishment. Moreover, the record reveals that both the prosecutors and defense counsel were allowed ample opportunity during *voir dire* to question jurors' beliefs about the death penalty. Defendant has not shown error, much less plain and prejudicial error, in the instruction. This assignment of error is overruled.

[2] Defendant next assigns as error the denial of his motion to question venire members about their understanding of the parole eligibility of persons sentenced to life imprisonment. This Court has consistently held that jurors should not be questioned during *voir dire* concerning their perceptions about parole eligibility. *State v. Lynch*, 340 N.C. 435, 451, 459 S.E.2d 679, 685 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 558 (1996). Defendant's request therefore was properly denied. This assignment of error is overruled.

In his next assignment of error, defendant challenges two of the trial court's rulings during jury selection. First, defendant contends that the trial court committed plain error when it refused to allow a change in counsel during the *voir dire* of prospective juror Edna Dupree. Second, defendant contends the trial court erred in denying his challenge for cause to venire member Thelma Moore.

[3] Prior to the commencement of jury selection, the trial court informed the parties that only one attorney for each side would be permitted to address the court on any given issue. The court added that the attorney addressing the court would be permitted to confer with his or her co-counsel as needed. During jury selection, defense attorney Ethridge was conducting *voir dire* of prospective juror Edna Dupree when the attorneys discovered that defense attorney Holland had represented the Department of Social Services in a proceeding in which Dupree's granddaughter was removed from the custody of Dupree's daughter. Defense counsel asked the court to permit Holland to continue the *voir dire* because "[i]t would be quicker if you would allow me [Holland] to ask some questions concerning her relationship with me that we think might be relevant." The court denied the request. Ethridge then proceeded to ask Dupree about the proceeding and her feelings toward Holland. Dupree indicated that she did not harbor any animosity toward Holland. Defendant argues that the trial court's denial of his request "likely" cost the defense a peremptory challenge.

"Although wide latitude is given counsel in voir dire examination of jurors, the form and extent of the inquiry rests within the sound discretion of the court." *State v. Johnson*, 317 N.C. 343, 382, 346 S.E.2d 596, 618 (1986). This Court repeatedly has found no abuse of discretion when a defendant has failed to show that further questioning of prospective jurors would likely have produced different answers or testimony. *See State v. Daughtry*, 340 N.C. 488, 509, 459 S.E.2d 747, 757 (1995), *cert. denied*, —- U.S. —-, 133 L. Ed. 2d 739 (1996); *State v. Davis*, 340 N.C. 1, 19, 455 S.E.2d 627, 636, *cert. denied*, —- U.S. —-, 133 L. Ed. 2d 83 (1995). Defendant has made no such showing here. The stated purpose of the request to have Holland question Dupree was to save time, not to elicit different testimony. Moreover, a full and searching *voir dire* was not hampered by the court's denial of the request, nor did the court prohibit defense counsel from communicating with and prompting each other during the *voir dire*. Thus, the decision to peremptorily challenge Dupree was a fully informed tactical decision, not the result of a restricted *voir dire*. We find no abuse of discretion in this ruling.

[4] Second, defendant argues that the trial court erred when it refused to excuse potential juror Thelma Moore for cause. During *voir dire*, the prosecutor asked Moore whether she could follow the law as it was given to her and whether she would be able to consider both life imprisonment and death as appropriate punishments for first-degree murder. Moore responded affirmatively to both questions. Later, while defense counsel was questioning Moore regarding her beliefs about capital punishment, the following exchange occurred:

> MR. HOLLAND: In the event the jury found a defendant guilty of first-degree murder, would you in every case impose the death penalty?
>
> JUROR MOORE: Well, that would be kind of hard to say, but I do believe in it.
>
> MR. HOLLAND: If the jury has returned in the guilt phase a verdict of guilty of first-degree murder, that is, malice of forethought [sic], deliberate, intentional, would you in every case in which the jury returns such a verdict impose the death penalty as the appropriate punishment?
>
> JUROR MOORE: Probably.

MR. HOLLAND: Your Honor, in view of [the] answer to that, we would challenge for cause.

THE COURT: Oh, no. You haven't gone through it fully with her. Challenge for cause is denied at this point. You may pursue it further, however.

MR. HOLLAND: Mrs. Moore, could you consider imposing life imprisonment in a first-degree murder case as well as imposing the death penalty?

JUROR MOORE: [No response.]

THE COURT: Ma'am, you're not saying that you would automatically impose the death penalty in every first-degree murder case, are you?

JUROR MOORE: Not in every one.

THE COURT: Yes, ma'am. All right. Go ahead.

MR. HOLLAND: [Appears to consult with defendant and co-counsel.] Mrs. Moore, do you feel you would be able to follow the instructions of the Court as to the standard for making a decision on the penalty phase and consider all of the matters that the judge instructs you to so consider and follow the law as he presents it to you?

JUROR MOORE: I would try, but I have a strong feeling for the death penalty. I believe in capital punishment.

MR. HOLLAND: How strong is that feeling for the death penalty?

JUROR MOORE: Pretty strong, because I feel like something has got to be done.

MR. HOLLAND: What do you mean by, "Something has got to be done"?

JUROR MOORE: Well, to help the public control crime.

MR. HOLLAND: Have you formed an opinion as to the guilt or the innocence of the defendant at this time?

JUROR MOORE: No.

MR. HOLLAND: If this jury entered a verdict of guilty of first-degree murder, could you consider imposing life imprisonment in a first-degree murder case as well as imposing the death penalty?

JUROR MOORE: Well, that might be based on what I heard.

MR. HOLLAND: Would you always impose the death penalty in cases in which the jury found someone guilty of first-degree murder?

JUROR MOORE: I've been asked that question. Probably.

MR. HOLLAND: We would renew our challenge for cause.

THE COURT: No, she said probably and just prior to that she said it would be based on what she heard. You may pursue it, however.

MR. HOLLAND: In that event, Your Honor, we would use a peremptory challenge and excuse this witness.

This Court has held that "[t]he 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. Abraham*, 338 N.C. 315, 343, 451 S.E.2d 131, 145 (1994). Moore indicated to the district attorney that she could consider either a life sentence or the death penalty and that she would try to follow the law and the court's instructions, even if she disagreed with the law. While she candidly admitted her strong belief in the death penalty, she also stated that she would not impose the death penalty automatically but would consider what she learned during trial. The constitutional standard for determining when a prospective juror may be excluded for cause because of 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); *Davis*, 340 N.C. at 21, 455 S.E.2d at 637. Despite her strong feelings in favor of the death penalty, Moore did not demonstrate an inability or unwillingness to consider everything that was presented and to follow the court's instructions regarding the law. The trial court did not abuse its discretion in refusing to excuse Moore for cause on these facts. This assignment of error is overruled.

[5] In his next assignment of error, defendant contends that the trial court erred by proceeding with jury selection from a venire in which contacts between prospective jurors and the district court had occurred outside the presence of the defendant and after the case had been called for trial. Trial commenced on Monday, 12 September

1994. An initial venire list had been used to summon seventy prospective jurors. In a letter dated 24 August 1994, Judge Wiley F. Bowen instructed the Clerk of Superior Court to summon forty additional jurors for Wednesday, 14 September 1994, for this case. Summonses accordingly were issued to forty additional persons. A third summons subsequently was issued to sixty additional persons. Pursuant to N.C.G.S. § 9-6, prospective jurors from the first two jury selection listings appeared before various district court judges and sought excusals or deferrals on statutory grounds before the convening of the 12 September Criminal Session.

Defendant argues that the second summons for forty persons at Judge Bowen's request was for a special venire. Defendant contends that a summons for a special venire serves the functional equivalent of calling the case and thus triggers a defendant's right to be present at any hearings for excusals or deferments. His argument relies on the assumption that a summons for a special venire identifies the particular case for which the jurors are being called. Defendant contends that members of the special venire who were excused pretrial knew they were being summoned specifically for his case and that therefore there is a theoretical possibility that some discussed specifics of the case with the judges who excused or deferred them. The State disputes this contention and argues that special venire members receive the same form summons as do members of a regular venire. Nothing in the record supports defendant's contention that the special venire members knew they were being summoned specifically for this case. Therefore, the usual form summons, which does appear in the record and which does not identify a specific case, imports verity.

Assuming that the venire was a special venire within the meaning of N.C.G.S. § 9-11 but that the regular form summons was used, there is no authority for the proposition that the commencement of a defendant's trial relates back to the date a summons for a special venire issues. To the contrary, in *State v. Cole*, 331 N.C. 272, 275, 415 S.E.2d 716, 717 (1992), this Court explicitly held that it was not error to excuse prospective jurors before a trial commences. No logical reason suggests application of a different rule to a special venire where venire members were not informed of the particular case for which they were being summoned. This Court has found error in excusing members of a special venire outside of a defendant's presence only when the excusals occurred *after* the case had been called for trial. *See State v. McCarver*, 329 N.C. 259, 260-61, 404 S.E.2d 821, 822 (1991). The excusals defendant complains of here occurred

before trial. We therefore conclude that defendant's argument is without merit.

Defendant obliquely argues further that excusals and deferrals of venire members occurred out of his presence after trial commenced. The record indicates, however, that all excusals and deferrals occurred pretrial or in the defendant's presence after trial commenced. The burden is on the defendant to show error; he has not shown that excusals or deferrals of prospective jurors occurred outside his presence after trial commenced. This assignment of error is therefore overruled.

[6] Defendant next assigns as error the trial court's denial of defendant's motion for a mistrial. State's witness Thomas Boderick testified that after the shooting of Reginald Emory, defendant bought a "ten-cent" piece of crack from a man at a pool room. At that point, the trial court interjected:

> THE COURT: Well, for clarification, does a ten-cent piece of crack cost ten cents?
>
> THE WITNESS: It cost [sic] ten dollars.

Defendant moved for a mistrial, arguing that this testimony provided information that had not yet been elicited by the State. Defendant contended that the State could not have elicited this testimony without first laying a foundation showing the witness's knowledge of the price and value of crack cocaine. Defendant argued further that the testimony was important evidence because it could have led the jurors to believe that defendant had acquired ten dollars from his armed robbery of Emory.

"The court may interrogate witnesses, whether called by itself or by a party." N.C.G.S. § 8C-1, Rule 614(b) (1992). Defendant concedes that judges may interrogate witnesses but contends that the judge exceeded the scope of Rule 614(b) with this interrogation. We disagree. This Court has held that "[i]n fulfilling the duties of a trial judge 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). The question complained of called for clarification of potentially confusing "street" vernacular. The question was within the scope of the discretion afforded the court under Rule 614(b). This assignment of error is overruled.

[7] In his next assignment of error, defendant contends that the trial court erred in denying defendant's request for an instruction on second-degree murder. First-degree murder is, *inter alia*, the unlawful killing of a human being committed with malice, premeditation, and deliberation. N.C.G.S. § 14-17 (Supp. 1996); *State v. Gainey*, 343 N.C. 79, 82, 468 S.E.2d 227, 229 (1996). The unlawful killing of a human being with malice but without premeditation and deliberation is murder in the second degree. N.C.G.S. § 14-17; *Gainey*, 343 N.C. at 83, 468 S.E.2d at 230. If the evidence satisfies the State's burden of proving each element of first-degree murder, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial, the trial court should exclude second-degree murder from the jury's consideration. *State v. Conner*, 335 N.C. 618, 634-35, 440 S.E.2d 826, 835 (1994).

Defendant argues first that any evidence that he premeditated and deliberated the murder was negated by evidence of provocation because the State's own evidence showed that defendant and the victim were engaged in an extended argument. 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. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). 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." *Id.* The fact that defendant was angry or emotional will not negate the element of deliberation during a killing unless there was anger or emotion strong enough to disturb defendant's ability to reason. *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 338 (1986). "[E]vidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason." *State v. Solomon*, 340 N.C. 212, 222, 456 S.E.2d 778, 785, *cert. denied*, — U.S. —, 133 L. Ed. 2d 438 (1995). There is ample evidence to support a finding that defendant premeditated and deliberated the murder and that his ability to reason was not overcome by his argument with the victim. The testimony indicated that the argument involved no more than raised voices. Moreover, several of the facts in evidence indicated that defendant premeditated and deliberated the killing. Among other things, there was evidence that defendant fired a warning shot, ordered the victim to remove his shoes and socks, and ignored the victim's pleas for his life. The trial court did

not err in refusing to instruct on second-degree murder under this evidence.

[8] Next, defendant argues that the testimony indicating that he had drunk two pints of "white lightning" raises a reasonable inference of voluntary intoxication sufficient to negate the specific intent to kill, thus meriting an instruction on second-degree murder (defendant did not request an instruction on voluntary intoxication). It is well settled that a defendant is entitled to an instruction on voluntary intoxication only after defendant has produced substantial evidence which would support a conclusion by the trial court that "the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated intent to kill." *State v. Laws*, 325 N.C. 81, 98, 381 S.E.2d 609, 619 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). Evidence tending to show only that defendant drank some unknown quantity of alcohol over an indefinite period of time before the murder does not satisfy the defendant's burden of production. *Id.* Here, the evidence showed only that defendant drank some liquor. There was no evidence indicating that defendant was so intoxicated as to be utterly incapable of forming the intent to kill. Therefore, defendant would not have been entitled to an instruction on voluntary intoxication, nor did the evidence as to his drinking merit an instruction on second-degree murder. We thus overrule this assignment of error.

[9] In his next assignment of error, defendant argues that the trial court should not have excluded three items of evidence he offered during the sentencing proceeding. First, defendant contends that the court improperly excluded evidence about the death of one of defendant's siblings. Defendant's first witness at the penalty phase was his sister, Mary Geddie Richardson. Richardson testified that she and defendant had an older sister, Grace, who died when defendant was almost seven years old. Defense counsel asked Richardson if she recalled the circumstances of Grace's death. The State objected, and the court sustained the objection. The court subsequently submitted as a nonstatutory mitigating circumstance the death of a loved one when defendant was seven years old.

To prevail on a contention that evidence was improperly excluded, either a defendant must make an offer of proof as to what the evidence would have shown or the relevance and content of the answer must be obvious from the context of the questioning. *State v.*

Barton, 335 N.C. 741, 749, 441 S.E.2d 306, 310 (1994). Defendant concedes that he did not make an offer of proof, and the content and relevance of the excluded testimony are not evident from the context of the questioning. We therefore reject this argument.

Defendant argues next that the trial court erred when it sustained the prosecutor's objection to a question asked of defendant's expert psychologist. The prosecutor objected to the following question: "Based on your experience and your interviews, did you form any opinions concerning his capacity to deal with the situation?" The trial court sustained the objection and offered defense counsel an opportunity to rephrase. Defense counsel did not rephrase, choosing instead to move to a different line of questioning, nor did defense counsel make an offer of proof as to how the expert psychologist would have answered if allowed. Again, the failure to make an offer of proof is fatal to defendant's argument. The context of the questioning provides clarity neither as to the information defendant was attempting to elicit nor as to its relevance. Moreover, the trial court did not foreclose defendant's eliciting this aspect of the expert's opinion; rather, the defense attorney was merely asked to pose the question in more clear and relevant terms.

[10] Defendant argues further that an offer of proof is unnecessary to establish an independent Eighth Amendment violation in these situations because *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), confers on a defendant in a capital case an affirmative right to place relevant mitigating evidence before the sentencer. Defendant contends that the exclusion of Richardson's and the psychologist's testimony denied him this right. We disagree. Absent an offer of proof, defendant cannot show that the excluded evidence was relevant to any mitigating circumstance; thus, he has not shown that the court failed to comport with the mandate of *Lockett*.

[11] Defendant's final contention in this assignment of error is that two statements he made to Sergeant Walter A. Martin at the time of his arrest should have been admitted. In the first, defendant claimed that he handed the gun to Thomas Boderick and that the gun went off accidentally. In the second, defendant again claimed that the gun went off accidentally, but he stated that the gun was in his hands when it went off. Sergeant Martin was allowed to testify that defendant made statements but was not allowed to testify to the substance of those statements.

Any evidence which the trial court deems to have probative value relating to mitigating circumstances may be presented at a capital sentencing proceeding . N.C.G.S. § 15A-2000(a)(3) (1988) (amended 1994); *State v. Pinch*, 306 N.C. 1, 19, 292 S.E.2d 203, 219, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 650 (1995), and *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). Defendant does not specify the relevance to any mitigating circumstance of his statements to Sergeant Martin, however. Further, given that the jury, by its conviction in the guilt phase, had rejected any notion of an accidental shooting, the statements would appear to implicate defendant in an attempt to deceive the police officers and avoid responsibility for the crime and thus not to be mitigating. Under these circumstances, the trial court properly excluded testimony regarding the content of the statements as irrelevant to any mitigating circumstance.

We conclude that the trial court did not err in excluding these items of evidence. This assignment of error is therefore overruled.

[12] In his next assignment of error, defendant contends that the prosecution's penalty phase arguments contained misstatements of the law and the evidence, were intended to inflame the jury, and were grossly improper. Although defendant did not object at trial, he now contends that the remarks violated his state and federal rights to a fair trial such that the trial court erred by failing to intervene *ex mero motu*. When defense counsel fails to object to a prosecutor's argument, "the remarks 'must be gross indeed for this Court to hold that the trial court abused its discretion in not recognizing and correcting *ex mero motu* the comments regarded by defendant as offensive only on appeal.' " *State v. Basden*, 339 N.C. 288, 300, 451 S.E.2d 238, 244 (1994) (quoting *State v. Brown*, 327 N.C. 1, 19, 394 S.E.2d 434, 445 (1990)), *cert. denied*, —- U.S. —-, 132 L. Ed. 2d 845 (1995). In making this inquiry, "it must be stressed that prosecutors are given wide latitude in their argument." *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, —- U.S. —-, 133 L. Ed. 2d 60 (1995). Moreover, the prosecutor in a capital case has a duty to advocate zealously that the facts in evidence warrant imposition of the ultimate penalty. *Id.* Having examined the arguments complained of in the light of these principles, we conclude that they were not so grossly improper as to violate defendant's rights and that the trial court therefore did not err in failing to intervene *ex mero motu*.

Defendant argues first that the prosecutor sought to confuse the jury into believing that defendant was convicted of armed robbery, rather than attempted robbery, in the District of Columbia. In the context of urging the jury to find as an aggravating circumstance that defendant had previously been convicted of a felony involving violence or the threat of violence, the prosecutor referred to the District of Columbia's armed robbery statute. The prosecutor pointed out that the statute and a court opinion, both of which were placed in evidence, stated clearly that robbery is a crime involving violence and that attempted robbery is a felony in the District of Columbia. These statements were correct representations of the evidence that was before the jury and did not imply that defendant had been convicted of any crime other than attempted robbery in the District of Columbia.

[13] Defendant argues next that the prosecutor misrepresented the testimony of defendant's expert psychologist. Defendant contends that the prosecutor argued that the psychologist testified that defendant had good coping and adaptive skills, when in fact the psychologist's testimony was to the opposite effect.

The psychologist testified that defendant "has limited intellectual resources and coping skills." He also testified, however, that in interacting with defendant, "[defendant] comes across as being much more intelligent and socially adept than what the scoring would indicate." In light of this testimony, the prosecutor's description of defendant's coping skills as "good" may have been an overstatement, but his reference to defendant's adaptive skills was a fair inference to be drawn from the testimony.

Prosecutors are given wide latitude in arguments to the jury and are permitted to argue the evidence which has been presented as well as all reasonable inferences which can be drawn therefrom. *State v. Shank*, 327 N.C. 405, 407, 394 S.E.2d 811, 813 (1990). The trial court instructed the jurors that if their recollection of the evidence differed from that of the court, the district attorney, or the defense attorney, they were to rely solely upon their recollection of the evidence in their deliberations. Viewing the prosecutor's argument in the context of all the arguments and the court's curative instruction, it is clear that the impact of the prosecutor's inaccurate portrayal of the psychologist's testimony was slight and did not amount to a gross impropriety requiring the trial court's *ex mero motu* intervention.

[14] Defendant next contends that the prosecutor misstated the law in five instances. In the first instance, the prosecutor argued that in order to impose a sentence of death, the jurors had to find that one or more aggravating circumstances were present, that any mitigating circumstances found did not outweigh the aggravating circumstances, and that the aggravating circumstance or circumstances were sufficient to justify the death penalty. Defendant complains that the prosecutor failed to mention that each of these findings must be unanimous. This statement was a correct, if incomplete, representation of the law; moreover, it is the role of the court, not the prosecutor, to instruct the jury on application of the law. The prosecutor did not misstate the law in this instance, and the trial court thus did not err in failing to intervene *ex mero motu*.

[15] In the second instance, defendant contends that the prosecutor misstated the function of mitigating evidence when he argued that many people grow up impoverished and in abusive conditions but that not all of them rob and kill others. We disagree with defendant's characterization of the statements. The prosecutor did not misstate the function of mitigating evidence; rather, he argued that the jury should not give great weight to the mitigating circumstances of defendant's unfortunate background and upbringing. Such an argument is within the bounds of propriety for a prosecutor, who has a duty to pursue ardently the imposition of the death penalty. *Pinch*, 306 N.C. at 24, 292 S.E.2d at 221-22.

[16] In the third instance, defendant contends that the prosecutor misstated the law when he argued that a synonym for defendant's mitigating circumstances was "excuses." Defendant is correct in asserting that mitigating circumstances are not legal excuses for committing crimes. Any misunderstanding the jurors may have had about the law as a result of the prosecutor's statement was subsequently cured, however. Defense counsel clarified this aspect of the law during final arguments, and the trial court instructed the jury correctly as to how mitigating circumstances are to be found and weighed. Therefore, although the prosecutor's statement was legally incorrect, we conclude that the trial court did not commit error warranting a new sentencing proceeding by failing to intervene *ex mero motu*.

[17] In the fourth instance, defendant contends that the prosecutor argued that even if the jury were to find the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance, the circumstance has no mitigating value.

Such a statement would be incorrect. *See State v. Fullwood*, 329 N.C. 233, 238, 404 S.E.2d 842, 845 (1991). We find no evidence that the prosecutor made such an argument, however. On the transcript page defendant cites, the following argument appears:

> And when you get to looking for mitigating value, or start to weigh the mitigating with aggravating circumstances, consider can the defendant blame what he did to Reginald Emory on his family? Can the way he dehumanized Reginald, by forcing him to take his shoes and sock[s] off, be lessened by his alcohol abuse? And the way he tortured Reginald in the last minute of his life, by having him beg for his life be at all minimized by his drug use of cocaine, heroin and PCP? Can the almost execution-like slaying of Reginald be at all mitigated by the defense of so-called diminished capacity?

It is clear from the context that the prosecutor was urging the jury, if it were to find that the circumstance existed, to give little weight to the 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. Such arguments are proper advocacy for the State and are not tantamount to arguing that statutory mitigating circumstances have no mitigating value as a matter of law. The trial court thus did not err in failing to intervene *ex mero motu*.

[18] In the final instance, defendant contends that the prosecutor misstated the law when he argued that sentencing defendant to death was the only way to insure that he would not kill again. This Court has held such specific deterrence arguments proper. *E.g.*, *Rouse*, 339 N.C. at 92, 451 S.E.2d at 561. The trial court thus did not err by allowing this argument.

[19] Defendant next contends that two of the prosecutor's arguments were grossly improper and designed to inflame the passions of the jury. First, the prosector stated that defendant killed the victim for less than "thirty pieces of silver." Defendant contends that this was an improper biblical reference. Biblical references this Court has disapproved have been arguments to the effect that the law enforcement powers of the State come from God and that to resist those powers is to resist God. *Laws*, 325 N.C. at 120, 381 S.E.2d at 632-33. When the potential impact of a biblical reference is slight, it does not amount to gross impropriety requiring the court's intervention. *Id.* at 121, 381

S.E.2d at 633. While some jurors may have recognized that the words were biblical, the reference was slight, not warranting the trial court's *ex mero motu* intervention.

[20] Finally, defendant contends that the prosecutor inflamed the passions of the jury by pointing out that defendant was the beneficiary of all the constitutional protections afforded defendants in our criminal justice system and by asking, "[W]hat one right did he give Reginald Dale Emory in this life?" This Court has held that such arguments are not grossly improper. *Basden*, 339 N.C. at 306, 451 S.E.2d at 248.

We conclude that the trial court did not err by failing to intervene *ex mero motu* during the prosecution's final arguments. This assignment of error is overruled.

[21] Defendant next assigns as error the trial court's submission to the jury of the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1). Defendant argues that no reasonable juror could have found this circumstance because defendant's record included three prior violent felonies. Defendant did not object when the trial court asked defendant and the State if either objected to submission of this circumstance. Nevertheless, defendant now contends that the credibility of the defense was injured because jurors probably believed defendant had requested submission of this circumstance and was thereby asking them to attach mitigating value to his criminal record.

The test governing the submission of this statutory mitigating circumstance is " 'whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity.' " *State v. Walker*, 343 N.C. 216, 223, 469 S.E.2d 919, 922 (quoting *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988)), *cert. denied*, — U.S. —, 136 L. Ed. 2d 180 (1996). "If so, the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant." *Id.*; *see also State v. Ingle*, 336 N.C. 617, 642, 445 S.E.2d 880, 893 (1994) ("[W]here evidence is presented in a capital sentencing proceeding that may support a statutory mitigating circumstance, N.C.G.S. § 15A-2000(b) directs that the circumstance must be submitted for the jury's consideration absent defendant's request or even over his objection."), *cert. denied*, — U.S. —, 131

L. Ed. 2d 222 (1995). When the trial court is deciding whether a rational juror could reasonably find this mitigating circumstance to exist, the nature and age of the prior criminal activities are important, and the mere number of criminal activities is not dispositive. *State v. Walls*, 342 N.C. 1, 56, 463 S.E.2d 738, 767 (1995), *cert. denied*, —- U.S. —-, 134 L. Ed. 2d 794 (1996).

Defendant's first two felony convictions occurred ten and fifteen years before this trial. The third conviction was five years old and was for the inchoate crime of attempted robbery, which jurors could have considered less significant than a completed violent felony. Given these facts, a rational juror could have found that defendant did not have a significant history of prior criminal activity. We conclude that there was sufficient evidence to support the submission of the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance, and we overrule this assignment of error.

[22] In his next assignment of error, defendant contends that the trial court erred in failing to submit to the jury the statutory mitigating circumstance that defendant was under the influence of a mental or emotional disturbance at the time of the offense. N.C.G.S. § 15A-2000(f)(2). In support of this argument, defendant asserts that there was evidence of a dispute, that he had been drinking, and that he displayed hostility toward the victim after the killing. Defendant also points to the testimony of his expert psychologist indicating that he lacked coping skills, was a substance abuser, and had been the victim of child abuse. Defendant argues that this evidence was sufficient to warrant submission of the (f)(2) mitigating circumstance. Upon the basis of the same evidence, however, the trial court properly submitted the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance—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. The evidence defendant presented related to the impairment circumstance. Defendant did not present evidence that at the time of the killing, he was under the influence of a mental or emotional disorder or disturbance. Defendant's mental and emotional state *at the time of the crime* is the central question presented by the (f)(2) circumstance. *State v. McKoy*, 323 N.C. 1, 28-29, 372 S.E.2d 12, 27 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). The use of the word "disturbance" in the (f)(2) circumstance "shows the General Assembly intended something more . . . than mental impairment which is found in another mitigating circumstance." *State v. Spruill*, 320 N.C. 688, 696, 360 S.E.2d 667,

671 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988). Defendant's psychologist never testified to any mental disorder or emotional disturbance at the time of the killing; rather, he diagnosed defendant as a substance abuser and antisocial person, characteristics which relate to diminished capacity.

[23] Defendant also mistakenly relies on voluntary intoxication to support submission of the (f)(2) circumstance. This Court has held that "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 [N.C.]G.S. [§] 15A-2000(f)(2)." *State v. Irwin*, 304 N.C. 93, 106, 282 S.E.2d 439, 447-48 (1981). To the extent that it affects a defendant's ability to control or understand his actions, voluntary intoxication is properly considered under the (f)(6) circumstance for impaired capacity. *Id.* at 106, 282 S.E.2d at 448.

Defendant's evidence of impaired capacity was properly submitted to the jury, and he has not shown evidence sufficient to support a finding that he was under the influence of a mental or emotional disturbance within the meaning of the (f)(2) circumstance at the time he committed the murder. This assignment of error is overruled.

[24] Defendant next argues that the trial court erred by instructing the sentencing jury not to consider nonstatutory mitigating circumstances unless it found that those circumstances had mitigating value. Defendant contends that allowing the jury discretion to decide whether to give mitigating value to a submitted nonstatutory mitigating circumstance does not satisfy the constitutional requirement that the sentencer consider and give effect to mitigating evidence. *See McKoy*, 494 U.S. at 442-43, 108 L. Ed. 2d at 381. This Court has rejected this argument, holding that jurors are not required to agree with a defendant that the evidence proffered in mitigation is in fact mitigating unless the legislature has declared it to be mitigating as a matter of law by including it among the statutory mitigating circumstances. *State v. Williams*, 339 N.C. 1, 44-45, 452 S.E.2d 245, 270-71 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 61 (1995). This assignment of error is overruled.

[25] In his final assignment of error, defendant contends that the trial court erred in instructing the jury on Issue Three as follows:

> 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 determined to exist by a preponderance of the evidence in Issue Two.

Defendant also complains of the instruction on Issue Four, which was worded similarly. He argues that jurors hearing these instructions could conclude that they were allowed, rather than required, to consider mitigating circumstances they previously had found when weighing the aggravating circumstances against the mitigating circumstances.

The precise instruction quoted above was approved by this Court in two recent cases. *State v. Daniels*, 337 N.C. 243, 280-81, 446 S.E.2d 298, 321 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895 (1995); *State v. Lee*, 335 N.C. 244, 286-87, 439 S.E.2d 547, 569-70, *cert. denied*, — U.S. —, 130 L. Ed. 2d 162 (1994). In those cases, we concluded that the instruction did not preclude the jurors from giving effect to all mitigating evidence they found to exist. We likewise conclude here that the instructions were correct and that they properly informed the jurors of their duty to weigh the mitigating circumstances against the aggravating circumstances in their consideration of Issues Three and Four. This assignment of error is overruled.

[26] Defendant does not argue that the record does not support the jury's finding of the aggravating circumstances; that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; or that the sentence of death was disproportionate. It is nevertheless this Court's statutory duty to make these determinations. N.C.G.S. § 15A-2000(d)(2).

The record fully supports the jury's finding of the aggravating circumstances. It does not suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We turn, then, to our final duty of proportionality review.

The purpose of proportionality review is to "eliminate the possibility that a sentence of death was imposed by the action of an aberrant jury," *Lee*, 335 N.C. at 294, 439 S.E.2d at 573, and to guard "against the capricious or random imposition of the death penalty," *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). To determine whether the sentence of death is disproportionate, we compare this case to

other cases that "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).

This case has certain distinguishing characteristics relevant to the Court's proportionality review. First, there is the unprovoked and deliberated nature of the killing. Defendant forced his victim to beg for his life and showed no remorse for shooting him. The jury convicted defendant of first-degree murder under the theory of premeditation and deliberation as well as under the felony murder rule. A conviction of premeditated and deliberate murder "indicates a more calculated and cold-blooded crime." *Davis*, 340 N.C. at 31, 455 S.E.2d at 643. Second, the jury found two aggravating circumstances: that defendant previously had been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), and that defendant committed the murder while engaged in the commission of robbery with a firearm, N.C.G.S. § 15A-2000(e)(5). The aggravating circumstance of a previous felony conviction involving the use or threat of violence to the person is one that is commonly present when a jury recommends the death penalty. *See, e.g., State v. Keel*, 337 N.C. 469, 503-04, 447 S.E.2d 748, 767 (1994), *cert. denied*, —- U.S. —-, 131 L. Ed. 2d 147 (1995).

This Court has often reviewed the circumstances of the cases in which the sentence of death was held to be disproportionate. *See, e.g., State v. Powell*, 340 N.C. 674, 697-98, 459 S.E.2d 219, 231-32 (1995), *cert. denied*, —- U.S. —-, 133 L. Ed. 2d 688 (1996). We need not reiterate such review here. It suffices to say that the foregoing distinguishing characteristics compel the conclusion that this case is not similar to any in which the death penalty was found to be disproportionate and is similar to many in which it was found to be proportionate.

We conclude that the death sentence was not excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. ISAAC JACKSON STROUD

No. 162A95

(Filed 6 December 1996)

1. **Constitutional Law § 202 (NCI4th)— kidnapping and murder—blows to restrain separate from blows causing death—convictions of both crimes**

The trial court did not err by denying defendant's motion to dismiss a charge of second-degree kidnapping in a prosecution for murder and kidnapping on the ground that all of the blows to restrain the victim were essential to or related to the victim's death where the evidence showed that the victim received innumerable and various blows over the course of many hours, some of which initially immobilized and restrained her and others of which proximately caused her death; the evidence was thus sufficient to establish that the blows used for restraint were separate and apart from the blows causing death; and the evidence regarding restraint was irrelevant to the charge of first-degree murder.

Am Jur 2d, Abduction and Kidnapping § 54; Criminal Law §§ 20, 21.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine. 50 ALR3d 397.

Due process as violated by successive state criminal trials for single offense or for multiple offenses of the same character, committed simultaneously. 2 L. Ed. 2d 2020.

2. **Constitutional Law § 202 (NCI4th)— double jeopardy—submission of kidnapping and felony murder—defendant not sentenced for kidnapping**

The trial court did not subject defendant to multiple punishments for the same offense by submitting to the jury a charge of second-degree kidnapping and a charge of felony murder based on the underlying felony of kidnapping where defendant was not sentenced for kidnapping but prayer for judgment was continued on that charge.

Am Jur 2d, Criminal Law §§ 276-279; Homicide §§ 46, 190.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L. Ed. 2d 924.

3. **Criminal Law § 1367 (NCI4th Rev.)— felony murder and murder by torture—underlying felony as aggravating circumstance**

The underlying felony of kidnapping was properly submitted as an aggravating circumstance where defendant was convicted on theories of felony murder and murder by torture.

Am Jur 2d, Abduction and Kidnapping § 54; Criminal Law § 598; Homicide § 46.

What constitutes murder by torture. 83 ALR3d 1222.

4. **Appeal and Error § 418 (NCI4th)— defendant's contentions—concession of rejection by appellate court—no further argument—waiver**

Defendant's contentions that his constitutional rights were violated in a murder trial by the admission of hearsay testimony of eight witnesses relating to his prior acts of violence against the victim and by statements of the prosecutor in his closing argument in the capital sentencing proceeding were waived where defendant conceded that the appellate court has consistently rejected similar claims and made no further argument in support of his contentions. N.C. R. App. P. 28.

Am Jur 2d, Constitutional Law § 849; Criminal Law §§ 647, 722, 957; Evidence § 892; Homicide § 560.

Admissibility of statement under Rule 803(24), providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guarantees of trustworthiness. 36 ALR Fed. 742.

Federal Constitutional right to confront witnesses—Supreme Court cases. 98 L. Ed. 2d 1115.

5. **Jury § 141 (NCI4th)— capital sentencing—voir dire—parole eligibility questions excluded**

The trial court did not err in the denial of defendant's motion to permit *voir dire* of prospective jurors in a capital sentencing proceeding regarding their beliefs about parole eligibility. The decision of *Simmons v. South Carolina*, 512 U.S. 154, does not

affect this issue where, as here, the defendant would have been eligible for parole if given a life sentence.

Am Jur 2d, Criminal Law § 913; Jury §§ 202, 206.

Right of counsel in criminal case personally to conduct the voir dire examination of prospective jurors. 73 ALR2d 1187.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.

6. Criminal Law § 1370 (NCI4th Rev.)— aggravating circumstance—heinous, atrocious, or cruel murder—constitutional instructions

The trial court's instructions on the especially heinous, atrocious, or cruel aggravating circumstance provided constitutionally sufficient guidance to the jury.

Am Jur 2d, Criminal Law § 598; Trial §§ 841, 1760.

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.

7. Criminal Law § 1402 (NCI4th Rev.)— death penalty not excessive or disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant was convicted on theories of felony murder and murder by torture; defendant beat the victim to death over the course of many hours; the victim's brutal death was found by the jury to be especially heinous, atrocious, or cruel; the jury found the aggravating circumstance that the murder was committed by defendant while engaged in the commission of a kidnapping; the victim suffered great pain over an extended period of time before her death; the victim was of unequal physical strength to the defendant; the victim feared defendant; defendant was thirty-eight years old at the time of the killing; defendant waited for several hours and attempted to clean up the evidence of the beating before seeking medical help for the victim; and defendant showed no remorse and denied beating the victim.

Am Jur 2d, Criminal Law § 628; Homicide § 48.

STATE v. STROUD

[345 N.C. 106 (1996)]

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.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Allen (J.B., Jr.), J., at the 23 January 1995 Criminal Session of Superior Court, Durham County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for second-degree kidnapping was allowed 30 November 1995. Heard in the Supreme Court 15 May 1996.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State.

Anthony Lynch for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 17 May 1993 for the first-degree murder of Jocelyn Mitchell and on 7 November 1994 for the first-degree kidnapping of Mitchell. The defendant was tried capitally, and the jury found the defendant guilty of first-degree murder on the basis of felony murder and on the basis of murder by torture. The defendant was also found guilty of second-degree kidnapping. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that the defendant be sentenced to death. Judge Allen entered a prayer for judgment continued on the kidnapping conviction and sentenced the defendant to death for the murder conviction.

At trial, the State presented evidence tending to show that Jocelyn Mitchell died on 1 May 1993 from dozens of blunt force injuries to her body. Defendant was in the apartment with the victim the night of the beating. John McPhatter, the defendant's next-door neighbor, and McPhatter's girlfriend, Debra Harper, each testified that on 1 May 1993, between 12:30 and 1:30 a.m., they awoke to a loud thump from defendant's apartment. McPhatter and Harper also heard the defendant arguing and the victim talking and crying. They specifically heard the defendant say, "You shouldn't have gone to that party," and heard the victim say, "Look what you've done to my face." McPhatter and Harper testified that as the night went on, the defend-

ant continued to argue, but the victim stopped talking and only cried. McPhatter testified that when he left his apartment at 5:30 a.m., he could still hear the defendant arguing and the victim crying. Similarly, when Harper left the apartment between 6:00 and 6:30 a.m., she could still hear the defendant arguing and the victim "whimpering." Linda Baldwin, an upstairs neighbor, testified that by 7:30 a.m., there were no noises coming from the apartment occupied by the defendant and Mitchell.

Approximately seven hours later, the defendant called 911 from his apartment. He told the dispatcher that Mitchell had collapsed, that he could not wake her and that she was breathing lightly. The victim was not breathing when paramedics arrived, she had no pulse and her neck and arms were stiff. Defendant told the paramedics that Mitchell had been assaulted around 6:00 p.m. the night before at the school where she was employed as a teacher. The paramedics called the police.

Officers M.L. Hayes and J.A. Pickett, Jr., of the Durham Police Department arrived at the defendant's apartment around 3:00 p.m. The defendant told Officer Hayes that he and Mitchell had been fighting all night. Defendant also told the officers that Mitchell had come home around 8:00 p.m. and stated that she had been attacked and could not breathe. At trial, however, the State presented evidence that at about 8:00 p.m., Mitchell was seen parking her car and that she looked normal, had no visible injuries, was not bleeding and had no trouble walking. The State also presented evidence from a co-worker who observed Mitchell shopping at a grocery store around 11:55 p.m. The co-worker noticed nothing strange about Mitchell's appearance or actions and testified that Mitchell was not crying and appeared to be in good health.

Dr. John Butts, Chief Medical Examiner of the State of North Carolina, performed an autopsy on the victim. Dr. Butts' examination revealed, among other injuries, bruising on either side of the eyes, behind the right ear, on the lower part of the neck and over the front part of the skull. There was a laceration on the top of the head that extended into the deeper skin tissue that covers the skull. There were multiple bruises on the upper and mid-back, as well as extensive bruising of the right side and back, upper left arm and elbow, buttocks, back of the right thigh and all along the front part of the legs. The victim's skin was torn and scratched in several places. One back left rib was broken in two places, and ribs eight through eleven on

the right side in the back were broken. One of the victim's ribs punctured the right lung, causing it to collapse and causing bleeding into the chest cavity. Dr. Butts characterized the wounds to the hands and forearms as defensive wounds from fending off her assailant's blows.

Dr. Butts testified that, in his opinion, Jocelyn Mitchell was struck dozens of times, causing her tissues to rupture and bleed into the muscles and fat beneath her skin. Further, some of her fat was broken up by the blunt-force trauma. The fat liquified and flowed into the victim's lungs, causing hypoxia, a lack of oxygen to the tissues. The overall process of internal bleeding, loss of blood to the tissues, collapse of the lung and fat in the lungs gradually resulted in loss of consciousness, coma and then death. Dr. Butts further testified that the victim's injuries would have been very painful, would have affected the victim's ability to move or walk and eventually would have incapacitated her.

[1] In his first assignment of error, the defendant contends that the trial court erred by denying his motion to dismiss the second-degree kidnapping charge. This is based on defendant's assertion that all of the blows dealt to the victim in this case were essential to or related to the victim's death. Therefore, the argument continues, the restraint that resulted in the victim's murder is indistinguishable from the restraint used by the State to support the kidnapping charge. As a result, defendant contends, all three theories of first-degree murder submitted to the jury were tainted by the failure to dismiss the second-degree kidnapping charge. We disagree.

When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each element of the offense charged and substantial evidence that the defendant was the perpetrator of such offense. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). If substantial evidence of each element is presented, the motion to dismiss is properly denied. *State v. Quick*, 323 N.C. 675, 682, 375 S.E.2d 156, 160 (1989). Substantial evidence is "that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *Olson*, 330 N.C. at 564, 411 S.E.2d at 595.

Viewed in the light most favorable to the State, the evidence is clearly sufficient to establish that the blows used for restraint were separate and apart from the blows causing death. An argument ensued between the defendant and the victim sometime between 12:30 and 1:30 a.m. and continued for six or seven hours, during which time the victim's talking degenerated to crying, then whimpering and finally silence. The autopsy evidence shows that the victim suffered dozens of blunt-force injuries. In addition to a number of broken ribs, she had bruises and cuts all over her body, from her head down to her legs. These injuries caused internal bleeding, loss of blood to the tissues, accumulation of fat in the lungs and collapse of one lung. The medical examiner testified that the injuries would have affected the victim's ability to move or walk and eventually would have incapacitated the victim. From this evidence, it is reasonable to infer that at some point the victim's injuries were severe enough to prevent her from leaving but not so severe as to cause death. Based on this evidence, we find sufficient evidence that the restraint and death blows were separable and conclude that the trial court did not err in denying defendant's motion to dismiss the second-degree kidnapping charge.

Defendant attempts to analogize this case to *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986). In *Prevette*, the victim suffocated to death from a gag being placed in her mouth. The evidence established that the victim would not have died from the gag if her hands, knees and ankles had not been bound. As a result, the bonds could not be regarded as a separate and distinguishable restraint because they were necessary conditions of the cause of death. In the present case, however, there were innumerable and various blows struck over the course of many hours, some of which initially merely immobilized and restrained and others of which proximately caused death. Because not all of the blows were necessary conditions of the cause of death, *Prevette* is not applicable in the present case.

Moreover, the evidence regarding restraint is irrelevant to the charge of first-degree murder based on murder by torture. In this case, the defendant was convicted of first-degree murder on the basis of felony murder *and* on the basis of murder by torture, as well as convicted of second-degree kidnapping. In order to sustain a conviction of first-degree murder by torture, the State must prove that the defendant intentionally tortured the victim and that such torture was a proximate cause of the victim's death. *State v. Crawford*, 329 N.C. 466, 479-81, 406 S.E.2d 579, 586-88 (1991). Conviction for kidnap-

ping requires proof that "the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute." *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986).

In *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988), this Court considered and rejected a restraint argument similar to defendant's. In *Wilson*, the defendant tied the victim's hands behind his back, looped the rope around his neck and body, and pulled the loose end under the victim's groin area. The victim died from ligature strangulation. The defendant was convicted of first-degree murder on the theories of premeditation and deliberation and felony murder, as well as first-degree kidnapping. As here, the defendant argued that the restraint integral to the kidnapping was not separate from the strangulation that resulted in the victim's death. This Court rejected the defendant's argument, reasoning that a "restraint is not essential to a charge of premeditated and deliberated murder." *Id.* at 139, 367 S.E.2d at 602.

Similarly, in this case, restraint is not an essential element of first-degree murder by torture. There is no requirement that the victim be restrained in order to convict the defendant of murder by torture, and there is no requirement that death or torture occur to convict the defendant of kidnapping. Because the crimes have separate, integral elements, any purported error in the submission of second-degree kidnapping (of which we have found none) would not infect the submission and conviction of first-degree murder by torture.

[2] Defendant also argues that the trial court's failure to dismiss the kidnapping charge and the subsequent submission of the charge of first-degree felony murder based on the underlying felony of kidnapping unconstitutionally subjected him to multiple punishments for the same offense. We find defendant's argument to be without merit. As related to punishment, the Double Jeopardy Clauses of the North Carolina and United States Constitutions only protect against multiple *punishments* for the same offense. *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). The defendant in this case was not sentenced for the kidnapping; a prayer for judgment continued was granted as to the kidnapping charge. The trial court did not subject the defendant to multiple punishment merely by submitting to the jury, under separate statutes, both the second-degree kidnapping charge and the charge of felony murder based on the underlying felony of kidnapping. While the law requires that a defendant con-

victed of murder solely on the theory of felony murder not be sentenced for the felony underlying the felony murder conviction, it is not error to deny a motion to dismiss the underlying felony charge. *Id.* at 459, 340 S.E.2d at 712.

[3] The defendant concedes that the submission of the underlying felony as an aggravating circumstance is prohibited only when the defendant is convicted solely of felony murder. *State v. Conaway*, 339 N.C. 487, 531, 453 S.E.2d 824, 852, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 153 (1995). The defendant in this case was convicted of both felony murder and murder by torture. Submission of kidnapping as an aggravating circumstance was therefore proper. After careful review, we find no compelling reason to overrule prior precedent of this Court. This assignment of error is overruled.

[4] In his next assignment of error, the defendant contends that the admission of hearsay testimony of eight witnesses relating to the defendant's alleged prior acts of violence against the victim deprived the defendant of his state and federal constitutional rights to confrontation, to due process of law, to a fair trial by jury, to effective assistance of counsel and to be free from cruel and unusual punishment. The defendant concedes that this Court has rejected similar claims of error in admission of hearsay testimony. *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 100 (1996); *State v. McHone*, 334 N.C. 627, 435 S.E.2d 296 (1993), *cert. denied*, 511 U.S. 1046, 128 L. Ed. 2d 220 (1994); *State v. Walker*, 332 N.C. 520, 422 S.E.2d 716 (1992), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271 (1993); *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991); *State v. Payne*, 327 N.C. 194, 394 S.E.2d 158 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991); *State v. Meekins*, 326 N.C. 689, 392 S.E.2d 346 (1990); *State v. Faucette*, 326 N.C. 676, 392 S.E.2d 71 (1990); *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990). Defendant makes no further argument in support of his position. Therefore, defendant's argument is waived pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure. Nevertheless, we have examined the statements at issue, and we find no grounds for overruling the trial court's rulings. This assignment of error is therefore overruled.

Defendant further contends that he is entitled to a new capital sentencing proceeding because of several improper arguments by the prosecutor which deprived him of his constitutional rights to due process of law, to a fair trial by jury and to be free from cruel and

unusual punishment. Again, the defendant concedes this Court has consistently rejected similar claims of error in prosecutors' closing arguments in the penalty phase of a capital trial, *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687; *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 478 (1996); *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 60 (1995), and he makes no further argument in his favor. Likewise, this issue is deemed waived. Despite defendant's abandonment of his argument, we have thoroughly reviewed the record, and we find that the prosecutor's arguments all fall within the wide latitude accorded prosecutors in the scope of their argument. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). Thus, this assignment of error is overruled.

PRESERVATION ISSUES

[5] The defendant next assigns error to the trial court's denial of his motion to permit *voir dire* of prospective jurors regarding their beliefs about parole eligibility. The defendant concedes that this issue previously has been decided against him by this Court.

This Court has consistently held that "evidence about parole eligibility is not relevant in a capital sentencing proceeding because it does not reveal anything about defendant's character or record or about any circumstances of the offense." *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995). This Court has also held that the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133 (1994), does not affect our position on this issue where, as here, the defendant would have been eligible for parole if given a life sentence. *State v. Miller*, 339 N.C. 663, 676, 455 S.E.2d 137, 151, *cert. denied*, — U.S. —, 133 L. Ed. 2d 169 (1995). This assignment of error is overruled.

[6] Defendant next argues that the trial court improperly instructed the sentencing jury by giving pattern jury instruction 150.10, which instruction fails to adequately limit the facially vague N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel. We have consistently upheld the instruction as given. "Because these jury instructions incorporate narrowing definitions adopted by this Court and expressly approved by the United States Supreme Court, or are of the tenor of the definitions approved, we reaffirm that these instructions provide constitutionally sufficient guidance to the jury." *State v. Syriani*, 333

N.C. 350, 391-92, 428 S.E.2d 118, 141, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Upon careful review of defendant's arguments, we find no reason to alter or reverse our previous holdings. Accordingly, this assignment of error is overruled.

PROPORTIONALITY REVIEW

Having found no error in either the guilt/innocence phase of defendant's trial or the capital sentencing proceeding, we are required by statute to review the record and determine (1) whether the evidence supports the aggravating circumstances found by the jury; (2) whether passion, prejudice or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (Supp. 1995).

In the present case, the defendant was convicted of first-degree murder on the theories of felony murder and murder by torture. The jury found the aggravating circumstances that the murder was committed while the defendant was engaged in the commission of a kidnapping, N.C.G.S. § 15A-2000(e)(5), and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). After thoroughly reviewing the record, transcript and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. We further conclude that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

[7] The final statutory duty of this Court is to conduct a proportionality review. One purpose of proportionality review is to guard against the "capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). Another "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In conducting proportionality review, we compare this case to others in the pool, defined in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995), that "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). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994).

The case *sub judice* has several distinguishing characteristics: the jury convicted the defendant under the theory of murder by torture; the victim's brutal murder was found by the jury to be especially heinous, atrocious, or cruel; the jury found the aggravating circumstance that the murder was committed by the defendant while engaged in the commission of a kidnapping; the victim suffered great pain over an extended period of time before death; the victim was of unequal physical strength to the defendant; and the victim feared the defendant. These characteristics distinguish this case from those in which we have held the death penalty 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. *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). Both *Stokes* and *Bondurant* are distinguishable from this case.

In *Stokes*, the seventeen-year-old defendant, along with four accomplices, robbed the victim and beat him to death. This Court found the sentence of death disproportionate because of the defendant's young age and because the defendant received the death penalty while an older accomplice received only a life sentence. *Stokes*, 319 N.C. at 21, 352 S.E.2d at 664. By contrast, the defendant's age is not a mitigating circumstance in the present case. Here, the thirty-eight-year-old defendant, without the aid of an accomplice, beat the victim to death.

In *Bondurant*, the defendant shot the victim while they were riding together in a car. This Court found the death penalty disproportionate because the defendant immediately exhibited remorse and concern for the victim's life by directing the driver to go to the hospital. The defendant went into the hospital to secure medical help for the victim, voluntarily spoke to police and admitted shooting the victim. *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. In the present case, the defendant showed no remorse and denied beating the victim. Additionally, the defendant waited for several hours and attempted to clean up the evidence of the beating before seeking medical help for the victim. Thus, we find no significant similarity

between this case and *Stokes* or *Bondurant*.

As noted above, two aggravating circumstances were found by the jury. Of the cases in which this Court has found a sentence of death disproportionate, the jury found the existence of more than one aggravating circumstance in only two cases, *Bondurant* and *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985). *Bondurant*, as discussed above, is clearly distinguishable. In *Young*, this Court focused on the jury's failure to find the existence of the especially heinous, atrocious, or cruel aggravating circumstance. The present case is distinguishable from *Young* because here, the jury found the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. For all of the foregoing reasons, we conclude that the cases in which this Court has found the death penalty disproportionate are distinguishable from the instant case.

In performing proportionality review, it is also appropriate for us to compare the case before us to other cases in which we have found the death sentence to be proportionate. *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994). Although we review all of the cases in the pool when engaging in our statutory duty of proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* Here, it suffices to say that we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

Based on the nature of this crime, and particularly the distinguishing features noted above, we cannot conclude as a matter of law that the sentence of death is excessive or disproportionate. We conclude that the defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. SHALAN DAVENSKI WILSON

No. 217A96

(Filed 6 December 1996)

1. Homicide § 256 (NCI4th)— murder and robbery—no evidence of who fired fatal shots—no charge on acting in concert—evidence of premeditation and deliberation insufficient

The trial court erred in a prosecution arising from the robbery of a convenience store and the killing of two employees by submitting first-degree murder to the jury based on premeditation and deliberation where the evidence merely raised a suspicion that defendant fired the fatal shots, even though there was evidence that defendant was present, armed, participated in the robbery, and may have been involved in the shooting, and the jury was not instructed on acting in concert with respect to first-degree murder based on premeditation and deliberation. Felony murder is left as the sole basis for the convictions and judgment was arrested on the underlying felony of robbery with a firearm. Defendant's convictions and life sentences for first-degree murder based on the felony murder rule were not affected.

Am Jur 2d, Homicide §§ 482-535.

2. Evidence and Witnesses § 369 (NCI4th)— murder and robbery—prior robbery—admissible to show common plan

There was no error in a prosecution arising from the robbery of a convenience store and the killing of two employees in the admission of evidence of the robbery of a Hardee's restaurant two days before the robbery of the convenience store. The trial court conducted a *voir dire* of the evidence and found that defendant and an accomplice, Wilson, had been driven to both crime scenes by the same person, Adams, who parked away from both crime scenes while defendant and Wilson approached on foot; both crimes were committed after dark; defendant and Wilson fled both scenes on foot and returned to the car; Adams then drove away from both scenes; defendant used his nine-millimeter weapon in both robberies; and both robberies lasted a short period of time. The court then concluded that the evidence was admissible to show a common plan or design and gave the jury a limiting instruction. The probative value of the evidence of the Hardee's robbery was not substantially outweighed by any danger

of unfair prejudice or other improper consideration. N.C.G.S. § 8C-1, Rule 403; N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 448-451.

Admissibility, in robbery prosecution, of evidence of other robberies. 42 ALR2d 854.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of life imprisonment entered by Burroughs, J., at the 3 July 1995 Special Criminal Session of Superior Court, Cleveland County, upon jury verdicts of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed 15 May 1996. Heard in the Supreme Court 16 October 1996.

Michael F. Easley, Attorney General, by William Dennis Worley, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

On 10 January 1994, defendant, Shalan Davenski Wilson, was indicted on two counts of first-degree murder and one count of robbery with a dangerous weapon. Superseding indictments were issued on 12 February 1994, and an additional indictment was issued for conspiracy to commit robbery with a dangerous weapon. In a capital trial, defendant was found guilty on both counts of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. Defendant was also found guilty of robbery with a firearm and conspiracy to commit robbery with a firearm. At a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended sentences of life imprisonment as to each of the first-degree murder convictions. The trial judge imposed a sentence of fourteen years' imprisonment for the robbery conviction; three years for the conspiracy conviction; and, in accordance with the jury recommendation, two life sentences for the first-degree murder convictions.

Defendant makes two arguments on this appeal. We agree with his first argument which requires that we vacate the judgment entered on defendant's conviction of robbery with a firearm. We

reject defendant's second argument which relates to the introduction of evidence of an armed robbery that occurred two days prior to the date of the offenses for which defendant was convicted.

The State's evidence presented at trial tended to show the following facts and circumstances: On 30 November 1993, Ashley Dye, Cassandra Adams, Chris Wilson, and defendant were riding together in Adams' mother's automobile in Kings Mountain, North Carolina. While stopped at a Hardee's restaurant, Dye told Adams, "I know what Chris and them have been doing and I know a place they can rob that don't have any cameras, don't have a security system." Adams asked Dye if she was talking about Little Dan's Convenience Store, and Dye replied in the affirmative. While defendant, Dye, Adams, and Wilson were driving later, Wilson told Dye that he had overheard her talking. Dye told Wilson that she knew that Little Dan's did not have a security system and that the camera was broken.

On 2 December 1993, after Adams arrived at Wilson's home between 8:45 and 9:00 p.m., they rode together to meet defendant. Adams, Wilson, and defendant then rode around in an unsuccessful search for Dye, passing Little Dan's in the process. There were a number of vehicles outside. They passed Little Dan's a second time and noticed there were no vehicles there. After stopping at a truck stop to buy some gloves, Adams drove by Little Dan's a third time, and there were still no vehicles at the store. Defendant and Wilson exited the automobile and approached the store. Adams drove down the road a short distance and turned around. Coming back toward the store, she saw her companions running toward her. Defendant and Wilson entered the automobile, and Adams observed a shiny revolver in defendant's possession which he did not have before entering the store.

During the late evening hours of 2 December 1993, C. Ervin Lovelace and Hugh Wayne Marcrum were found shot to death at Little Dan's, their place of employment.

Defendant was arrested at about 9:45 a.m. on 3 December 1993. A gun holster was tucked in the front of defendant's pants and a nine-millimeter automatic handgun was found between the mattress and box springs of the bed in which defendant was lying. Officers found the .38-caliber revolver identified as belonging to Danny Goforth, the owner of Little Dan's, in a footlocker in the hallway of defendant's residence.

The State also presented evidence that on 30 November 1993, Paul Stroupe, the manager of a Hardee's restaurant in Kings Mountain, identified defendant as the person who entered the kitchen of the Hardee's restaurant. Defendant pointed a nine-millimeter weapon at Stroupe's temple, demanded money, and threatened to kill Stroupe. Defendant was accompanied by another black male who was armed with a .38-caliber revolver. The nine-millimeter handgun seized from defendant's bed resembled the gun Stroupe observed in defendant's hand during the Hardee's robbery. Stroupe gave defendant the keys to open the money drawers, and defendant removed the money and fled the restaurant.

Defendant did not present any evidence.

[1] In his first argument on appeal, defendant contends that the judgment imposing a sentence for his conviction of robbery with a firearm must be arrested because the evidence was not sufficient to support the first-degree murder convictions on the basis of malice, premeditation, and deliberation; thus, he cannot be sentenced separately for felony murder and the underlying felony. At the conclusion of the evidence, defendant moved to dismiss the charges of first-degree murder, arguing insufficiency of the evidence. The trial court denied defendant's motion and submitted the issue of defendant's guilt of first-degree murder to the jury on two bases: (1) malice, premeditation, and deliberation; and (2) the felony murder rule.

We begin by noting that the sufficiency of the evidence supporting the conviction of first-degree murder based on the felony murder rule is not seriously challenged by defendant. Having reviewed the transcripts, briefs, and record, we conclude that the evidence was clearly sufficient to support defendant's convictions of first-degree murder under the felony murder rule.

While defendants are convicted of crimes, not theories, *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 561 (1989), we have held that when the sole theory of first-degree murder is the felony murder rule, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder, *State v. Small*, 293 N.C. 646, 660, 239 S.E.2d 429, 438-39 (1977). On the other hand, where a defendant's conviction of first-degree murder is based on both the felony murder rule and premeditation and deliberation, the defendant may be sentenced both for the first-degree murder conviction and for the underlying felony. *State v. Lewis*, 321 N.C. 42, 50, 361 S.E.2d 728, 733 (1987). Thus, in the instant case, defendant can only be punished

for both murder and the underlying felony if the convictions of first-degree murder are supported under the trial court's instructions by evidence sufficient to convict defendant of first-degree murder under both theories. We acknowledge that defendant can only be punished once for each of the first-degree murders; however, the theory on which defendant is convicted of those murders determines whether defendant may be sentenced separately for the underlying felony of robbery with a firearm. Therefore, we must consider defendant's contention regarding the premeditation and deliberation theory on which he was also convicted of the first-degree murders.

In the instant case, defendant does not challenge the trial court's felony murder and acting in concert instructions. However, in instructing the jury on premeditation and deliberation, the court explicitly told the jury that acting in concert was only to be considered with respect to the felony murder rule and that acting in concert did not apply to first-degree murder on the basis of premeditation and deliberation. Defendant contends that by instructing the jury in this manner, it became incumbent on the State to prove each element of first-degree murder based on premeditation and deliberation as to him, and that the evidence, when considered in light of the instructions given by the trial court, was insufficient to do so. We agree with defendant's main contention that, in the absence of an instruction on acting in concert, the evidence is insufficient to convict him of first-degree murder on the theory of premeditation and deliberation because the State did not prove each element of premeditated and deliberate murder as to him.

The Due Process Clause of the United States Constitution requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed. *Presnell v. Georgia*, 439 U.S. 14, 16, 58 L. Ed. 2d 207, 211 (1978). In order to obtain a conviction under the principle of acting in concert, "the State need not prove that the defendant committed any act which constitutes an element of the crime with which he is charged." *State v. Cox*, 303 N.C. 75, 86, 277 S.E.2d 376, 383 (1981). On the other hand, in the absence of an acting in concert instruction, the State must prove that the defendant committed each element of the offense. *See id.* Thus, even where the evidence is sufficient to support a conviction of first-degree murder on a theory of premeditation and deliberation *while acting in concert*, the conviction cannot be upheld absent a jury charge to that effect. *See Presnell*, 439 U.S. at 16, 58 L. Ed. 2d at 211.

In the instant case, absent an acting in concert instruction, it was necessary for the State to prove each element of first-degree murder on the theory of premeditation and deliberation, including the *actus reus* of firing the fatal shots. Defendant contends that while there is speculation as to his firing the fatal shots, the evidence is not substantial and does not support a reasonable inference that he fired the fatal shots. We agree.

In *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987), this Court held the evidence insufficient to go to the jury on the issue of premeditated and deliberate murder. In that case, the night manager of a store was attacked and stabbed during the course of an armed robbery of the store by two persons. The defendant, one of the alleged felons, moved to dismiss the charge of first-degree murder on the theory of premeditation and deliberation for insufficient evidence. The evidence before the trial court when it ruled on defendant's motion was defendant's own pretrial statement and the physical evidence of the killing. After reviewing the evidence, this Court concluded:

> While there was circumstantial evidence that might have created a suspicion—even a strong suspicion—that defendant probably participated in the stabbing, there was no direct evidence of defendant's participation in the stabbing; certainly nothing to show that defendant himself stabbed [the victim]. . . . While the State is entitled to rely on circumstantial evidence to show either the *mens rea* or the *actus reus* of the crime, this evidence must be substantial and real, not speculative. An examination of the evidence in the record before us convinces us that there was insufficient evidence from which a reasonable jury could determine beyond a reasonable doubt that defendant participated in the killing.

Id. at 139-40, 353 S.E.2d at 369 (citations omitted).

In the instant case, the evidence tends to show that two bullets were recovered from the scene and five bullets were recovered from the victims' bodies. It is clear from the autopsy reports that Marcrum died from a gunshot wound to the chest and that Lovelace died from a gunshot wound to the brain. The evidence also tends to show that four of the bullets could not have been fired from defendant's gun or the gun taken from Little Dan's that was found in defendant's possession when he was arrested. One of the remaining three bullets and its corresponding cartridge were found on the floor of Little Dan's and were shown to have been fired from defendant's gun. Therefore, there

are two unidentified bullets, one of which was a fragment found on the floor of Little Dan's and the other recovered from Mr. Lovelace's brain.

The evidence as to the weapons used in the robbery is as follows: Defendant's nine-millimeter handgun has the capacity to hold a total of nine bullets, eight in the magazine and one in the chamber. When defendant was arrested, his nine-millimeter handgun had eight bullets in the magazine. The revolver belonging to the owner of Little Dan's has the capacity to hold six rounds. It was found in defendant's possession containing five unspent rounds and one spent round. Chris Wilson's .38-caliber revolver, with the capacity to hold six rounds, was never recovered. In addition, the evidence tends to show that the entire encounter at Little Dan's lasted about ten seconds.

Even taken in the light most favorable to the State, while there was evidence that defendant was present, armed, participated in the robbery, and may have been involved in the shooting, this evidence merely raises a suspicion that defendant fired the shots that killed the two victims. "A suspicion, even a strong suspicion, is insufficient to support a guilty verdict." *Reese*, 319 N.C. at 141, 353 S.E.2d at 369. Considering the number of bullets recovered, the location of those bullets, the number of bullets found in the guns recovered from defendant's possession, and the short length of the encounter, a conclusion that defendant himself fired the fatal shots during this robbery could only be based on suspicion and conjecture.

Since the jury was not instructed on acting in concert with respect to first-degree murder based on premeditation and deliberation, verdicts finding defendant guilty on that basis cannot stand. Thus, the trial court erred by submitting first-degree murder to the jury on the basis of premeditation and deliberation. This leaves felony murder as the sole basis for the first-degree murder convictions. Since defendant cannot be punished separately for felony murder and the underlying felony, we must arrest judgment on the underlying felony of robbery with a firearm. *Small*, 293 N.C. at 660, 239 S.E.2d at 438-39. Defendant's convictions and sentences of life imprisonment for first-degree murder based on the felony murder rule are not affected by the arrest of judgment on the underlying felony.

[2] In his second argument, defendant contends that the trial court committed reversible error by allowing the introduction of evidence of a prior armed robbery of a Hardee's restaurant that occurred two

days before the Little Dan's robbery. Defendant contends that this evidence of the earlier robbery was irrelevant and highly prejudicial since it constituted evidence of unrelated misconduct for which defendant was not on trial and which was not a proper matter for the jury's consideration.

Prior to trial, defendant filed a motion *in limine* to exclude all evidence regarding his involvement in the armed robbery of the Hardee's restaurant. After conducting *voir dire*, the court denied defendant's motion, ruling that the Hardee's robbery possessed sufficient similarities to the Little Dan's incident to be admissible as evidence of a plan, scheme, or design to rob Little Dan's. When the evidence was introduced, the trial court gave a limiting instruction.

The North Carolina Rules of Evidence provide that:

> 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) (1993). In *State v. Weathers*, 339 N.C. 441, 451 S.E.2d 266 (1994), this Court stated:

> Rule 404(b) is a rule of "*inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." [*State v.*] *Coffey*, 326 N.C. [268,] 278-79, 389 S.E.2d [48,] 54 [(1990)].

Weathers, 339 N.C. at 448, 451 S.E.2d at 270.

In the instant case, the trial court conducted *voir dire* on the evidence sought to be introduced and made the following findings: Adams had driven defendant and Wilson to both crime scenes; Adams parked away from both crime scenes while defendant and Wilson approached on foot; both crimes were committed after dark; defendant and Wilson fled both scenes on foot and returned to Adams' car; Adams drove away from both scenes; defendant used his nine-millimeter weapon in both robberies; and both robberies lasted a short period of time. The court then concluded that the evidence was admissible to show a common plan or design and gave the jury a lim-

iting instruction on the purpose for which the evidence could be considered. We find no error in this ruling by the trial court.

We also reject defendant's contention that the probative value of the evidence of the Hardee's robbery was substantially outweighed by the danger of unfair prejudice under Rule 403. Rule 403 of the North Carolina Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1992). "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree." *Weathers*, 339 N.C. at 449, 451 S.E.2d at 270. Relevant evidence is properly admissible "*unless* the judge determines that it must be excluded, for instance, because of '*unfair* prejudice.' " *State v. Mercer*, 317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986). " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (quoting N.C.G.S. § 8C-1, Rule 403 commentary (Supp. 1985)). "In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

In the instant case, the trial court conducted *voir dire* on the evidence of the Hardee's robbery, made extensive findings, and concluded that the evidence was relevant to show a common plan or design. The jury was instructed to consider the evidence for the limited purpose of considering whether a common plan or design existed involving the crimes charged. We conclude that the probative value of the evidence of the Hardee's robbery was not substantially outweighed by any danger of unfair prejudice or other improper consideration and that the trial court did not abuse its discretion in admitting this evidence. Therefore, we reject defendant's second argument.

For the reasons stated earlier in this opinion, we arrest judgment on defendant's robbery conviction. Otherwise, defendant received a fair trial, free of prejudicial error. In sum, we hold as follows:

No. 93CRS11197—First-Degree Murder—NO ERROR;

No. 93CRS11198—First-Degree Murder—NO ERROR;

No. 93CRS11744—Robbery with a Firearm—JUDGMENT ARRESTED;

No. 94CRS839—Conspiracy to Commit Robbery with a Firearm—NO ERROR.

PERCELL RICHARDSON v. NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 250A95

(Filed 6 December 1996)

1. Workers' Compensation § 41 (NCI4th)— prisoner injured on prison job—workers' compensation as exclusive remedy

Workers' compensation is the exclusive remedy for prisoners injured while working on prison jobs because the effect of N.C.G.S. § 97-13(c) is that a working prisoner whose injuries arise out of and in the course of his work may get workers' compensation benefits by applying to the Industrial Commission within twelve months after discharge from prison, as long as the prisoner is still disabled from the injury at the time of discharge; section 97-13(c) further provides that a prisoner who is entitled to such compensation is subject to section 97-10.1 to the same extent as any other employee or employer; and section 97-10.1 establishes that workers' compensation is the exclusive remedy for injured workers. Therefore, plaintiff prisoner did not have the right to file a claim under the Tort Claims Act for injuries suffered while working on a prison farm.

Am Jur 2d, Workers' Compensation § 157.

2. Workers' Compensation § 41 (NCI4th)— working prisoners—workers' compensation as exclusive remedy—equal protection—public policy

The limitation of working prisoners to workers' compensation as their exclusive remedy does not violate their rights to

equal protection by discriminating between working and non-working prisoners and by discriminating between working prisoners and other employees. Nor does the exclusivity provisions of the Workers' Compensation Act in N.C.G.S. §§ 97-13(c) and 97-10.1 contravene sound public policy by lowering the incentive for prisons to provide safe working conditions for prisoners.

Am Jur 2d, Workers' Compensation § 157.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 118 N.C. App. 704, 457 S.E.2d 325 (1995), affirming an order of the Industrial Commission, filed 31 March 1994, dismissing plaintiff's claim under the Tort Claims Act. Plaintiff's petition for discretionary review as to additional issues was allowed by this Court on 15 September 1995. Heard in the Supreme Court 15 February 1996.

N.C. Prisoner Legal Services, Inc., by Linda B. Weisel and Kathryn L. VandenBerg; and J. Henry Banks for plaintiff-appellant.

Michael F. Easley, Attorney General, by Don Wright, Assistant Attorney General, for defendant-appellee.

Patterson, Harkavy & Lawrence, by Martha A. Geer, on behalf of The American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

LAKE, Justice.

Plaintiff appeals a decision of the Court of Appeals upholding an order of the Industrial Commission dismissing plaintiff's claim under the Tort Claims Act. For the reasons stated herein, we conclude that plaintiff's exclusive source of remedy is through the Workers' Compensation Act, and thus plaintiff's claim under the Tort Claims Act is barred. Accordingly, we affirm the Court of Appeals.

On 13 September 1991, the plaintiff, an inmate at the Caledonia Correctional Institution, was operating a tractor with an attached silage harvesting machine at the prison farm. The farm superintendent directed plaintiff to operate the harvester. During the operation, plaintiff's legs were caught in the silage cutter. His right leg was almost completely severed and had to be amputated below the knee. His left leg was permanently and severely injured.

On 23 September 1991, plaintiff filed a claim against the Department of Correction with the North Carolina Industrial Commission under the Tort Claims Act, N.C.G.S. §§ 143-291 to -300.1. The plaintiff alleged defendant's negligence, due to inadequate training and supervision, as the cause of his injury. In its answer, defendant Department of Correction denied plaintiff's tort claim and alleged contributory negligence on the part of the plaintiff as the cause of the injury. Defendant subsequently submitted an amended answer that included a motion to dismiss plaintiff's tort claim on the ground that workers' compensation was plaintiff's exclusive remedy.

When the case was called for hearing before Deputy Commissioner Jan N. Pittman, the parties requested a ruling on the motion to dismiss. No evidence was presented at the hearing. By order filed 6 January 1993, Deputy Commissioner Pittman granted defendant's motion to dismiss. Plaintiff appealed to the Full Commission, which, by order filed 31 March 1994, affirmed the decision of the deputy commissioner. Plaintiff appealed to the Court of Appeals, which affirmed the Full Commission.

[1] The sole issue on appeal is whether workers' compensation is the exclusive remedy for prisoners injured while working on prison jobs. In its opinion, the majority of the Court of Appeals found that sections 97-13(c) and 97-10.1 of the Workers' Compensation Act operate to prevent plaintiff from pursuing his claim under the Tort Claims Act. We agree with the majority's reasoning and affirm the Court of Appeals.

A thorough examination of the applicable provisions of the Workers' Compensation Act establishes that working prisoners are excluded from suing in tort for work-related injuries. N.C.G.S. § 97-13(c) sets forth the circumstances under which prisoners may be eligible for workers' compensation benefits and provides in relevant part:

> This Article shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Department of Correction shall suffer accidental injury . . . arising out of and in the course of the employment to which he had been assigned, . . . if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this Article, then such discharged prisoner . . . may have the benefit of this Article by applying to the

> Industrial Commission as any other employee; provided, such application is made within 12 months from the date of the discharge; and provided further that the maximum compensation to any prisoner . . . shall not exceed thirty dollars ($30.00) per week and the period of compensation shall relate to the date of his discharge rather than the date of the accident. . . . The provisions of G.S. 97-10.1 and 97-10.2 shall apply to prisoners and discharged prisoners entitled to compensation under this subsection and to the State in the same manner as said section applies to employees and employers.

N.C.G.S. § 97-13(c) (1991). N.C.G.S. § 97-10.1 defines the effect that coverage under workers' compensation has on other rights and remedies of the prisoner:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury or death.

N.C.G.S. § 97-10.1 (1991).

The effect of N.C.G.S. § 97-13(c) is that a working prisoner whose injuries arise out of and in the course of his work may get workers' compensation benefits by applying to the Industrial Commission within twelve months after discharge, as long as the prisoner is still disabled from the injury at the time of discharge. Section 97-13(c) further provides that a prisoner who is entitled to such compensation is subject to section 97-10.1 to the same extent as any other employee or employer. Section 97-10.1 establishes that workers' compensation is the exclusive remedy for injured workers. Thus, the language of the statute establishes that workers' compensation is the exclusive remedy for prisoners injured while working for the State.

In the instant case, plaintiff was severely and permanently injured while working as a prisoner. If and when plaintiff is released from prison, he can apply to the Industrial Commission for workers' compensation benefits. There is little doubt under the circumstances of this case that plaintiff will be found disabled and that his injury will be found compensable.

Plaintiff cites several cases in support of his argument that statutes and case law give prisoners the right to file claims under the

Tort Claims Act for injuries suffered on prison jobs. *Ivey v. N.C. Prison Dep't*, 252 N.C. 615, 114 S.E.2d 812 (1960) (burial expenses did not constitute compensation, and plaintiff could pursue Tort Claims Act suit); *Lawson v. N.C. State Highway & Pub. Works Comm'n*, 248 N.C. 276, 280, 103 S.E.2d 366, 369 (1958) (Tort Claims Act "did not except any prisoners from its provisions"); *Gould v. N.C. State Highway & Pub. Works Comm'n*, 245 N.C. 350, 95 S.E.2d 910 (1957) (representative of nonworking prisoner who was killed entitled to recover under Tort Claims Act). Plaintiff also cites precedent for the assertion that the Industrial Commission and courts have adjudicated prisoner tort claims for more than thirty years without distinguishing between prisoners negligently injured on prison jobs and other prisoners negligently injured. *Brewington v. N.C. Dep't of Correction*, 111 N.C. App. 833, 433 S.E.2d 798, *disc. rev. denied*, 335 N.C. 552, 439 S.E.2d 142 (1993); *Baker v. N.C. Dep't of Correction*, 85 N.C. App. 345, 354 S.E.2d 733 (1987). We find these cases inapplicable to the case at hand.

The case of *Gould* is distinguishable because it dealt with the death of a nonworking prisoner and did not address workers' compensation. The essence of the *Gould* decision was that nonworking prisoners could sue under the Tort Claims Act. That ruling is still good law, but it has no application to the case of a working prisoner injured at work.

The next case in time cited by plaintiff is *Lawson*. *Lawson* also involved the death of a prisoner, but this time while working for the State. There the Court noted that section 97-13(c) conferred workers' compensation benefits upon the special class of prisoners who were injured while working for the Department of Transportation but not other prisoners. *Lawson*, 248 N.C. at 280, 103 S.E.2d at 369. The *Lawson* Court went on to say, "In *Gould* . . . , this Court held that a prisoner not in said special classification was entitled to recover under the Tort Claims Act." *Id.* At that time, however, section 97-13(c) did not grant compensation to prisoners killed on the job. Neither did the exclusivity provisions of section 97-10 apply to prisoners in the same manner as other employees. *Id.* (applicable portion of section 97-13(c) added by 1957 General Assembly). Thus, Lawson's next of kin were permitted to seek recovery under the Tort Claims Act. *Id.* at 280-81, 103 S.E.2d at 369-70.

Ivey is similarly distinguishable. Section 97-13(c) was amended in 1971 to provide full workers' compensation benefits for injured and

killed prisoners. *Ivey* was a pre-1971 amendment case of a prisoner killed while working. At that time, section 97-13(c) applied to both injured and killed prisoners, but provided only burial expenses for those who died. *Ivey*, 252 N.C. at 618, 114 S.E.2d at 814. The Court in *Ivey* held that burial expenses did not meet the applicable definition of compensation. *Id.* at 620, 114 S.E.2d at 815. Because only prisoners "entitled to compensation" were barred by section 97-13(c) and former section 97-10, the statute did not bar tort claims arising from the death of a prisoner. *Id.* We agree with the Court of Appeals that, "[s]ince *Ivey* was a pre-1971 amendment death case in which the dead prisoner was not entitled to workers' compensation, its holding does not apply to plaintiff who is an injured employee who may elect to pursue compensation under the present version of the Workers' Compensation Act." *Richardson v. N.C. Dep't of Correction*, 118 N.C. App. 704, 706, 457 S.E.2d 325, 327 (1995).

The cases of *Brewington* and *Baker* are similarly inapposite. Neither of these cases addressed directly the issue of whether a working prisoner was precluded from filing a tort claim, and thus they are not instructive to the issue at hand.

At the time *Gould*, *Lawson* and *Ivey* were written, section 97-13(c) did not provide for the payment of compensation under the particular circumstances of these cases. Accordingly, the courts held that the statute did not preclude suit under the Tort Claims Act. Now, with the statutory amendments and the absolute right to compensation, there is no basis for interpreting the statute as giving a prisoner the option to sue under the Tort Claims Act or for workers' compensation benefits.

The fact that the worker is incarcerated and recovery under workers' compensation is deferred until discharge is not relevant to the issue of remedy. First, the primary purpose of workers' compensation is to compensate injured employees for their loss of earning capacity at approximately their present standard of living, not to compensate for pain and suffering. Leonard T. Jernigan, Jr., *North Carolina Workers' Compensation* §§ 1-1 to -2 (2d ed. 1995). Prisoners have all of their daily needs met while in prison. Since they do not have to purchase these on the open market with what otherwise would be their earned wage like other workers, prisoners have no need for immediate compensation. The statutory discharge rule merely sets forth the premise that a prisoner, who by operation of law does not have the right to earn wages, should not have the right to

receive payments made in lieu of wages. Second, the deferment of compensation until discharge rule does not act as a bar against remedy. When the prisoner is released, he is entitled to compensation if he is still disabled.

Plaintiff further argues that the use of the word "may" in section 97-13(c) gives injured working prisoners a choice of pursuing claims under either the Workers' Compensation Act or the Tort Claims Act. We find this argument unpersuasive. Section 97-13(c) states that the exclusive remedy provision of section 97-10.1 "*shall* apply to prisoners . . . entitled to compensation." N.C.G.S. § 97-13(c) (emphasis added). The use of the word "may" merely establishes that plaintiff is permitted to file a workers' compensation claim. It cannot reasonably be construed as granting plaintiff the option to choose his remedy.

[2] Plaintiff further contends that the limitation of working prisoners to workers' compensation as their exclusive remedy constitutes a violation of the right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Plaintiff argues that such a holding violates equal protection rights in two ways: (1) by discriminating between working prisoners and nonworking prisoners, and (2) by discriminating between working prisoners and other employees. Plaintiff asserts that these are similarly situated classes of people and that such distinctions do not bear a rational relationship to a legitimate governmental interest and thus violate the Equal Protection Clause. We find this argument to be without merit.

The principle of equal protection of the law is explicit in both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971). This principle requires that all persons similarly situated be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 798 (1982). Our courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis. *Duggins v. N.C. State Bd. of CPA Examiners*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978). If the statute does not impact upon a suspect class or a fundamental right, it is necessary to show only that the classification created by the statute bears a rational relationship to some legitimate state interest. *State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994).

Under the rational basis test, statutes "come before the Court with a presumption of validity." *In re Assessment of Use Taxes Against Village Publishing Corp.*, 312 N.C. 211, 221, 322 S.E.2d 155, 162 (1984), *appeal dismissed*, 472 U.S. 1001, 86 L. Ed. 2d 710 (1985). The court "need only determine if the classification's relation to the objectives sought by the General Assembly attains a minimum level of rationality. As long as there exist reasonable facts on which the legislature *could* have relied in creating the classification, we will not interfere with the legislature's decision." *Powe v. Odell*, 312 N.C. 410, 414, 322 S.E.2d 762, 764 (1984) (emphasis added). Thus, a statutory classification survives this assault if it bears " 'some rational relationship to a conceivable legitimate interest of government.' " *In re Assessment*, 312 N.C. at 221, 322 S.E.2d at 162 (quoting *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983)).

Without regard to whether plaintiff has shown the classes designated to be similarly situated, there are numerous legitimate governmental interests that are rationally addressed by the exclusive remedy effect of sections 97-13(c) and 97-10.1. Among them are: (1) suspending compensation to prisoners during incarceration because their needs are met by the State, (2) limiting the liability of the State in the same way as that of private employers by tying compensation to wages, and (3) protecting the exclusiveness of workers' compensation as a remedy by treating work-injured prisoners the same as work-injured private employees.

Furthermore, the differential impact between working and nonworking prisoners mirrors the effect of workers' compensation upon private individuals injured at work and those who are injured elsewhere. People injured at work are limited to workers' compensation, whereas those injured elsewhere are excluded from workers' compensation but can sue in tort. The United States Supreme Court and this Court have held that limiting avenues of remedy for workers through workers' compensation is a valid exercise of the police power and does not violate the Constitution. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 239, 61 L. Ed. 685, 697 (1917) (workers' compensation "legislation which, in carrying out a public purpose, . . . affects alike all persons similarly situated, is not within the [Fourteenth] Amendment"); *Heavner v. Town of Lincolnton*, 202 N.C. 400, 162 S.E. 909, *appeal dismissed*, 287 U.S. 672, 77 L. Ed. 2d 579 (1932). Just as the limiting of remedies is not violative of the Constitution with regard to differential treatment of work-injured and nonwork-injured citizens, likewise the limitation of remedies to

work-injured prisoners as opposed to nonwork-injured prisoners is not violative.

Much of plaintiff's equal protection argument centers on the alleged insufficiency of the wage-based benefits an inmate receives. This argument is lacking in two respects. First, it fails to consider the value of the full benefits granted to an injured prisoner while incarcerated and the benefits afforded under workers' compensation after discharge over and above the wage benefit. While in prison, all of the inmate's personal and medical needs are paid by the State. After discharge, workers' compensation provides medical care and vocational training to prepare the worker for another job field. These medical and vocational benefits may, over the course of a lifetime, amount to far more than the $150,000 allowed under the Tort Claims Act for some prisoners. Some injured prisoners are better served under workers' compensation, and some are not. However, this variance is not unique to prisoners; it applies equally to nonprisoners. As such, there is no equal protection violation. The plaintiff urges this Court to allow working prisoners to elect between workers' compensation and tort. This would place them in a position not equal with the noninmate worker, but rather in a superior position. Such a result would be untenable.

Second, plaintiff's argument ignores the fact that all employees/workers receive differential wage benefits based on their earnings at the time of injury. Poorly paid workers get lower wage-based compensation payments than do better paid workers. The employee who unfortunately breaks his leg while working at a weekly Saturday-only job has his compensation calculated upon his average weekly wage from that job, not his regular forty-hour-a-week employment. *See Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966). This may create a hardship disparity, but it is the result of a statute that treats all persons so injured *the same*. This is hardly an equal protection violation. By virtue of their choice to break the law, prisoners have placed themselves in the position of receiving a lower wage than they would be afforded in civil society. Thus, it is appropriate that they should bear the natural consequences of that decision in terms of workers' compensation benefits.

Finally, plaintiff asserts that the exclusivity provisions of the Workers' Compensation Act in sections 97-13(c) and 97-10.1 contravene sound public policy by lowering the incentive for prisons to provide safe working conditions for prisoners. We disagree with this

view. All other workers are restricted to workers' compensation remedies, and there is no evidence that this leads to more dangerous working conditions. If anything, the guaranteed recovery increases the incentive for employers to be safe. Also, like all other employers, prisons are subject to regulatory oversight and the close scrutiny of advocacy groups concerned with such issues. Moreover, under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), prisoners still have the right to sue the Department of Correction directly if misconduct rises to the level of generating a substantial certainty of injury to the worker. This provides protection against, and incentive not to create, dangerous working conditions for prisoners.

For the above stated reasons, we conclude that the exclusive source of remedy for a prisoner injured while working is through the Workers' Compensation Act, and accordingly we affirm the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA v. RODERICK S. WILLIAMS, JR.

No. 449A95

(Filed 6 December 1996)

1. Evidence and Witnesses § 1143 (NCI4th)— first-degree murder—hearsay statement of coconspirator

The trial court did not err in a prosecution for first-degree murder and other offenses by allowing a witness to testify that she had heard defendant's coconspirator, Robinson, tell defendant that "he wanted to get into something, rob a Quick Stop or do a white boy." A hearsay statement of a coconspirator is admissible as an exception to the hearsay rule if the statement was made during the course of and in the furtherance of the conspiracy, and a coconspirator's statement may be admitted even before the State establishes a *prima facie* case of conspiracy conditioned upon the establishment of the elements of conspiracy before the close of the State's evidence. Viewing the evidence in the light most favorable to the State and considering the wide lat-

itude allowed the State in proving conspiracy, this statement was made during the course of the conspiracy and in furtherance of its objectives.

Am Jur 2d, Homicide § 346.

Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence. 44 ALR Fed. 627.

Admissibility as against conspirator of extrajudicial declarations of coconspirator—Supreme Court cases. 1 L. Ed. 2d 1780.

2. Homicide § 510 (NCI4th)— first-degree murder—presence at scene—requested instructions denied—instructions given sufficient

There was no prejudicial error in a prosecution for first-degree murder, robbery, kidnapping, and other offenses by refusing to give defendant's requested instructions on presence at the scene of the crimes. Although defendant contends that without his requested instruction the jury could have arrived at the conclusion that defendant's failure to intervene was enough to infer that defendant shared in an alleged coconspirator's plan, the instructions given clearly required the jury to find not only that defendant was present at the scene of the crime but also that he possessed the requisite *mens rea* for each charge. Moreover, the court instructed on "mere presence" several times when the jury asked for reinstruction on several concepts throughout its deliberations. Given these instructions, a reasonable juror could not have concluded that defendant's failure to intervene was enough evidence for inferring that he shared in the coconspirator's plan.

Am Jur 2d, Conspiracy § 13; Homicide § 499.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Gore, J., at the 17 January 1995 Criminal Session of Superior Court, Cumberland County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed 19 December 1995. Heard in the Supreme Court 9 September 1996.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant was indicted for the first-degree murder of Erik R. Tornblom in violation of N.C.G.S. § 14-17 and was tried capitally. The jury first found defendant not guilty of premeditated murder, guilty of felony murder based on robbery with a firearm, guilty of first-degree kidnapping, not guilty of robbery with a firearm, guilty of possession of a weapon of mass destruction, guilty of possession of a stolen vehicle, and not guilty of felonious larceny. The trial court informed the jury that the court believed the verdict was inconsistent and sent the jury back for further deliberations on the verdicts of guilty of felony murder and not guilty of robbery with a firearm. After further deliberation, the jury found defendant guilty of first-degree murder under the felony murder rule and guilty of robbery with a firearm. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to life imprisonment; and the trial court entered judgment accordingly. The trial court also sentenced defendant to consecutive terms of imprisonment for the convictions of first-degree kidnapping, possession of a stolen vehicle, and possession of a weapon of mass destruction. The trial court arrested judgment on the conviction for robbery with a firearm, the underlying felony supporting the first-degree felony murder conviction.

At trial the State's evidence tended to show that on 20 June 1991, Marcus Robinson (sometimes referred to as Marcus Green) went to Michelle Lilly's home in Topeka Heights Apartments to obtain a gun. Later that afternoon Lilly saw Robinson and defendant together at the park in Topeka Heights. Lilly heard Robinson tell defendant that he "wanted to get into something, rob a Quick Stop or do a white boy."

James Lloyd Casey was the midnight clerk at a Quick Stop convenience store located in Fayetteville, North Carolina. During the early morning hours of 21 June, Casey recalled a young man with blonde hair coming into the store and asking for change. Casey later identified the young man as the victim, Erik Tornblom.

Shortly after the victim left the store, two young black males entered. One man stood by the door while the other man walked

around inside the store. The two men had a brief conversation and then left. Casey observed them conversing with the driver of an automobile in the store parking lot. The two men got into the automobile with the driver and left the premises. Casey identified one of the men as defendant.

Later that morning Lilly observed defendant and Robinson driving a small gray automobile. Defendant and Robinson told Lilly that the automobile was a "beamer car," a car that is loaned out in exchange for drugs. At trial Lilly identified the victim's automobile as the car she saw the two men driving on 21 June.

On the morning of 21 June, George Ward looked out his bedroom window and saw defendant get out of a car and wipe off the steering wheel, dash, and door handle with a rag. Defendant then walked away from the car. Ward recognized defendant as a student at his school. Ward told his mother what he had seen, and she notified the police. The car was later determined to belong to the victim.

Bruce Townsend discovered the victim's body on the morning of 21 June on the premises of the Davis Forklift Company. Dr. Gerald Franklin Wolford, a pathologist, testified that the victim died as the result of a gunshot wound to the left side of the face.

Defendant gave a statement to Officer Michael Ballard, a sergeant with the Fayetteville Police Department. In his statement defendant recounted the events of 20 and 21 June as follows: At approximately 11:20 p.m. on 20 June, defendant went with Robinson to Robinson's trailer. Robinson had a gun and was showing it off. Robinson told "Reggie," who was also at the trailer, that he and defendant "were going for a walk." Reggie encouraged Robinson not to take the gun with him, but Robinson "must have" taken the gun anyway.

Robinson and defendant walked to three local Quick Stop stores before they found one that was open. They bought some candy and then sat down for a few minutes. When they got up to leave, they noticed a man driving up in a "gray and blue-ish" automobile. Robinson asked the man for a ride, and Robinson and defendant got into the car. Defendant thought they were going to Topeka Heights, so he gave the victim directions to that area. However, Robinson pulled out a gun, held it to the young man's neck, and directed the man to proceed in a different direction. They ultimately arrived in the area later identified as the Davis Forklift Company. Robinson told the victim to get out of the car. The victim was opening his door slowly, so

Robinson told defendant to open the door. Defendant went around to the driver's side of the car, but the victim had already gotten out of the car. Robinson ordered the victim onto the ground and shot the victim while he pleaded for his life. Defendant ran from the scene, but Robinson followed him in the victim's car and convinced him to get in. Robinson and defendant drove the car to a nearby park. They got out of the car and walked around for a while. While they were walking, Robinson took the contents out of the victim's wallet and threw the wallet into a drain. After using the car to pick up a grill that defendant had to return, the two men ultimately parked the car at a gas station and walked back to Robinson's trailer and went to sleep. When defendant woke up he "walked by the car with the keys and went home." Defendant later returned to the car and moved it to another location. After defendant moved the car one time, he went back and moved the car again before going home. The car was recovered a quarter of a mile from defendant's residence, and the victim's car keys were recovered from defendant's residence.

Defendant presented no evidence at trial.

[1] Defendant brings forward two assignments of error. Defendant first alleges the trial court erred in allowing Michelle Lilly to testify that she heard Robinson tell defendant that "he wanted to get into something, rob a Quick Stop or do a white boy." Defendant contends that this statement constituted inadmissible hearsay. Assuming arguendo that the statement was admitted for the truth of the matter asserted and not for a nonhearsay purpose, we, nevertheless, conclude its admission was not error.

Pursuant to N.C.G.S. § 8C-1, Rule 801(d)(E), a hearsay statement of a defendant's coconspirator is admissible as an exception to the hearsay rule if the statement was made during the course and in furtherance of the conspiracy. In order for the statements or acts of a coconspirator to be admissible, there must be a showing that a conspiracy existed and that the acts or declarations were made by a party to it and in pursuance of its objectives while the conspiracy was active, that is, after it was formed and before it ended. *State v. Tilley*, 292 N.C. 132, 138, 232 S.E.2d 433, 438 (1977). The proponents must establish a *prima facie* case of conspiracy without relying on the declaration sought to be admitted. *Id.*

Defendant alleges the evidence in the instant case does not make out a *prima facie* showing of conspiracy. He argues that the trial court improperly considered the statement at issue when determining

whether the State had established the required showing of a conspiracy. Defendant also argues that even if the State had established a *prima facie* case of conspiracy, the statement at issue was made prior to the existence of any conspiracy established by the evidence.

Trial courts are allowed wide latitude in determining the order in which pertinent facts are offered in evidence to prove the formation of a criminal conspiracy. *Tilley*, 292 N.C. 132, 139, 232 S.E.2d 433, 438-39. A coconspirator's statement may be admitted even before the State establishes a *prima facie* case of conspiracy conditioned upon the establishment of the elements of conspiracy before the close of the State's evidence. *Id.* at 138-39, 232 S.E.2d at 438-39. Furthermore, in determining the sufficiency of the evidence of conspiracy, the evidence is considered in the light most favorable to the State. *State v. Withers*, 111 N.C. App. 340, 432 S.E.2d 692, *disc. rev. denied*, 335 N.C. 180, 438 S.E.2d 207 (1993). The State's burden of proof is to produce evidence sufficient to permit the jury to find the existence of a conspiracy, but the State is not required to produce evidence sufficient to compel the jury to find a conspiracy. *State v. Morris*, 102 N.C. App. 541, 402 S.E.2d 845 (1991); *State v. Cotton*, 102 N.C. App. 93, 401 S.E.2d 376, *appeal dismissed and disc. rev. denied*, 329 N.C. 501, 407 S.E.2d 543 (1991).

In the instant case defendant's statement to the investigating officer showed that defendant and Robinson went to three Quick Stops before they found one open. James Casey testified that when defendant and Robinson came into the store, defendant stood by the door while Robinson walked around. When customers came into the store, defendant and Robinson conversed and then left. Casey saw both defendant and Robinson approach the victim and get into the victim's car. Just before the murder defendant responded to Robinson's command to open the door when the victim did not open it fast enough. Defendant moved the victim's car several times and was seen wiping the steering wheel and door handle. This evidence, viewed in the light most favorable to the State, is sufficient to meet the State's burden to produce evidence sufficient to permit the jury to find the existence of a conspiracy.

In *State v. Mahaley* this Court recognized the inherent difficulty in proving the formation of a conspiracy and determining the exact moment the conspiracy was formed. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 649 (1995). "While a *prima facie* showing of the existence of a conspiracy

must be established independently of the statements sought to be admitted, the trial court may use such statements in establishing the times when the conspiracy was entered and terminated." *Id.* at 594, 423 S.E.2d at 65. Viewing the evidence in the light most favorable to the State and considering the wide latitude allowed the State in proving conspiracy, we conclude that Robinson's statement was made during the course of the conspiracy and in furtherance of its objectives. Thus, the trial court properly admitted the statement.

[2] Defendant next contends the trial court erred by refusing to give his requested instructions on defendant's presence at the scene of the crimes. During the charge conference, defendant submitted a request for a charge concerning "mere presence" as follows:

> The mere presence of [defendant] at the site of where Erik Tornblom was killed at the time of his killing does not make him guilty of any crime. This is so even though he may have been aware the crime was being committed and made no effort to prevent the crime.
>
> To find someone guilty who does not actually participate in the commission of a crime guilty of that crime, there must be evidence proving beyond a reasonable doubt that he intended for the crime or crimes to be committed, that he by word or deed gave active encouragement to the perpetrator of the crime, and was present to knowingly lend assistance to the accomplishment of the crime or crimes, if necessary, and made this known to the actual perpetrator.
>
> If the evidence is merely that the defendant was present during the commission of the offense, this is not sufficient for you to find him guilty. In order for you to find him guilty, the State by its evidence must convince you beyond a reasonable doubt that the defendant intended that crimes be committed against Erik Tornblom and that he gave active encouragement to the perpetrator or made it known he was ready to do so. If the evidence merely proves that he was present during the commission of the crime or crimes, then you must find the defendant not guilty.

The trial judge declined to give the requested instruction and stated that he would "probably put one sentence in that the mere presence of [defendant] at the site of the murder of Erik Tornblom or at the site of where Erik Tornblom was killed at the time of the killing does not make him guilty of any crime." Later in the charge conference, the

defense submitted a proposed written instruction within the instructions on felony murder which in part recapitulated the requested and denied instruction on presence. The trial court again declined to adopt the requested language on presence.

Defendant contends that the primary issue for the jury in this case was the significance of defendant's presence at the scene of the crimes committed by Robinson. Defendant asserts that his requested instruction would have clarified the meaning of "acting in concert" on the facts of this case. He argues that absent his requested instruction, the jury could have arrived at the conclusion that defendant's failure to intervene was enough evidence for inferring that he shared in Robinson's plan. We do not agree.

The trial court stated in its instructions on premeditation and deliberation that defendant must have acted together with Robinson with a common purpose to kill the victim and must have himself formed a specific intent to kill the victim after premeditation and deliberation. The trial judge began his instructions on first-degree murder on the theory of premeditation and deliberation as follows:

> Now, in order to convict the defendant of murder in the first degree under a theory of malice, premeditation and deliberation the State is required to prove from the evidence beyond a reasonable doubt that [defendant] acted together with Marcus Robinson with a common purpose to kill Erik Tornblom, and that [defendant] himself had formed a specific intent to kill Erik Tornblom after premeditation and deliberation.

The trial judge later expanded upon the instruction by adding that presence alone was not enough to find defendant guilty of any crime. The court's instruction was as follows:

> I further instruct you, Ladies and Gentlemen, that the presence of [defendant] at the site of where Erik Tornblom was killed at the time of Erik Tornblom's killing does not alone make [defendant] guilty of any crime.
>
> I further charge that for the defendant to be guilty under a theory of premeditation and deliberation, the State must prove from the evidence and beyond a reasonable doubt that [defendant] himself formed the specific intent to kill and, in fact, premeditated and deliberated the act, and that thereafter Marcus Robinson, acting in concert with [defendant] in a[] common purpose to kill Erik Tornblom, unlawfully killed Erik Tornblom. If

> you are not convinced of these things, then you must find [defendant] not guilty on the theory of premeditation and deliberation.

The trial judge then instructed the jury on the theory of felony murder based on acting in concert. The trial court explained acting in concert as follows:

> Now, Ladies and Gentlemen, for a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons acted together with a common purpose to commit robbery with a firearm and are actually or constructively present at the time the crime is committed, each of them is held responsible for the acts of the others done in the commission of robbery with a firearm.
>
> However, again I instruct you that the presence of a defendant at the scene of a crime does not alone make a defendant guilty of any crime.

These instructions clearly required the jury to find not only that defendant was present at the scene of the crime but also that he possessed the requisite *mens rea* for each charge.

The jury asked for reinstruction on several concepts throughout its deliberations. During these reinstructions the trial court instructed on "mere presence" several additional times. The trial court's instructions emphasized to the jury that (i) defendant must have acted together with Robinson in pursuit of a common plan to kill the victim and must have himself formed the specific intent to kill the victim after premeditation and deliberation, or (ii) defendant must have acted together with Robinson in pursuit of a common plan to commit robbery with a firearm. Given these instructions, a reasonable juror could not have concluded that defendant's failure to intervene was enough evidence for inferring that he shared in Robinson's plan. Thus, defendant cannot show that he was prejudiced by the trial court's refusal to give his requested instruction. This assignment of error is overruled.

For the foregoing reasons we hold that defendant's trial was free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY BARNES

No. 74PA96

(Filed 6 December 1996)

Larceny § 147 (NCI4th)— larceny from the person—insufficient evidence

The evidence did not support defendant's conviction of larceny from the person where it tended to show that defendant removed a bank bag containing money from below the cash register in a kiosk at a shopping mall and hid it under his shirt while the victim was in a store twenty-five to thirty feet from the kiosk, that the victim confronted defendant while he was in the kiosk, and that defendant left the kiosk before the victim discovered that the bank bag was missing, since the crime of larceny was completed when defendant removed the bank bag from below the cash register, and the bank bag was not in the immediate presence of and under the protection or control of the victim at the time of the taking. The case is remanded for entry of judgment as upon a conviction of nonfelonious larceny because the jury found all of the elements of the submitted lesser included offense of nonfelonious larceny and defendant concedes that he committed nonfelonious larceny.

Am Jur 2d, Larceny §§ 54, 55.

What constitutes larceny "from a person." 74 ALR3d 271.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 121 N.C. App. 503, 466 S.E.2d 294 (1996), vacating a judgment entered upon defendant's conviction of larceny from the person by Eagles, J., on 13 January 1995 in Superior Court, Guilford County, and remanding for entry of judgment of misdemeanor larceny. Heard in the Supreme Court 17 October 1996.

Michael F. Easley, Attorney General, by Mabel Y. Bullock, Special Deputy Attorney General, for the State-appellant.

Robert H. Edmunds, Jr., for defendant-appellee.

ORR, Justice.

The State's evidence tended to show that on 11 July 1994, James Morana was working alone at the House of Eyes, a freestanding kiosk in the business of selling sunglasses and optical frames, located in a Greensboro shopping mall. The kiosk was approximately fifteen feet by twenty feet in area and consisted of cabinets and display areas which enclosed all four sides except for one small entryway. At approximately 8:40 p.m., Morana left the kiosk to talk to a salesperson in a neighboring shop about twenty-five to thirty feet away. Another salesperson from the neighboring shop subsequently alerted Morana that someone had entered his kiosk.

Morana immediately returned to his kiosk and saw defendant behind the cash register, in the process of standing up from a crouched position. When Morana questioned him, defendant said that he was looking for sunglasses and denied any wrongdoing. Morana testified, "I told him I was going to look underneath my counter and see if he had taken anything he wasn't supposed to because I knew I had a bank bag stored under there." When Morana stepped past defendant and looked under the counter, defendant began to walk out of the kiosk. Immediately upon looking, Morana discovered that the bank bag, which contained approximately $50.00 in cash and an undeposited check, was missing.

Morana followed defendant toward the mall exit and asked him to stop and return the bank bag. After catching up with defendant at the exit, Morana again asked for the bag. Defendant denied having the bag. However, Morana saw a bulge under defendant's shirt, grabbed the shirt, and saw the bank bag. Defendant attempted to hit Morana and exited the mall. A mall security officer saw defendant run to his car and drive away. Defendant was later identified through his license plate number. A detective left a message for defendant, and defendant called the detective and arranged to meet him at the magistrate's office, where he was arrested.

At trial, the court submitted four possible verdicts to the jury: (1) guilty of common law robbery, (2) guilty of larceny from the person, (3) guilty of nonfelonious larceny, and (4) not guilty. The jury returned a verdict of guilty of larceny from the person. Defendant thereafter pleaded guilty to being a habitual felon, but appealed, alleging that the trial court erred in denying his motion to dismiss the charge of larceny from the person because of the insufficiency of the evidence. The Court of Appeals held that although the evidence sup-

ported the charge of misdemeanor or nonfelonious larceny, the evidence was insufficient to support the charge of larceny from the person. We agree.

"The motion to dismiss must be allowed unless the State presents substantial evidence of each element of the crime charged." *State v. Davis*, 340 N.C. 1, 11, 455 S.E.2d 627, 632, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 83 (1995). What constitutes substantial evidence is a question of law for the court. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). 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). "In evaluating a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom." *State v. Davis*, 340 N.C. at 12, 455 S.E.2d at 632. However, even when viewed in the light most favorable to the State, the evidence in the case before us does not support the charge of larceny from the person.

This Court recently addressed the crime of larceny from the person in *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991). We noted that because the North Carolina General Statutes do not define the phrase "from the person" as it relates to larceny, the common law definition controls. *Id.* at 317, 401 S.E.2d at 364 (citing *State v. Massey*, 273 N.C. 721, 161 S.E.2d 103 (1968)). We quoted with approval from the common law description of "from the person":

> Property is stolen "from the person," if it was under the protection of the person at the time. Property *attached* to the person is under the protection of the person even while he is asleep. And the word "attached" is not to be given a narrow construction in this regard. It will include property which is being held in the hand, or an earring affixed to the ear, or a chain around the neck, or anything in the pockets of clothing actually on the person's body at the moment. Moreover, property may be under the protection of the person although not actually "attached" to him. Thus if a man carrying a heavy suitcase sets it down for a moment to rest, and remains right there to guard it, the suitcase remains under the protection of his person. And if a jeweler removes several diamonds and places them on the counter for the inspection of a customer, under the jeweler's eye, the diamonds are under the protection of the person. On the other hand, one who is asleep is not actually protecting property merely because it is in

> his presence. Taking property belonging to a sleeping person, and in his presence at the time, is not larceny *from the person* unless the thing was attached to him, in the pocket of clothing being worn by him, or controlled by him at the time in some equivalent manner.

Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 342-43 (3d ed. 1982) (footnotes omitted), *quoted in part in State v. Buckom*, 328 N.C. at 317-18, 401 S.E.2d at 365. The crime of larceny from the person is regularly understood to include the taking of property "from one's presence and control." *Id.* Thus, for larceny to be "from the person," the property stolen must be in the immediate presence of and under the protection or control of the victim *at the time the property is taken. Id.*; *State v. Buckom*, 328 N.C. at 317-18, 401 S.E.2d at 365.

The question before us is whether the bank bag was in the immediate presence of and under the protection or control of Morana at the time the property was taken. The Court of Appeals held that the crime of larceny was completed when defendant removed the bank bag and hid it under his shirt, and because at that time, Morana was absent and the bag was left unprotected, the larceny of the bank bag was not from Morana's person. The State argues that the crime was not complete when defendant hid the bank bag under his shirt, but instead formed a "continuous transaction" which included Morana's subsequent confrontations with defendant.

However, the State relies on cases involving armed robbery, rather than larceny. *See State v. Hope*, 317 N.C. 302, 345 S.E.2d 361 (1986); *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986); *State v. Lilly*, 32 N.C. App. 467, 232 S.E.2d 495, *disc. rev. denied*, 292 N.C. 643, 235 S.E.2d 64 (1977). " '[T]he exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one continuing transaction amounting to armed robbery with the elements of violence and of taking so joined in time and circumstances as to be inseparable.' " *State v. Hope*, 317 N.C. at 305-06, 345 S.E.2d at 363-64 (quoting *State v. Lilly*, 32 N.C. App. at 469, 232 S.E.2d at 496-97). The case at bar is distinguishable because it deals with larceny rather than armed robbery. As explained in *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986):

> For purposes of larceny the element of taking is complete in the sense of being satisfied at the moment a thief first exercises dominion over the property. *See State v. Carswell*, 296 N.C. 101,

> 249 S.E.2d 427 (1978) [(the slightest taking and movement of property with the intent to permanently deprive the owner of the property is sufficient to constitute the crime of larceny)]. For purposes of robbery the taking is not over until after the thief succeeds in removing the stolen property from the victim's possession.

State v. Sumpter, 318 N.C. at 111, 347 S.E.2d at 401.

Therefore, the crime of larceny was completed when defendant removed the bank bag from below the cash register. Whether this constituted nonfelonious larceny or larceny from the person depends on whether the bank bag was in the immediate presence of and under the protection or control of Morana at the time of the taking. "The reason the crime of larceny from a person is afforded special consideration is to protect the person or immediate presence of the victim from invasion." 50 Am. Jur. 2d *Larceny* § 54 (1995).

In *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362, this Court held that the evidence supported a conviction for larceny from the person where the defendant openly took money from a cash register drawer while the clerk was making change for him out of the same drawer. Such action clearly constituted an invasion of the victim's person or immediate presence. In *State v. Lee*, 88 N.C. App. 478, 363 S.E.2d 656 (1988), the Court of Appeals held that the evidence did not support a conviction for larceny from the person where the defendant secretly took the victim's purse from her unattended grocery cart while she was four to five steps away, looking for an item in the grocery store. Such action did not constitute an invasion of the victim's person or immediate presence. The facts of the case at bar are more analogous to those of *State v. Lee* than *State v. Buckom*.

In the case at bar, defendant secretly removed the bank bag from below the cash register, and his actions did not constitute an invasion of the victim's person or immediate presence. When defendant entered the kiosk and removed the bank bag from below the cash register, the kiosk was empty, and the bag was unprotected. Morana was twenty-five to thirty feet away from the kiosk, at another shop. At that time, the bag was not in the immediate presence of or under the protection or control of Morana. Morana became aware that defendant had entered the kiosk only after being alerted by a salesperson at another shop, and defendant left the kiosk before Morana discovered that the bank bag was missing.

Because the evidence was insufficient to support a finding that the bank bag was in the immediate presence of and under the protection or control of Morana at the time of the taking, the bag was not taken "from the person" of Morana. Therefore, the trial court erred in denying defendant's motion to dismiss the charge of larceny from the person, and the judgment for larceny from the person while being a habitual felon should be vacated. As the Court of Appeals correctly concluded, because the jury found all of the elements of the submitted lesser included offense of nonfelonious larceny and because defendant concedes that he committed nonfelonious larceny, the case should be remanded for entry of judgment as upon a conviction of nonfelonious larceny. For the foregoing reasons, we affirm the decision of the Court of Appeals.

AFFIRMED.

DALLAS L. ISENHOUR, AND WIFE, SANDRA K. ISENHOUR v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, AND UNIVERSAL UNDERWRITERS GROUP

No. 181PA96

(Filed 6 December 1996)

1. Pleadings § 369 (NCI4th)— motion to amend answer--new defenses—denial not abuse of discretion

The trial court did not abuse its discretion by denying defendant fleet insurer's motion to amend its answer to interpose two new defenses where the motion was filed more than five years after the complaint was filed; the trial court based its decision on undue delay and undue prejudice; and there was no merit to defendant's contention that one of the new defenses was created by a Court of Appeals decision and was unknown to it. N.C.G.S. § 1A-1, Rule 15(a).

Am Jur 2d, Pleading §§ 306 et seq.

2. Insurance § 510 (NCI4th)— rejection of UIM coverage—denial of amendment of answer—UIM coverage equal to liability coverage

Where the trial court did not abuse its discretion in denying defendant fleet insurer's motion for leave to amend its answer to

allege that the insured had rejected UIM coverage, the amount of the UIM coverage available under the fleet policy is equal to the liability coverage limit of the policy. N.C.G.S. § 20-279.21(b)(4).

Am Jur 2d, Automobile Insurance §§ 304 et seq.

Construction of statutory provision governing rejection or waiver of uninsured motorist coverage. 55 ALR3d 216.

3. Insurance § 530 (NCI4th)— UIM coverage—settlement with excess insurer—primary insurer not entitled to credit

Where a fleet policy issued to plaintiff's employer provided primary UIM coverage and plaintiff's personal automobile policy provided excess UIM coverage for an accident while plaintiff was operating a vehicle owned by the employer, plaintiff settled for $25,000 under the UIM portion of his personal (excess) policy, plaintiff obtained a $750,000 judgment against the tortfeasor, and the UIM coverage available under the fleet policy is $2,000,000, the fleet insurer is not entitled to a credit for the $25,000 settlement received by plaintiff from his personal (excess) automobile insurer since the excess insurer was not yet required to pay any of its UIM coverage because the policy limit of the primary coverage had not been met.

Am Jur 2d, Automobile Insurance §§ 388-417.

Uninsured motorist insurance: Reduction of coverage by amounts payable under medical expense insurance. 24 ALR3d 1353.

Uninsured motorist coverage: Validity and effect of policy provision purporting to reduce coverage by amount paid under workmen's compensation law. 24 ALR3d 1369.

Uninsured and underinsured motorist coverage: Recoverability, under uninsured or underinsured motorist coverage, of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of a partial judgment for plaintiff Dallas L. Isenhour and an order denying defendants' motion to amend their answer entered by Ferrell, J., on 2 February 1996 in

Superior Court, Catawba County. Heard in the Supreme Court 14 October 1996.

Pritchett, Cooke & Burch, by David J. Irvine, Jr.; and Lovekin & Ingle, P.A, by Stephen L. Lovekin, for plaintiff-appellees.

Petree Stockton, L.L.P., by James H. Kelly, Jr., and Susan H. Boyles, for defendant-appellants.

FRYE, Justice.

This case is again before this Court following remand to, and rulings by, the superior court pursuant to our opinion in *Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 461 S.E.2d 317 (1995) (*Isenhour I*). We conclude that the superior court did not abuse its discretion in denying defendants' motion to amend their answer and did not err in entering partial summary judgment for plaintiff Dallas Isenhour.

On 29 April 1989, plaintiff Dallas Isenhour was seriously injured when the vehicle he was operating was involved in a collision with a vehicle driven by Willie Kate Clark. The vehicle Mr. Isenhour was operating was owned by his employer, Far East Motors, Inc. (Far East Motors), and was a covered automobile under a multiple-coverage fleet insurance policy purchased by Far East Motors and issued by defendants, Universal Underwriters Insurance Company and Universal Underwriters Group (Universal). On 12 March 1990, Dallas and Sandra Isenhour instituted an action against Willie Kate Clark for damages for personal injuries sustained in the accident. At the time of the accident, both Clark and the Isenhours were insured by Nationwide Mutual Insurance Company (Nationwide) under nonfleet personal automobile insurance policies. On 11 July 1991, Nationwide paid to the Isenhours $50,000, the per-person liability limit under the Clark policy. Additionally, the Isenhours settled for $25,000 under the underinsured motorist (UIM) portion of their Nationwide policy.

On 10 March 1992, the trial court entered judgment in the underlying action against Ms. Clark in the amount of $750,000 for Mr. Isenhour and $150,000 for Mrs. Isenhour. On 8 June 1992, plaintiffs filed this suit against Universal in an attempt to collect their judgment pursuant to the UIM provisions of the fleet policy issued to Mr. Isenhour's employer, Far East Motors. Universal filed its answer on 23 July 1992, denying liability. Universal moved for summary judgment, and on 10 November 1992, the trial court granted summary

judgment in favor of Universal and dismissed the Isenhours' claims. The Court of Appeals affirmed. *Isenhour v. Universal Underwriters Ins. Co.*, 113 N.C. App. 152, 437 S.E.2d 702 (1993). On discretionary review, we reversed the decision of the Court of Appeals and remanded the case for further proceedings consistent with our opinion. *Isenhour I*, 341 N.C. 597, 461 S.E.2d 317.

On 21 November 1995, Universal filed a motion for an order dismissing the claim of plaintiff Sandra Isenhour in conformity with the decision of this Court in *Isenhour I*. Judge Forrest A. Ferrell allowed this motion in a judgment signed 2 February 1996, and this matter is not before us on this appeal.

Also on 21 November 1995, Universal filed a motion pursuant to N.C.G.S. § 1A-1, Rule 15(a) to amend its answer to interpose two new defenses: (1) that a selection/rejection of UIM coverage limits Universal's liability to $60,000 per person, and (2) that plaintiff Dallas Isenhour executed a release of the tort-feasor that bars recovery against Universal. On 12 December 1995, plaintiffs filed a motion in the cause seeking a judgment against Universal relying, *inter alia*, on the decision of this Court in *Isenhour I*.

On 2 February 1996, Judge Ferrell entered an order denying Universal's motion to amend its answer and entered partial judgment in favor of plaintiff Dallas Isenhour for $700,000 plus interest and costs. Universal appealed from these rulings. On 12 June 1996, this Court allowed plaintiffs' and Universal's petitions for discretionary review prior to determination by the Court of Appeals.

[1] The first issue on this appeal is whether the trial court erred in denying Universal's motion for leave to amend its answer to interpose two new defenses. Universal moved to amend its answer pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure.

In situations where a party has no right to amend because of the time limitations in Rule 15(a), an amendment may nevertheless be made by leave of court or by written consent of the adverse party. N.C.G.S. § 1A-1, Rule 15(a) (1990). "A motion to amend is addressed to the [sound] discretion of the trial court. Its decision will not be disturbed on appeal absent a showing of abuse of discretion." *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). However, leave to amend "shall be freely given when justice so requires." N.C.G.S. § 1A-1, Rule 15(a). "Although the spirit of the North Carolina Rules of Civil Procedure is to permit parties to proceed on the merits without

the strict and technical pleadings rules of the past, the rules still provide some protection for parties who may be prejudiced by liberal amendment." *Henry*, 310 N.C. at 82, 310 S.E.2d at 331. "Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the nonmoving party." *News & Observer Publishing Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992).

In the instant case, the trial court articulated clear reasons for denying Universal's motion to amend its answer: undue delay and undue prejudice. Universal concedes that the denial of its motion to amend was within the discretion of the trial court since it had no right to amend its answer as a matter of course and plaintiffs did not consent to the amendment.

Upon careful consideration, we conclude that the trial court did not abuse its discretion by denying Universal's motion to amend its answer to interpose the two new defenses. The motion to amend Universal's answer was filed initially, in this Court, more than five years after the complaint in the instant action was filed. *See Isenhour I*, 341 N.C. at 606 n.2, 461 S.E.2d at 322 n.2 ("This Court denied [Universal's] motion, made for the first time in this Court, to amend the record on appeal by introducing evidence of a purported rejection of [UIM] coverage by Far East Motors."). We further conclude that the trial court did not abuse its discretion by denying Universal's motion to amend its answer to allege plaintiff Dallas Isenhour's release of the tort-feasor as a defense. We do not accept Universal's contention that the defense was created by the Court of Appeals in *Spivey v. Lowery*, 116 N.C. App. 124, 446 S.E.2d 835, *disc. rev. denied*, 338 N.C. 312, 452 S.E.2d 312 (1994), and for that reason was unknown to Universal prior to 1994. Indeed, the Court of Appeals addressed this defense in the context of a UM/UIM claim in *Buchanan v. Buchanan*, 83 N.C. App. 428, 350 S.E.2d 175 (1986), *disc. rev. denied*, 319 N.C. 224, 353 S.E.2d 406 (1987). We have carefully reviewed Universal's contentions under the circumstances presented and find no abuse of discretion by the trial court in denying Universal's motion to amend its answer.

The next issue on this appeal is whether the trial court erred in entering a $700,000 judgment against Universal in favor of plaintiff Dallas Isenhour. Universal argues that the purported selection/rejection form signed by the President of Far East Motors limited its liability under the Far East Motors' policy to $60,000 in UIM coverage.

[2] "Under N.C.G.S. § 20-279.21(b)(4), the UIM coverage is the same as the policy limits for automobile liability unless the insured has rejected such insurance or selected a different limit, and this rejection or selection must be in writing." *Isenhour I*, 341 N.C. at 605, 461 S.E.2d at 322. Since we have already decided that the trial court did not abuse its discretion in denying Universal's motion for leave to amend its answer to allege the purported rejection of UIM coverage, the amount of UIM coverage available under the Far East Motors' policy is equal to the liability coverage policy limit, that is, $2,000,000. *Id.* Accordingly, we reject Universal's contention that a UIM judgment could be entered against it for only $60,000.

[3] In Universal's final argument, it contends that the trial court erred in crediting $50,000, rather than $75,000, against Mr. Isenhour's $750,000 judgment against the tort-feasor, Willie Kate Clark.

Nationwide, as liability carrier for Clark, paid its policy limits of $50,000 to plaintiffs. Nationwide then paid an additional $25,000 to plaintiffs pursuant to plaintiffs' personal UIM coverage policy and obtained a release from any additional liability. Universal contends that the trial court's failure to credit Nationwide's $25,000 UIM payment against the judgment gives plaintiff a double recovery because it allows Mr. Isenhour to recover an amount greater than his judgment against the tort-feasor. Therefore, Universal argues, it should have received a credit for the $25,000 that Mr. Isenhour collected from Nationwide pursuant to plaintiffs' Nationwide UIM coverage.

In *Isenhour I*, we held that "Far East Motors' Universal policy provides primary coverage and the Isenhours' Nationwide policy provides secondary coverage." 341 N.C. at 608, 461 S.E.2d at 324. We said therefore that "the liability of Nationwide, the excess insurer, does not arise until the limits of the Universal policy, the primary coverage policy, have been exceeded." *Id.* at 608-09, 461 S.E.2d at 324. Universal's policy limit of $2,000,000 is more than plaintiff's judgment of $750,000. Since Nationwide was not required to pay any of its UIM coverage until the policy limit of Universal's UIM coverage had been exceeded, we conclude that Universal is not entitled to a credit for the $25,000 settlement between plaintiff Dallas Isenhour and Nationwide, the secondary insurance carrier. Accordingly, we reject Universal's final argument, and we affirm the decision of the superior court.

AFFIRMED.

IN RE FULLER

[345 N.C. 157 (1996)]

IN RE: INQUIRY CONCERNING A JUDGE, No. 198 GEORGE T. FULLER, RESPONDENT

No. 348A96

(Filed 6 December 1996)

Judges, Justices, and Magistrates § 36 (NCI4th)— district court judge—negotiating plea—censure rejected

A recommendation by the Judicial Standards Commission that a judge be censured was rejected where respondent presided over a trial in which a defendant was charged with failure to stop for a stopped school bus; after hearing the State's evidence, respondent felt there was insufficient evidence to convict defendant and that some type of speeding violation was more appropriate; respondent inquired of counsel whether defendant would be willing to enter some lesser plea; defendant indicated that he would enter a plea of exceeding a safe speed; the State inquired as to whether respondent intended to accept a plea that the State had rejected in pretrial negotiations; respondent accepted the plea; a motion for appropriate relief was filed; and respondent set aside the plea and entered a plea of not guilty. It is the responsibility of the trial judge to accept or reject a plea negotiated between the district attorney and defendant; it is not within the trial judge's province to negotiate a plea or enter judgment on a plea to a charge which is not a lesser included offense of the charge at issue. However, the respondent's conduct here was not of such character as to bring the judicial office into disrepute.

Am Jur 2d, Judges § 20.

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties. 87 ALR4th 727.

This matter is before the Court upon a recommendation by the Judicial Standards Commission (Commission), filed with the Court on 8 August 1996, that Judge George T. Fuller, a Judge of the General Court of Justice, District Court Division, Twenty-Second Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Canons 2A and 3A(1) of the North Carolina Code of Judicial Conduct. Calendared in the Supreme Court 15 November 1996.

No counsel for Judicial Standards Commission or for respondent.

ORDER REJECTING CENSURE.

The evidence stipulated to and presented during these proceedings shows the facts to be as follows:

On 9 June 1995, respondent presided over a trial in which the defendant was charged with failure to stop for a stopped school bus in violation of N.C.G.S. § 20-217. The defendant entered a plea of not guilty. Respondent, after hearing the evidence offered by the State, felt there was insufficient evidence to convict the defendant of the charge of passing a stopped school bus. Respondent's testimony before the Judicial Standards Commission, which was uncontroverted, is set out below:

> On the conclusion of the testimony of [the State's witnesses], the State rested. Mr. Homesley made a motion to dismiss at the close of the State's evidence. At that time it was my feeling that under the circumstances and facts of this situation that it was a young and inexperienced driver, it was a bus stop located in a place where visibility was poor, and that all of the evidence from the State's witnesses indicated it was not a deliberate act of not wanting to stop but being unable to stop due to the speed.
>
> It was my opinion at that point that it was more appropriate as an exceeding safe speed or some type of speeding situation than a passing stopped school bus violation.
>
> I called the counsel, Mr. Homesley and Ms. Gullett, to the bench and inquired as to whether the defendant would be willing to enter into some lesser plea. Mr. Homesley spoke with his client and told the court that his client would enter a plea of exceeding safe speed. At that point Ms. Gullett inquired as to whether the court intended to accept the plea that they had—that the State had rejected in pretrial negotiations.
>
> At that point I told her that was my intention. Mr. Homesley tendered the plea. I announced that the court accepted it and entered judgment accordingly.

Subsequently, on 12 October 1995, respondent was asked to rule on a motion for appropriate relief concerning the above matter, which had been filed by an assistant district attorney on 15 June 1995. Respondent testified concerning the motion for appropriate relief as follows:

I was considering the facts of the case at the time that I entered—accepted the plea and entered the judgment and was attempting to make the facts fit the offense, what I felt had taken place, and was more interested in doing justice than I was in technically following the law.

When I received the motion for appropriate relief, I immediately saw that it was based on meritorious grounds; that it was not in fact a lesser included offense and I granted the motion to set aside. At that point there had been no verdict by the court at the close of the State's evidence. There had been a plea. I accepted that plea; and when I set aside that plea, we were back at the close of the State's evidence.

Mr. Homesley was present and Ms. Gullett was present. And if I recall correctly, I said that, "We've heard State's evidence. Is there anything that you wish to offer, Mr. Homesley?" And he said no and [I] entered a verdict of not guilty, which is what I should have done back in June under the facts of this case, under the circumstances as I saw them at that time.

Based upon these and other findings of fact and conclusions of law, the Commission recommended that this Court censure the respondent.

A proceeding before the Judicial Standards Commission is "an inquiry into the conduct of one exercising judicial power . . . . Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *In Re Nowell*, 293 N.C. 235, 241, 237 S.E.2d 246, 250 (1977). The recommendations of the Commission are not binding upon the Supreme Court, and this Court must consider all the evidence and exercise its independent judgment as to whether it should censure the respondent, remove him from office, or decline to do either. *In re Martin*, 295 N.C. 291, 301, 245 S.E.2d 766, 772 (1978).

In re Bullock, 328 N.C. 712, 717, 403 S.E.2d 264, 266 (1991). Pursuant to N.C.G.S. § 7A-377, this Court is provided with three options concerning the recommendation of the Judicial Standards Commission: "The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation." N.C.G.S. § 7A-377 (1995).

This Court has previously noted that where an improper verdict is entered knowingly by a judge, the judge has acted beyond the

scope of his powers. *See In re Martin*, 333 N.C. 242, 424 S.E.2d 118 (1993) (district court judge censured based upon his conviction of defendants for reckless driving when they were charged with impaired driving and when he knew that such actions were improper and *ultra vires*). In the present case, however, the facts and circumstances differ from *Martin*. In *Martin*, the defendants were charged with driving while impaired but were found guilty by the judge of reckless driving, an offense with which neither defendant had been charged and to which neither had pleaded. *Id.*

Here, the defendant was charged with failure to stop for a stopped school bus, and the respondent inquired as to whether defendant would plead to exceeding a safe speed. Defendant agreed to this plea, and it was subsequently entered. Additionally, in the present case, when respondent received a motion for appropriate relief and saw that it was based on meritorious grounds, the respondent corrected his prior action by withdrawing the plea and ruling on the case by finding defendant not guilty of the initial charge.

After careful consideration, we conclude respondent's conduct does not rise to the level of conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of N.C.G.S. § 7A-376 so as to warrant censure by this Court.

> Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office."

In re Edens, 290 N.C. 299, 305-06, 226 S.E.2d 5, 9 (1976) (quoting *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 284, 515 P.2d 1, 9, 110 Cal. Rptr. 201, 209 (Cal. 1973), *cert. denied*, 417 U.S. 932, 41 L. Ed. 2d 235 (1974)).

Respondent erred by soliciting and accepting the plea to exceeding a safe speed. However, when the error of accepting the plea was called to his attention, respondent promptly corrected his mistake. We emphasize to the judiciary that it is solely the responsibility of the district attorney's office to negotiate and tender pleas. It is the responsibility of the trial judge to accept or reject a tendered plea negotiated between the district attorney and defendant. It is not within the trial judge's province to negotiate a plea or enter judgment

on a plea to a charge which is not a lesser included offense of the charge at issue. *See* N.C.G.S. § 15-170 (1983); *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989).

However, under these facts, respondent questioned whether defendant was guilty of the offense charged. Initially, rather than enter a judgment of not guilty, respondent sought to enter a plea which conformed with defendant's action. While we do not condone respondent's actions in asking for and taking the plea, we conclude that the conduct complained of is not of such character as to bring the judicial office into disrepute. The Court, accordingly, rejects the recommendation of the Commission that respondent be censured.

Now, therefore, it is, pursuant to N.C.G.S. §§ 7A-376 and -377 and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, ordered that the recommendation of the Commission that Judge George T. Fuller be censured be and it is hereby rejected.

Done by order of the Court in Conference, this the 5th day of December 1996.

s/ORR, J.
For the Court

STATE OF NORTH CAROLINA v. LAMONT ARMSTRONG

No. 41A96

(Filed 6 December 1996)

1. Homicide § 226 (NCI4th)— first-degree murder—defendant as perpetrator—sufficiency of evidence

The State presented plenary evidence to support a jury finding that defendant was the perpetrator of a first-degree murder where a witness testified that he drove defendant to the victim's house and that he was present when defendant began to attack the victim physically; a second witness testified that he saw defendant enter the victim's house about the time of the murder and exit a short while later; a third witness testified that defendant told him that he went to the victim's house to borrow money, got into a struggle with the victim when she refused to advance

him a loan, and consequently put a drop cord around her neck; and another witness testified that defendant talked about the murder, imparting more information than anyone not present at the murder scene should have known, and that defendant said that he "had the sense to do it by [him]self" and was going to be "proof that he beat the system."

Am Jur 2d, Homicide §§ 425 et seq.

2. Evidence and Witnesses § 2055 (NCI4th)— absence of fingerprints—detective's qualifications

A detective's testimony that it was common not to find identifiable fingerprints at a crime scene was nothing more than a statement of fact which his employment and experience qualified him to give without his being qualified as an expert.

Am Jur 2d, Expert and Opinion Evidence §§ 279 et seq.

Fingerprints, palm prints, or bare footprints as evidence. 28 ALR2d 1115.

3. Evidence and Witnesses § 2054 (NCI4th)— request for DNA testing of bloodied items—not speculation about perpetrator's blood—admissibility as foundation for exhibits

A detective did not improperly speculate about the actual presence of the perpetrator's blood at the crime scene by his testimony that he requested that bloodied items recovered from the crime scene be tested for a possible DNA match with blood samples from defendant and a codefendant and that he did not have any reason to suspect that the perpetrator shed blood in the victim's house, and this testimony was admissible as the foundation for the introduction of several of the State's exhibits.

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

Admissibility of DNA identification evidence. 84 ALR4th 313.

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

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Freeman, J., at

the 14 August 1995 Criminal Session of Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 14 November 1996.

Michael F. Easley, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State.

Henry E. Frye, Jr., for defendant-appellant.

WHICHARD, Justice.

Defendant was tried noncapitally for the first-degree murder of Ernestine Crowder Compton. The jury found defendant guilty as charged, and the trial court sentenced him to a mandatory term of life imprisonment.

The State's evidence at trial tended to show that on 9 July 1988 defendant asked Charles Blackwell to give him a ride to the victim's house so that defendant could borrow money from her. Blackwell testified that he drove defendant to the house and sat on the front porch while defendant went inside. Blackwell went inside when he heard defendant and the victim arguing. The victim told defendant he could not borrow more money until he repaid what he already owed her. Upon hearing this, defendant grabbed the victim by the neck and pushed her to the ground. Blackwell testified that he left at this point and told defendant that he should leave as well. Defendant caught up with him outside the house a short time later. After they were back in Blackwell's vehicle, defendant pulled from his pocket some money and a watch he had taken from the victim.

Timothy McCorkle testified that he saw Blackwell and defendant parked in front of the victim's house. According to McCorkle, defendant went in the house while McCorkle talked to Blackwell. McCorkle left briefly, and when he returned, he saw Blackwell and defendant running out of the victim's house. He heard Blackwell, who came out first, say "Damn Lamont."

William Davis testified that he had been incarcerated with defendant in Asheville in 1992 and later in McLeansville. Davis stated that defendant was concerned that his codefendant, Blackwell, was "trying to snitch on him" in exchange for money. Defendant told Davis that he went to the victim's house to borrow money but got into a struggle with her when she refused to advance him a loan. Defendant put a drop cord around the victim's neck while Blackwell searched

the house. Defendant told Davis that he felt sure no one would believe he had committed the crime because the victim was his mother's close friend.

Wayne Blockem also testified for the State. Blockem was serving a prison sentence at the time of defendant's trial and had shared a holding cell with defendant and Charles Blackwell. According to Blockem, while he and defendant were alone in the cell, defendant had talked about the murder, imparting more information than anyone not present at the murder scene should have known. Defendant told Blockem that he "had sense enough to do it by [him]self," that the investigating officer was wrong when he said where various items were located in the victim's house, and that he (defendant) was going to be "proof that he beat the system."

Defendant also presented evidence at trial. His first witness, Dolphus Cates, testified that he had been incarcerated with Blackwell and that Blackwell had told him defendant did not have anything to do with the murder. Defendant's brother, Kermit Armstrong, testified as well. He stated that if defendant needed money, he could have gotten it from their parents. Defendant would not have attempted to borrow money from the victim because she was a close friend of defendant's mother and would have reported defendant's activities to her. Finally, defendant testified in his own behalf. He maintained that he knew nothing about the murder, was at a Winston-Salem barber shop at the time, and fully cooperated with the investigation. He further maintained that he had met Blackwell in prison and had not associated with him outside of jail. He said he knew nothing of the victim's practice of loaning money and that he had never borrowed from her.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss made at the close of all the evidence. Defendant does not dispute the sufficiency of the evidence establishing that the crime of first-degree murder was committed but contends that the evidence was insufficient to establish that he was the perpetrator. We disagree.

The question presented on such a motion is whether, upon consideration of all the evidence in the light most favorable to the State, there is substantial evidence that the crime charged in the bill of indictment was committed and that defendant was the perpetrator. *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

Substantial evidence is that amount of "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988).

Review of the record reveals that the State presented plenary evidence to support a finding that defendant was the perpetrator of the murder of Ernestine Compton. Charles Blackwell testified that he drove defendant to the victim's house and that he was present when defendant began to attack the victim physically. Timothy McCorkle placed defendant at the scene of the crime, testifying that he saw defendant enter the victim's house about the time of the murder and exit a short while later. William Davis testified that defendant told him that he went to the victim's house to borrow money, got into a struggle with the victim when she refused to advance him a loan, and consequently put a drop cord around her neck. Wayne Blockem testified that defendant talked about the murder, imparting more information than anyone not present at the murder scene should have known, and that defendant said that he "had sense enough to do it by [him]self," and was going to be "proof that he beat the system."

Confronted with this testimony, defendant nevertheless argues that the State's physical evidence did not link him to the murder scene. The existence of inculpatory physical evidence is not a requirement for overcoming a defendant's motion to dismiss, however. Rather, contradictions, discrepancies, and omissions are for the jury to resolve. The evidence presented here, considered cumulatively and in the light most favorable to the State, clearly permitted a jury to find that a crime was committed and that defendant was the perpetrator. Accordingly, the trial court properly denied defendant's motion to dismiss, and this assignment of error is overruled.

[2] Defendant next argues that the trial court erred in allowing Detective Joseph Whitt of the Greensboro Police Homicide Unit to testify about the frequency of finding identifiable fingerprints. Detective Whitt testified on direct examination that it was common not to find identifiable fingerprints at a crime scene. Defendant contends that in admitting this testimony, the trial court erroneously permitted Detective Whitt to give his opinion without first qualifying

him as an expert. We conclude that Detective Whitt's testimony was nothing more than a statement of fact which his employment and experience qualified him to give. We therefore find no merit to defendant's argument.

[3] By his last assignment of error, defendant argues that the trial court erred in allowing Detective Whitt to testify as to whether a suspect's blood was left at the crime scene. Defendant contends the testimony was irrelevant and prejudicial. Our review of the transcripts convinces us that defendant misapprehends the nature of Detective Whitt's testimony and that considering its intended meaning, the testimony was admissible.

Detective Whitt testified that he requested that bloodied items recovered from the crime scene be tested for a possible DNA match with blood samples from defendant and Charles Blackwell. He stated that he did not have any reason to suspect that the perpetrator shed blood in the house, only that he wanted the test performed. The witness was merely explaining that his request to have DNA comparisons made of various blood samples found at the scene was routine and not based on any particular expectation or belief that the perpetrator's blood was in fact left at the scene. He was not speculating about the actual presence of blood, as defendant contends. The testimony was the foundation for the introduction of several of the State's exhibits; as such, it was clearly relevant and admissible. Defendant's assignment of error on these grounds is overruled.

We conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

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

IN RE: INQUIRY CONCERNING A JUDGE, No. 191 JAMES E. MARTIN, RESPONDENT

No. 349A96

(Filed 6 December 1996)

Judges, Justices, and Magistrates § 35 (NCI4th)— district court judge—arrest and bond hearing—censure recommendation rejected

An order recommending censure of a district court judge was rejected where a defendant was charged with misdemeanor DWI and released on bond; the police decided that the offense was a felony and issued a new warrant that would have required rearrest; the defendant's employer contacted respondent and expressed his concern that the matter be handled in a manner that would allow the defendant to continue working; respondent suggested that the defendant and the employer come to his courtroom at a particular time and requested that the officer who was to serve the warrant, his supervisor, and the assistant district attorney be present; respondent indicated in the meeting that he wanted to have the arrest warrant served immediately and proposed to conduct bond proceedings himself rather than in accordance with normal arrest procedures; he also stated that he would simply continue the bond previously posted; the assistant district attorney objected; respondent suggested that they meet later in the day because they could not agree on how to proceed; the assistant district attorney went to the district attorney, who spoke with defendant's attorney; they agreed that the arrest should be handled with normal intake procedures; the district attorney told respondent of the agreement and respondent supported the decision; and the defendant was taken to the magistrate and released on a recognizance bond on his earlier posted bond. Although *ex parte* communications and the voluntary injection of judicial officials into cases not properly before them are not approved, the respondent here appeared to act in good faith, acted openly with full disclosure to all parties, and upon objection did not see his initial course to fruition. His actions do not rise to the level constituting conduct prejudicial to the administration of justice.

This matter is before the Court upon a recommendation by the Judicial Standards Commission (Commission), entered 30 July 1996, that Judge James E. Martin, a Judge of the General Court of Justice,

District Court Division, Three-A Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of Canons 2A, 2B, and 3A(4) of the North Carolina Code of Judicial Conduct. Calendared in the Supreme Court 15 November 1996.

No counsel for Judicial Standards Commission or for respondent.

ORDER REJECTING CENSURE.

After reviewing the evidence adduced at the hearing before the Commission, this Court concludes that respondent's conduct that is in question may be described as follows.

The respondent was contacted by Elmer Heath, the employer of Joseph Reiger. Reiger was the defendant in the case of *State v. Joseph Richard Reiger*, Pitt County file number 94CR20681. Reiger had been charged initially with misdemeanor DWI and had been released on bond. Subsequently, the Greenville Police decided that the offense was a felony and issued a new warrant that would have required Reiger's rearrest. Heath expressed to the respondent his concern that the matter be handled in such a manner as to allow Reiger to continue working.

As a result of this conversation, the respondent suggested that Heath and Reiger come to his courtroom on 9 September 1994 around noon. On the morning of 9 September, the respondent contacted the Greenville Police Department and requested that Officer "Bobby" Wyrick, who was to serve the arrest warrant, and Officer Edward Haddock, Wyrick's supervisor and custodian of the arrest warrant, come to the respondent's chambers. The respondent also requested that Assistant District Attorney Mary Dee Carraway be present for the meeting.

During this meeting, and in the presence of all of the above-named individuals, the respondent indicated that he desired to have Reiger served with the arrest warrant immediately. The respondent proposed to conduct bond proceedings himself rather than having Reiger taken before a magistrate in accordance with normal arrest procedures for felony cases. He also stated that he would simply continue the bond previously posted by Reiger for the misdemeanor DWI charge, as opposed to requiring a new bond. Carraway, the assistant district attorney, objected to the respondent's proposed course of

action. The respondent suggested they meet again at 2:00 p.m. because they could not agree on how to proceed and because Reiger's attorney was not present.

Carraway went to her supervisor, District Attorney Thomas D. Haigwood, and informed him of what had occurred. Haigwood then spoke with Reiger's attorney, Bill Little, and they agreed that the arrest should be handled through the normal arrest intake procedures. Haigwood approached the respondent and told him of the agreement, wherein the respondent supported the decision. Reiger was taken to the magistrate and released on a recognizance bond based on his earlier posted bond (the same action proposed by the respondent).

The respondent contends that his intent in proposing this course of action was to meet with all of the parties involved and alleviate any hardship a second arrest would cause. The suggestion was also an effort to avoid Reiger fleeing the jurisdiction because Reiger was reluctant to turn himself in on the new charge. The respondent maintains that his purpose was only to facilitate a fair, expedient and just resolution to the matter, in light of the facts as he understood them.

For these actions, the Commission concluded that the respondent's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Commission recommends that the respondent be censured by this Court.

When the recommendations of the Judicial Standards Commission are reviewed, "[i]ts recommendations are not binding upon the Supreme Court, which will consider the evidence of both sides and exercise its independent judgment as to whether it should censure, remove or decline to do either." *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977).

After careful consideration, we conclude that the respondent's conduct was not so egregious as to amount to conduct prejudicial to the administration of justice within the meaning of N.C.G.S. § 7A-376.

> Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office."

In re Edens, 290 N.C. 299, 305, 226 S.E.2d 5, 9 (1976) (quoting *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 284, 515 P.2d 1, 9, 110 Cal. Rptr. 201, 209 (1973), *cert. denied*, 417 U.S. 932, 41 L. Ed. 2d 235 (1974)).

In the present case, the respondent sought to have all involved parties present at the meeting so as to avoid any appearance of partiality. The respondent also withdrew his proposal after consultation with the district attorney. Because the respondent appeared to act in good faith, acted openly with full disclosure to all parties, and upon objection did not see his initial course to fruition, we conclude that his actions do not rise to the level constituting conduct prejudicial to the administration of justice. However, we reiterate our disapproval of and caution judicial officials against *ex parte* communications or the voluntary injection of themselves into cases not properly before them.

Now, therefore, pursuant to N.C.G.S. § 7A-376 and § 7A-377(a) and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that the recommendation of the Commission that Judge James E. Martin be censured be and it is hereby rejected.

Done by order of the Court in Conference, this the 5th day of December 1996.

s/ORR, J.
For the Court

STATE OF NORTH CAROLINA v. ROGER SCOTT COLLINS

No. 525A95

(Filed 6 December 1996)

1. Evidence and Witnesses §§ 84, 1113 (NCI4th)— prosecutor's statements at codefendant's trial—not admissions—irrelevancy in defendant's trial

Statements by the prosecutor of some of the legitimate inferences that could be drawn from evidence introduced during sentencing in a codefendant's case to persuade the sentencing judge to make the codefendant serve his sentences consecutively were

not admissions of a party opponent and were neither competent nor relevant as substantive evidence in the guilt-innocence phase of defendant's trial for first-degree murder, rape, and conspiracy to commit murder.

Am Jur 2d, Evidence §§ 305, 308; Homicide §§ 270, 279.

2. Evidence and Witnesses § 263 (NCI4th)— changes in defendant's behavior and appearance—inadmissible character evidence

The trial court properly excluded character evidence about changes in defendant's behavior and appearance after he began to associate with the codefendant because the evidence was not tailored to a particular trait that was relevant in the case. Assuming, *arguendo*, that the trial court erred, exclusion of the evidence was harmless error in light of the overwhelming evidence of defendant's guilt, including his confession. N.C.G.S. § 8C-1, Rule 404(a)(1).

Am Jur 2d, Evidence §§ 363, 368, 369; Homicide § 298.

Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence. 56 ALR4th 402.

When is evidence of trait of accused's character "pertinent" for purposes of admissibility under Rule 404(a)(1) of the Federal Rules of Evidence. 49 ALR Fed. 478.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence. 64 ALR Fed. 244.

3. Evidence and Witnesses § 90 (NCI4th)— exhibition of codefendant to jury—request denied—waste of time

The trial court did not abuse its discretion by concluding that the physical exhibition to the jury of a codefendant not on trial with defendant would have been cumulative and a needless waste of time, N.C.G.S. § 8C-1, Rule 403, where defendant argued that the codefendant's physical appearance was relevant to prove that he had a dominating and controlling influence over defendant when the crimes were committed, but defendant was not prevented from presenting to the jury the relevant facts about the codefendant's age, height, weight, appearance, and size compared with defendant's physical attributes.

Am Jur 2d, Evidence §§ 22, 353.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Britt (Joe Freeman), J., on 8 August 1995 in Superior Court, Chatham County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his convictions for conspiracy to commit murder and first-degree rape was allowed by the Supreme Court on 24 April 1996. Heard in the Supreme Court 14 October 1996.

Michael F. Easley, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

Ann B. Petersen and Wade Barber for defendant-appellant.

MITCHELL, Chief Justice.

Defendant, Roger Scott Collins, was indicted for the 29 September 1993 rape, conspiracy to commit murder, and first-degree murder of Bennie DeGraffenreidt. He was tried capitally at the 17 July 1995 Criminal Session of Superior Court, Chatham County, and was found guilty of first-degree rape, conspiracy to commit murder, and first-degree murder on the basis of premeditation and deliberation. After a capital sentencing proceeding, the jury recommended a sentence of life imprisonment for the murder, and the trial court sentenced defendant accordingly. In addition, the trial court sentenced defendant to a consecutive term of life imprisonment for first-degree rape and to nine years for conspiracy to commit murder.

The State's evidence tended to show *inter alia* that on 29 September 1993, police responded to a 911 phone call that an intruder had broken into a mobile home near Pittsboro. When police arrived at the scene, they discovered the victim's body in the master bedroom, lying across the bed at an angle. Her legs were tied together at the ankles with a necktie, and a telephone cord and receiver were wrapped around her wrists. A pillow covered her face. The autopsy revealed that the victim had been sexually assaulted and smothered to death.

Police officers questioned the victim's husband, Michael DeGraffenreidt. He told them that someone had broken into his home and knocked him unconscious after a fight. When he woke up, he found his wife dead. The officers collected a cassette tape from the telephone answering machine. On the tape was an incoming message from someone identifying himself as "Roger." Roger said he was at

Top's and asked Michael DeGraffenreidt to call him. Police officers questioned defendant, Roger Collins. Defendant confessed that he raped and murdered Bennie DeGraffenreidt after conspiring with Michael DeGraffenreidt to commit the murder. Defendant told the officers that he and Michael had been discussing plans to murder Bennie for two weeks before she was killed. She had insurance on her life of about $180,000, and defendant's "cut" was to be $6,000, Bennie's car, and $500.00 cash "up front."

[1] By his first assignment of error, defendant contends that the trial court erred in excluding statements made by the prosecutor at the plea and sentencing of codefendant Michael DeGraffenreidt. Defendant argues that these statements were admissible as admissions of a party opponent and relevant to his defense in the guilt-innocence phase of the trial. We disagree.

The prosecutor's statements at the sentencing of codefendant DeGraffenreidt were not representations of fact used to prove the basis for DeGraffenreidt's plea under N.C.G.S. § 15A-1023(c). The statements were merely arguments of counsel as to some of the legitimate inferences that could be drawn from the evidence that had been introduced during sentencing in DeGraffenreidt's case to persuade the sentencing judge to make DeGraffenreidt serve his sentences consecutively, rather than concurrently. Statements of this type are neither competent nor relevant as substantive evidence. This Court has held that the attorneys have wide latitude in the arguments of hotly contested cases and may argue all the facts in evidence and any reasonable inferences that can be drawn therefrom. *State v. Knight*, 340 N.C. 531, 561, 459 S.E.2d 481, 499 (1995). Furthermore, it is axiomatic that the arguments of counsel are not evidence. *See State v. Hinson*, 341 N.C. 66, 76, 459 S.E.2d 261, 267 (1995); *State v. Garner*, 340 N.C. 573, 597, 459 S.E.2d 718, 730 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 872 (1996). This assignment of error is overruled.

[2] By his next assignment of error, defendant contends that the trial court erred in excluding testimony from Eric Cates relating to defendant's character traits and changes in his character after he began his association with codefendant DeGraffenreidt.

Rule of Evidence 404(a)(1) provides that a defendant may offer character evidence as long as he tailors it "to a particular trait that is relevant to an issue in the case." *State v. Squire*, 321 N.C. 541, 546, 364 S.E.2d 354, 357 (1988). In the context of this rule, " 'pertinent' . . .

is tantamount to relevant." *Id.* at 547, 364 S.E.2d at 358. The evidence defendant sought to develop with Cates' testimony focused on factual information about defendant's behavior and appearance rather than pertinent traits of his character. Assuming, *arguendo*, that the trial court erred, exclusion of the evidence could not have affected the outcome of this case in light of the overwhelming evidence of defendant's guilt, including his confession. Thus, any possible error would have been harmless. N.C.G.S. § 15A-1443(a) (1988). This assignment of error is overruled.

[3] Finally, defendant contends that the trial court erred by denying his request to have codefendant DeGraffenreidt identified in the presence of the jury. Defendant argues that DeGraffenreidt's physical appearance was relevant to prove that he had a dominating and controlling influence over defendant when the crimes were committed.

Rule of Evidence 403 provides, in pertinent part, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992). Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, and its ruling may be reversed for abuse of discretion only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). Applying Rule 403 to this case, we see no abuse of discretion in the trial court's ruling. Defendant was not prevented from presenting to the jury the relevant facts about DeGraffenreidt's age, height, weight, appearance, and size compared with defendant's physical attributes. The trial court did not abuse its discretion by concluding that physical exhibition of DeGraffenreidt to the jury would have been cumulative and a needless waste of time. This assignment of error is overruled.

For the foregoing reasons, we conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

WALTER DOLPHUS BROWN AND WIFE, ELAINE H. BROWN; (93 CVS 144) PLAINTIFFS V. SHAWN NATHAN ROBINSON AND NATHAN ROBINSON, DEFENDANTS

WALTER DAVID BROWN, MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, ELAINE H. BROWN, ELAINE H. BROWN AND WALTER DOLPHUS BROWN, INDIVIDUALLY; (93 CVS 145) PLAINTIFFS V. SHAWN NATHAN ROBINSON AND NATHAN ROBINSON, DEFENDANTS

JONATHAN FISHER BROWN, MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, ELAINE H. BROWN, ELAINE H. BROWN AND WALTER DOLPHUS BROWN, INDIVIDUALLY; (93 CVS 146) PLAINTIFFS V. SHAWN NATHAN ROBINSON AND NATHAN ROBINSON, DEFENDANTS

HANNAH HEATHER WOODY, MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, PHILLIP H. WOODY, AND PHILLIP H. WOODY AND GAYLE B. WOODY, INDIVIDUALLY; (93 CVS 147) PLAINTIFFS V. SHAWN NATHAN ROBINSON AND NATHAN ROBINSON, DEFENDANTS

CHRISTOPHER C. TSAVATEWA, MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, BRENDA L. TSAVATEWA, AND BRENDA L. TSAVATEWA, INDIVIDUALLY; (93 CVS 148) PLAINTIFFS V. SHAWN NATHAN ROBINSON AND NATHAN ROBINSON, DEFENDANTS

KRESHANA LYNETTE SCHAFER, MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, ANNA IRENE FORREST AND ANNA IRENE FORREST, INDIVIDUALLY; (93 CVS 149) PLAINTIFFS V. SHAWN NATHAN ROBINSON AND NATHAN ROBINSON, DEFENDANTS

No. 311A96

(Filed 6 December 1996)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 123 N.C. App. 159, 472 S.E.2d 610 (1996), reversing an order for summary judgment for the defendants entered by Hyatt, J., on 12 January 1995 in Superior Court, Jackson County. Heard in the Supreme Court 13 November 1996.

Richard B. Harper, and Bryce Thomas & Associates, by Bryce O. Thomas, Jr., for plaintiffs-appellees.

Morris, York, Williams, Surles & Brearley, by Gregory C. York, for defendants-appellants.

PER CURIAM.

Reversed for the reasons stated in the dissenting opinion of Judge Wynn. Remanded to the Court of Appeals for further remand to Superior Court, Jackson County, for reinstatement of the order of summary judgment.

REVERSED AND REMANDED.

PROFESSIONAL LIABILITY CONSULTANTS, INC. v. HOMER U. TODD AND INSURANCE MANAGEMENT CONSULTANTS, INC.

No. 236A96

(Filed 6 December 1996)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 122 N.C. App. 212, 468 S.E.2d 578 (1996), affirming an order entered by Greeson, J., on 13 April 1995 in Superior Court, Guilford County. Heard in the Supreme Court 14 November 1996.

Roberson Haworth & Reese, P.L.L.C., by Robert A. Brinson and Alan B. Powell, for plaintiff-appellee.

Bennett & Blancato, L.L.P., by Richard V. Bennett and Sherry R. Dawson, for defendant-appellants.

PER CURIAM.

For the reasons stated by Smith, J., in the dissenting opinion in the Court of Appeals, the decision of the Court of Appeals is reversed. The cause is remanded to the Court of Appeals for further remand to the Superior Court, Guilford County, for entry of an order dissolving the preliminary injunction.

REVERSED AND REMANDED.

EVANS v. COWAN

[345 N.C. 177 (1996)]

GLORIA ANN EVANS v. JUDITH R. COWAN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS DIRECTOR OF STUDENT HEALTH SERVICES, UNC-CH; BRUCE VUKOSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE AFTERHOURS PROGRAM AT STUDENT HEALTH SERVICES, UNC-CH; AND JANE M. HOGAN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSOCIATE DIRECTOR OF STUDENT HEALTH SERVICES, UNC-CH

No. 213PA96

(Filed 6 December 1996)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(1) from a unanimous decision of the Court of Appeals, 122 N.C. App. 181, 468 S.E.2d 575 (1996), reversing an order granting summary judgment for defendants entered by Stephens (Donald W.), J., on 7 March 1995, in Superior Court, Orange County, and remanding the case to the trial court. Heard in the Supreme Court 13 November 1996.

McSurely Dorosin & Osment, by Alan McSurely, Mark Dorosin, and Ashley Osment, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, and Celia Grasty Jones, Associate Attorney General, for defendant-appellants.

PER CURIAM.

AFFIRMED.

H.B.S. CONTRACTORS, INC. v. CUMBERLAND COUNTY BOARD OF EDUCATION

No. 180PA96

(Filed 6 December 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 49, 468 S.E.2d 517 (1996), affirming declaratory judgment entered 1 March 1995 by Brewer, J., in Superior Court, Cumberland County. Heard in the Supreme Court 12 November 1996.

Thorp and Clarke, by Herbert H. Thorp and Matthew R. Plyler, for plaintiff-appellant and -appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Elizabeth L. Riley, for defendant-appellant and -appellee.

Tharrington Smith, by Ann L. Majestic, Michael Crowell, and Rod Malone, on behalf of North Carolina School Boards Association, Inc., amicus curiae.

Everett Gaskins Hancock & Stevens, by Hugh Stevens and C. Amanda Martin, on behalf of Fayetteville Publishing Company and The North Carolina Press Association, amici curiae.

PER CURIAM.

PETITION FOR DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

ADDISON v. MOSS

No. 304P96

Case below: 122 N.C. App. 569

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

CARTER v. STANLY COUNTY

No. 350A96

Case below: 123 N.C. App. 235

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 November 1996.

CRAFT v. BILL CLARK CONSTRUCTION CO.

No. 474P96

Case below: 123 N.C. App. 777

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

HIEB v. HOWELL'S CHILD CARE CENTER

No. 443P96

Case below: 123 N.C. App. 61

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

IN RE FORECLOSURE OF AAL-ANUBIAIMHOTEPOKOROHAMZ

No. 337P96

Case below: 123 N.C. App. 133

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

IN RE GORAYA

No. 462P96

Case below: 124 N.C. App. 228

Petition by respondents for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

KELLY v. OTTE

No. 422P96

Case below: 123 N.C. App. 585

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

MALINOWSKI v. GUM AND HILLIER

No. 478P96

Case below: 124 N.C. App. 230

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

PULLIAM v. SMITH

No. 499PA96

Case below: 124 N.C. App. 144

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 December 1996. Petition by plaintiff for writ of supersedeas allowed and motion for temporary stay dismissed as moot 5 December 1996.

SEUFERT v. SEVEN LAKES DEVELOPMENT CO.

No. 346PA96

Case below: 123 N.C. App. 161

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 December 1996.

STATE v. CREASON

No. 364A96

Case below: 123 N.C. App. 495

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question is allowed 5 December 1996 except as to defendant's Issue I, namely, whether defendant's constitutional protection against double jeopardy was violated by his being punished both under the North Carolina Controlled Substance Tax Act and by a criminal prosecution.

STATE v. KEY

No. 303P96

Case below: 122 N.C. App. 579

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question is allowed 5 December 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

STATE v. McCOTTER

No. 376P96

Case below: 123 N.C. App. 359

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

STATE v. McMILLAN

No. 446P96

Case below: 122 N.C. App. 400

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 December 1996.

STATE v. MOODY

No. 343P96

Case below: 123 N.C. App. 162

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

STATE v. PREVATTE

No. 126A95

Case below: Anson County Superior Court

Petition by defendant for writ of certiorari to review the order of the Anson County Superior Court denied 5 December 1996.

STATE v. SISK

No. 371A96

Case below: 123 N.C. App. 361

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 12 November 1996. As to Question Number 2 presented in defendant's petition for discretionary review: "Whether it was error for the Court to fail to dismiss the indictment against the defendant at the close of the State's evidence as being fatally defective?", the petition is allowed to consider that question. As to all other questions raised in the defendant's petition for discretionary review, the petition is denied 12 November 1996.

STATE v. SOUTHARD

No. 451P96

Case below: 123 N.C. App. 790

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

STATE v. STRICKLAND

No. 292P96

Case below: 122 N.C. App. 580

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 December 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

VASSEUR v. ST. PAUL MUTUAL INS. CO.

No. 427P96

Case below: 123 N.C. App. 418

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 December 1996.

STATE OF NORTH CAROLINA v. WILLIAM LEROY BARNES, ROBERT LEWIS BLAKNEY, FRANK JUNIOR CHAMBERS

No. 146A94

(Filed 10 February 1997)

1. Criminal Law § 76 (NCI4th Rev.)— capital murder—motion for change of venue—pretrial publicity—no showing of particular objection to individual juror

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery by denying defendants' motion for change of venue based upon pretrial publicity. While at least nine sitting jurors had been exposed to pretrial publicity and defendants exhausted all of their peremptory challenges, no defendant specifically identified a single juror who was objectionable to him. The jurors at issue each stated unequivocally that they would be able to arrive at a determination of defendant's guilt or innocence based solely upon the evidence presented at trial and defendants have not offered particular objections to any individual juror. Defendants have not shown any specific and identifiable prejudice necessitating a change of venue.

Am Jur 2d, Criminal Law § 378.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like. 34 ALR 3d 804.

2. Criminal Law § 76 (NCI4th Rev.)— capital murder—motion for change of venue—pretrial publicity—general prejudice against defendant

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery by denying defendants' motion for a change of venue based on the county's population being infected with prejudice against defendants. Several factors distinguish this case from *State v. Jerrett*, 309 N.C. 239, and *Sheppard v. Maxwell*, 384 U.S. 333; Rowan County does not constitute the small "neighborhood" type of environment at issue in *Jerrett*, none of the seated jurors possessed any preconceived notions about the guilt or innocence of the defendants, although a number had heard about the case; the level of

familiarity that the *Jerrett* jurors had with the victim, the victim's family, and the State's witnesses is not present in this case; and the proceedings here were not merely a sideshow to the larger carnival of public spectacle. Viewing the totality of the circumstances, there is not a reasonable likelihood that pretrial publicity prevented defendants from having a fair trial.

Am Jur 2d, Criminal Law § 378.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like. 34 ALR 3d 804.

3. Criminal Law § 78 (NCI4th Rev.)— change of venue—pretrial publicity—jurors' ability to rely solely on evidence presented at trial

Although defendant contends that *State v. Moore*, 335 N.C. 567, *cert. denied*, 130 L. Ed. 2d 174 (1994) (holding that the trial court does not err by denying a motion for change of venue when each juror states unequivocally that he or she can set aside what was heard previously about defendant's guilt and arrive at a determination based solely on evidence presented at trial) violates *Murphy v. Florida*, 421 U.S. 794 (1975) (holding that jurors' assurances that they are equal to the task of setting aside preconceived notions about a case cannot be dispositive of the accused's rights), our appellate courts have the power to consider the evidence and the totality of the circumstances in determining whether the trial court has erred in resolving such a motion. The most persuasive evidence as to whether pretrial publicity was prejudicial or inflammatory usually will be the jurors' responses to questions asked them during jury selection. Absent some reason to doubt jurors' unequivocal statements that they will rely solely on the evidence presented in determining the outcome of the trial, the North Carolina Supreme Court has no need to further examine the validity of the trial court's ruling.

Am Jur 2d, Jury §§ 193, 289; Trial § 1546.

4. Jury § 106 (NCI4th)— capital murder—jury selection—motion for individual voir dire denied

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery by refusing to allow individual voir dire of prospective jurors. Any error was harmless because the trial judge told defense counsel at the

beginning of the proceeding that, while his practice was to deal with jury selection a panel at a time, he would entertain arguments on individual voir dire and would be glad to keep an open mind on the issue. Defendants have failed to identify any possible particular harm resulting from their being required to question each of the jurors in the presence of the others.

Am Jur 2d, Jury §§ 194, 198.

5. Jury § 243 (NCI4th)— capital murder—jury selection—additional peremptory challenges denied

The trial court did not err in a capital prosecution for first-degree murder, burglary, and robbery by denying defendants additional peremptory challenges. The court allowed each defendant an additional peremptory challenge because one juror who had been accepted by all parties was dismissed because of a family emergency. Defendants therefore enjoyed the use of a total of forty-five peremptory challenges, more than the statutory provision allows.

Am Jur 2d, Jury §§ 235, 236.

Jury: number of peremptory challenges allowed in criminal case, where there are two or more defendants tried together. 21 ALR3d 725.

6. Jury § 248 (NCI4th)— capital murder—peremptory challenges—alleged racial discrimination—State's reasons sufficient

The trial court in a capital prosecution for first-degree murder, burglary, and robbery did not allow the State to exercise three peremptory challenges in a racially discriminatory manner where the trial court ruled that defendants failed to make a *prima facie* showing of racial discrimination but asked the district attorney to state his reasons for excluding the jurors. Even if answers of a venire member who is later peremptorily excused are similar to those of a juror of another race who sits in judgement of a defendant and the manner of questioning differs, this does not necessarily lead to a conclusion that the prosecutor's reasons were pretextual. It cannot be said that the trial court's rulings were clearly erroneous in light of the totality of the circumstances.

Am Jur 2d, Jury § 244.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-*Batson* state cases. 20 ALR5th 398.

7. Evidence and Witnesses § 1756 (NCI4th)— capital murder—mannequins—illustrative of number and direction of bullet wounds

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery by allowing the use of mannequins for the purpose of illustrating the number and direction of bullet wounds incurred by the victims. Although defendants argued that the demonstration was both cumulative and prejudicial, the evidence presented with respect to the killings was complex and the three dimensional evidence involving the mannequins and dowels was undoubtedly helpful to the jury in resolving and understanding these complex issues. The evidence concerning the bullet paths was also probative with respect to premeditation and deliberation, as the nature and number of a victim's wounds and whether the wounds are inflicted after a victim has been rendered helpless are circumstances to be considered in this determination.

Am Jur 2d, Homicide § 415.

Propriety, in trial of criminal case, of use of skeleton or model of human body or part. 83 ALR2d 1097.

8. Evidence and Witnesses § 1130 (NCI4th)— hearsay—codefendants' statements—admissible

The trial court did not err in a capital prosecution for first-degree murder, burglary, and robbery, by admitting hearsay statements by two codefendants against defendant Barnes. Blakney's conversation with Valerie Mason tended to subject him to criminal liability, and he no doubt knew the consequences of acknowledging his involvement in an attack on a law enforcement officer. His statements therefore fit within the hearsay exception in N.C.G.S. § 8C-1, Rule 804(b)(3). Moreover, without ruling on any issues concerning the scope of North Carolina's Rule 804(b)(3) hearsay exception, Blakney's comments do not have the taint of "special suspicion" reserved for those statements aimed at implicating another defendant while exonerating the declarant and therefore do not violate the rule of *Williamson v. United States*, 512 U.S. 594.

Am Jur 2d, Homicide § 345.

9. Evidence and Witnesses § 1123 (NCI4th)— hearsay statements by coconspirator—admissible

The hearsay statements of defendant Blakney, admitted in the capital trial of three defendants for first-degree murder, burglary, and robbery, fit within the exception for statements of a coconspirator found in N.C.G.S. § 8C-1, Rule 801(d)(E). It is not necessary for the prosecution to establish the existence of the conspiracy before the admission of a hearsay statement falling within this exception as long as the existence of the conspiracy is eventually established. The jury could find from the evidence that defendants' conduct up to and including the robbery was part of a conspiracy, that the subsequent actions of defendants were in the course of and in furtherance of the conspiracy, as Blakney's remarks and the actions of defendants were designed to conceal their involvement in the crimes.

Am Jur 2d, Homicide § 346.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence. 4 ALR3d 671.

10. Evidence and Witnesses § 1134 (NCI4th)— hearsay statements of coconspirator—Bruton distinguished

The trial court did not err as to defendant Barnes in a capital prosecution for first-degree murder, burglary, and robbery by admitting the statement of codefendant Chambers that "I shouldn't have gone with them." The statement was not powerfully incriminating in the context of the evidence against defendant Barnes; the reference to "them" was not made in the context of any specific statements about the killings and the trial court cautioned the jury with respect to the statement. The situation in this case is distinguishable from *Bruton v. United States*, 391 U.S. 123. Chambers' statements did not clearly identify Barnes or create a substantial risk that the jury would ignore the trial court's instructions in its determination of defendant Barnes' guilt.

Am Jur 2d, Homicide § 346.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence. 4 ALR3d 671.

11. Criminal Law § 331 (NCI4th Rev.)— multiple defendants—murder, robbery, burglary—joinder—no abuse of discretion

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery as to defendant Barnes by joining his case with that of the other defendants. There is a strong policy in North Carolina favoring the consolidation of the cases of multiple defendants at trial when they may be held accountable for the same criminal conduct and severance is not appropriate merely because the evidence against one codefendant differs from the evidence against another. The differences in evidence must result in a conflict in the defendants' respective positions at trial of such a nature that, in viewing the totality of the evidence in the case, the defendants were denied a fair trial; however, substantial evidence of guilt may override any harm resulting from the contradictory evidence offered by them individually. The common sense of the jury, aided by appropriate instructions, is often relied on not to convict one defendant on the basis of evidence which relates only to the other. The trial court here offered limiting instructions when the statements were introduced and defendant Barnes failed to show an abuse of discretion.

Am Jur 2d, Trial §§ 157, 158.

12. Criminal Law § 346 (NCI4th Rev.)— multiple defendants—joinder—evidence of guilt of other defendants

Defendant Barnes was not entitled to severance in a prosecution for capital murder, burglary, and robbery although he contended that the differences in evidence against him when compared with evidence against his codefendants prevent a fair determination of his guilt. Much of the evidence which Barnes contends overwhelmed jurors would have been admissible against him in a separate trial. Moreover, the common sense of the jury, aided by appropriate instructions, is relied on not to convict one defendant on the basis of evidence which relates only to the other.

Am Jur 2d, Trial § 165.

13. Criminal Law § 348 (NCI4th Rev.)— multiple defendants—severance denied—no error

The trial court did not abuse its discretion by denying defendant Chambers' motion for severance in a capital prosecution for

first-degree murder, burglary, and robbery given the strong policy favoring the consolidated trials of defendants accused of collective criminal behavior, the limited evidence at issue here, the North Carolina Supreme Court's trust in the common sense of the jury, and the limiting instructions of the trial court.

Am Jur 2d, Trial § 157.

14. Criminal Law § 348 (NCI4th Rev.)— multiple defendants—admission of redacted statement—motion for severance by defendant making statement

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery by denying defendant Blakney's motion for severance where Blakney contended that the introduction of his statements in a sanitized or redacted form denied him a fair trial in that his statements in their original form would have demonstrated that he was merely a passive participant in the crimes. The evidence at trial was sufficient for a finding of guilt based on acting in concert; any passivity by Blakney was a consideration more appropriate for sentencing. The redaction here does not rise to the level of exclusion of the statements in *State v. Boykin*, 307 N.C. 87 or *State v. Alford*, 289 N.C. 372.

Am Jur 2d, Trial §§ 164, 165.

15. Criminal Law § 325 (NCI4th Rev.)— capital sentencing—motions to sever—denial not error

There was no error in a capital prosecution for first-degree murder, burglary, and robbery in the trial court's denial of motions by defendants Barnes and Chambers to sever the capital sentencing proceeding where Barnes and Chambers argued that codefendant Blakney's testimony at sentencing was prejudicial to them. Blakney testified that he did not shoot the victims, that Barnes and Chambers shot the victims while he was in another room, and that he had not planned to kill anyone during the robbery; Barnes and Chambers did not testify and did not put forth any evidence challenging the testimony of their codefendant. The differences in evidence in this capital sentencing proceeding did not result in such antagonistic defenses as to deny a fair capital sentencing proceeding; each defendant could show why he should not receive the death penalty without arguing that the others should.

Am Jur 2d, Trial § 173.

Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 ALR3d 245.

16. Criminal Law § 482 (NCI4th Rev.)— capital murder—juror's contact with brother concerning defendant—inquiry by court

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery where a juror volunteered during the State's presentation of evidence that it had been brought to his attention by his brother that the brother had known two of the defendants in prison, the trial court asked whether the juror and his brother had discussed the case, the juror responded that they had not, and the trial court made no further inquiry. The trial court was in a position to observe and scrutinize the juror's credibility with respect to the juror's response to the question and was satisfied that the juror had not been tainted; it cannot be said that the trial court's actions were so arbitrary that they could not have been the result of a reasoned decision.

Am Jur 2d, Trial §§ 1562, 1564.

17. Criminal Law § 483 (NCI4th Rev.)— capital murder—juror misconduct—no abuse of discretion

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, robbery, and burglary in disposing of issues concerning juror misconduct. Assuming *arguendo* that defense counsel's unsubstantiated assertion that a juror read Bible verses before deliberations began was accurate, there was no assertion that the juror's reading from the Bible was accomplished in the context of any discussion about the case itself or that it involved extraneous influences as defined by the North Carolina Supreme Court. As to whether there was an abuse of discretion in the court's failure to inquire further into the assertion that a juror read the Bible aloud in the jury room prior to the commencement of deliberations and prior to the trial court's instructions to the jury, there is no evidence that the alleged Bible reading was in any way directed to the facts or governing law at issue in the case. As to the juror's alleged actions in calling a minister to ask a question about the death penalty, nothing in this assertion involved "extraneous information" as contemplated in N.C.G.S. § 8C-1, Rule 606(b) or dealt with the fairness or impartiality of the juror. There is no evidence that the content of any

such discussion prejudiced defendants or that the juror gained access to improper or prejudicial matters and considered them with regard to this case. It cannot be said under the particular circumstances of this case that the trial court's actions in failing to probe further into the sanctity of the jury room was an abuse of discretion.

Am Jur 2d, Trial §§ 1562, 1610.

Propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case. 21 ALR4th 444.

18. Homicide § 583 (NCI4th)— capital murder—instructions—acting in concert—*Blankenship* overruled

The trial court did not err in a capital prosecution for first-degree murder in its instruction to the jury on the doctrine of acting in concert with regard to premeditated and deliberate first-degree murder. Although the defendants argued that this instruction violated *State v. Blankenship*, 337 N.C. 543, by permitting the jury to find defendants guilty of premeditated and deliberate first-degree murder without specific findings that they individually possessed the requisite *mens rea* to commit that crime, *Blankenship*, *State v. Reese*, 319 N.C. 110, and their progeny are overruled to the extent that they are inconsistent with this opinion. The correct statement of the doctrine of acting in concert in this jurisdiction is that enumerated in *State v. Westbrook*, 279 N.C. 18, and *State v. Erlewine*, 328 N.C. 626.

Am Jur 2d, Criminal Law § 180; Homicide § 263.

Propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case. 21 ALR4th 444.

19. Constitutional Law § 166 (NCI4th)— capital murder—instructions—acting in concert—*Blankenship* overruled—not *ex post facto* in this case

The return to the acting in concert instructions as enumerated in *State v. Erlewine*, 328 N.C. 626, rather than *State v. Blankenship*, 337 N.C. 543, did not act as an *ex post facto* law in this capital first-degree murder prosecution because the crimes here were committed on 29 October 1992, defendants were sentenced on 10 March 1994, and the certification date for

Blankenship was 29 September 1994. The law on acting in concert at all relevant times during the disposition of this case was the rule as stated in *Erlewine*, which is reaffirmed.

Am Jur 2d, Criminal Law § 144.

20. Criminal Law § 690 (NCI4th Rev.)— capital murder—peremptory instructions—nonstatutory mitigating circumstances—no error

The trial court did not err as to defendants Barnes and Chambers in a capital sentencing proceeding in its peremptory instructions on nonstatutory mitigating circumstances. The peremptory instructions given were legally correct as they reflected the distinction between the statutory and nonstatutory mitigators, advised the jury that all of the evidence in the case tended to support the nonstatutory mitigating circumstance, and allowed but did not require the jury to find the circumstance.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

21. Criminal Law § 1370 (NCI4th Rev.)— capital sentencing—especially heinous, atrocious, or cruel aggravating circumstance—vicarious actions

There was no plain error in a capital sentencing proceeding as to defendants Barnes and Chambers where defendants contended that the instruction on the especially heinous, atrocious or cruel aggravating circumstance given by the court permitted the jury to find the circumstance vicariously based on the actions and specific intent of another defendant. The instruction was based on N.C.P.I. Crim. 150.10 and was said to be correct in *State v. Syriani*, 333 N.C. 350. Furthermore, the jury's findings tend to show that, for capital sentencing purposes, the jury adhered to the trial court's instruction to consider each defendant's involvement and culpability distinctly and that the jury did not find facts vicariously against one defendant based on the actions or intent of another.

Am Jur 2d, Criminal Law § 628; Trial § 166.

22. Appeal and Error § 150 (NCI4th)— capital murder—constitutional error—not raised at trial—not preserved for appeal

Defendants Barnes and Blakney were not heard on appeal from a capital sentencing hearing where they contended that the

trial court committed reversible constitutional error in overruling Barnes' objections to closing arguments made by the State but made no constitutional claims at trial.

Am Jur 2d, Appellate Review § 614.

23. Criminal Law § 475 (NCI4th Rev.)— capital sentencing—prosecutor's argument—prosecutor lying on floor

There was no error in a capital sentencing proceeding as to defendant Barnes where the prosecutor lay on the floor to demonstrate a previous attempted armed robbery by Barnes of a sixteen-year-old girl. Nothing in the record suggests that the prosecutor did anything other than lie on the floor and describe the attack; defendant has failed to show why or how this was an improperly prejudicial, theatrical, inflammatory demonstration.

Am Jur 2d, Trial § 649.

24. Criminal Law § 1346 (NCI4th Rev.)— capital sentencing—prosecutor's argument—aggravating circumstances—not double counting

There was no error in a capital sentencing proceeding as to defendant Barnes and Blakney where the prosecutor encouraged the jury to consider Mr. Tutterow's psychological torture in observing Mrs. Tutterow's death in determining the existence of the especially heinous, atrocious, or cruel aggravating circumstance and later encouraged the jury to use the death of Mrs. Tutterow to find the existence of the course of conduct aggravating circumstance. Aggravating circumstances are not redundant unless there is a complete overlap of evidence supporting them; some overlap in the evidence is permissible. Defendants concede that the court correctly instructed the jury not to find two or more aggravating circumstances from the same evidence and the argument did not conflict with any of the trial court's instructions and did not encourage the jury to ignore the instruction about not using the same evidence.

Am Jur 2d, Criminal Law § 628; Trial § 572.

25. Criminal Law § 1349 (NCI4th Rev.)— capital sentencing—prosecutor's argument—mitigating circumstances—statutory and nonstatutory—value—no prejudicial error

There was no prejudicial error as to defendants Barnes and Blakney in a capital prosecution where they contended that the

prosecution's argument on mitigating circumstances erroneously informed jurors that it was up to them to decide whether every mitigating circumstance, both statutory and nonstatutory, carried mitigating value, but immediately after the defense objection the prosecutor went on to differentiate between statutory and nonstatutory mitigators.

Am Jur 2d, Trial § 572.

26. Evidence and Witnesses § 221 (NCI4th)— murder—subsequent possession of victim's property—relevance

The trial court did not err as to defendant Barnes in a capital prosecution for first-degree murder, robbery, and burglary by not limiting its instruction on the doctrine of possession of recently stolen property to burglary and robbery charges. Although Barnes argues that the instructions allowed the jury to infer premeditation and deliberation from the fact that he had stolen goods in his possession shortly after the time of the murders, the instruction informed the jurors that they were permitted, but not required, under the doctrine of recent possession to make the inference that Barnes stole the property in their determination of whether Barnes committed the other crimes at issue, but were allowed to use any such inference only to the extent appropriate under the other instructions of the trial court. The trial court's instructions in no way imply that the inference that a defendant stole property can be substituted for the jury's specific and independent findings as to whether Barnes premeditated and deliberated the killings.

Am Jur 2d, Evidence § 541.

27. Homicide § 242 (NCI4th)— first-degree murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence of premeditation and deliberation as to defendant Barnes in a prosecution for first-degree murder, robbery, and burglary where the gunshot residue evidence tended to show that Barnes shot the victims, the fact that Barnes disposed of one of the murder weapons permits a reasonable inference that he had fired the weapon, and the State's evidence also tended to show that Barnes demonstrated a willingness to kill someone at different times on the day of the murders.

Am Jur 2d, Homicide § 439.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

28. Evidence and Witnesses §§ 1274, 1275 (NCI4th)— confession—waiver of rights—defendant's retardation and alcohol abuse

The trial court did not err as to defendant Blakney in a capital prosecution for first-degree murder, robbery, and burglary in its determination that Blakney had knowingly and intelligently waived his *Miranda* rights where a psychologist testified that he believed that Blakney's mental retardation, in addition to difficulties related to Blakney's consumption of alcohol, rendered him unable fully to understand his *Miranda* rights. While intoxication and subnormal mentality are factors to be considered, they do not of themselves necessarily cause a confession to be inadmissible because of involuntariness or the ineffectiveness of a waiver; the factors as presented by Blakney here are not sufficient to render his confession inadmissible.

Am Jur 2d, Criminal Law § 797; Evidence § 744.

Mental subnormality of accused as affecting voluntariness or admissibility of confession. 8 ALR4th 16.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs. 25 ALR4th 419.

29. Evidence and Witnesses § 1708 (NCI4th)— first-degree murder—photographs of crime scene showing victims' wounds

The trial court did not abuse its discretion as to defendant Blakney in a capital prosecution for first-degree murder, burglary, and robbery by allowing into evidence eighteen photographs that depicted the crime scene. All of the photographs illustrated testimony about the nature, number, and location of the victims' wounds and the court specifically noted for the record that it had examined the photographic evidence and determined that the probative value of all the photographs was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. Moreover, two of the eighteen exhibits were excluded from publication to the jury as duplicative and the trial court prohibited the State from introducing two other photographs for presentation to the witness or for admis-

sion into evidence. Defendant failed to establish that the trial court abused its discretion.

Am Jur 2d, Evidence §§ 961-964.

30. Criminal Law § 1342 (NCI4th Rev.)— capital sentencing—prior felony involving violence—breaking or entering—testimony

The trial court did not err during a capital sentencing proceeding as to defendant Frank Chambers by allowing testimony concerning a prior breaking and entering in support of the aggravating circumstance of a prior conviction for a felony involving the use or threat of violence where the witness testified that he had been bound, robbed, and severely beaten by an intruder he knew as "Richard Chambers"; the witness was unable to identify defendant in court; and the State introduced certified copies of the indictment, transcript of plea, and judgment in which Chambers pled guilty to breaking and entering the witness's residence. A proper in-court identification was unnecessary because the State introduced into evidence certified copies of the transcript of plea and judgment. The witness's testimony, along with the testimony by the investigating officer and photographs of the witness's injuries, support the conclusion that violence against the witness was an integral part of the commission of the breaking and entering. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law § 599.

31. Evidence and Witnesses § 213 (NCI4th)— first-degree murder—defendant's release from jail hours before murder—relevant to premeditation and deliberation and motive

The trial court did not err as to defendant Chambers in a capital prosecution for first-degree murder, burglary, and robbery by admitting testimony regarding his release from jail a few hours before the murders. The evidence was relevant to premeditation and deliberation and to motive in that it tended to show that defendant knew Mr. Tutterow, who cooked part-time at the jail and served as a deputy sheriff and was known to carry significant amounts of money in his wallet, and in that it tended to show that defendant wanted money when he was released from jail without money.

Am Jur 2d, Evidence § 525.

32. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not disproportionate

Death sentences for first-degree murders were not disproportionate where the record supports the jury's findings of aggravating circumstances, the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary consideration, and the sentences were not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the individual defendants. It is significant that a conviction was based upon both the theories of premeditation and deliberation; three of the four aggravating circumstances found in this case are most often found in death cases upheld on appeal; the presence of any of those three aggravators is sufficient when only a single aggravator is submitted and found; there has not been a finding of disproportionality when the previous violent felony conviction is found; the murder of multiple victims weighs heavily against defendant; and disproportionality has never been found in a case involving multiple murders. Defendant Barnes and Chambers robbed and viciously murdered two elderly victims and, in the course of the murders and the events that followed, showed an utter disregard for the value of human life. Although a number of mitigating circumstances were found as to Barnes, it cannot be said that the death sentences are disproportionate.

Am Jur 2d, Criminal Law § 628.

Justice FRYE dissenting.

Justices WHICHARD and PARKER join in this dissenting opinion.

Appeal as of right by defendants pursuant to N.C.G.S. § 7A-27 from judgments imposing sentences of death with respect to defendants Barnes and Chambers and sentences of life imprisonment with respect to defendant Blakney entered by Helms, J., on 10 March 1994, in Superior Court, Rowan County, upon jury verdicts finding defendants guilty of first-degree murder. Defendant Chambers' motion to bypass the Court of Appeals as to his robbery and burglary convictions was allowed by this Court on 6 June 1995; defendants Barnes' and Blakney's motions to bypass the Court of Appeals as to their robbery and burglary convictions were allowed on 14 June 1995. Heard in the Supreme Court 17 May 1996.

Michael F. Easley, Attorney General, by William B. Crumpler and John G. Barnwell, Assistant Attorneys General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine M. Crawley, Assistant Appellate Defender, for defendant-appellant Barnes.

Fred W. DeVore, III, for defendant-appellant Blakney.

Seth R. Cohen and J. David James for defendant-appellant Chambers.

MITCHELL, Chief Justice.

Defendants William Leroy Barnes, Robert Lewis Blakney, and Frank Junior Chambers were tried jointly and capitally upon indictments charging them each with two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of first-degree burglary in connection with the killings of B.P. and Ruby Tutterow. The jury returned verdicts finding all three defendants guilty of both counts of first-degree murder on the theory of premeditation and deliberation as well as under the felony murder rule. The felonies the jury relied upon in finding defendants guilty of felony murder were burglary and both counts of armed robbery. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendants Barnes and Chambers be sentenced to death for each murder and that defendant Blakney be sentenced to a mandatory term of life imprisonment for each murder. The trial court accordingly sentenced defendants Barnes and Chambers to death for the first-degree murders and sentenced defendant Blakney to two terms of life imprisonment. Defendants were also each sentenced to two terms of forty years' imprisonment for armed robbery and a term of forty years' imprisonment for burglary. All sentences are to be served consecutively.

Defendants appeal to this Court as a matter of right from the judgments and respective sentences of death and life imprisonment for the first-degree murders. We allowed their motions to bypass the Court of Appeals on their appeal of the judgments entered for the offenses of armed robbery and burglary. For the reasons set forth in this opinion, we conclude that defendants received a fair trial, free from prejudicial error, and that the respective death and life sentences imposed by the trial court must stand.

While we discuss the relevant evidence in detail where necessary in the individual assignments of error, a brief synopsis of the evidence introduced at trial is as follows: On 29 October 1992, all three defendants went to the Salisbury home of B.P. and Ruby Tutterow to rob the Tutterows. Defendant Chambers had met B.P. while incarcerated at the Rowan County jail, where B.P. cooked part-time and served as a deputy sheriff. B.P. was known to carry significant amounts of money in his wallet and had given defendant Chambers money to buy cigarettes and food while Chambers was in jail.

Chambers was released from jail on the afternoon of 29 October, and shortly thereafter met up with defendant Blakney and Antonio Mason at a nearby convenience store. Chambers told Blakney and Mason that he had been released from jail without any money and that he knew someone who lived nearby who had plenty of money. Chambers said that he was willing to kill someone if it was necessary to get some money. After being unable to convince Mason to cooperate in their efforts, Chambers and Blakney joined up with defendant Barnes, who was at that time in the convenience store parking lot. Chambers, Blakney, and Barnes then went with others to the apartment of Cynthia Gwen, where the three defendants talked together about "mak[ing] a lick," or robbing someone. Barnes got into an argument with another man while at Gwen's apartment, and Gwen asked him to leave. The three defendants then left Gwen's apartment together around 10:00 p.m.

Patricia Miller was speaking with B.P. Tutterow on the phone around 10:00 p.m. that evening when she heard a commotion on the line and the phone went dead. After attempting to reach the Tutterows several times, Miller telephoned the police around 11:30 p.m. Salisbury police officers arrived at the Tutterow home around 12:30 a.m. on 30 October and found the Tutterows dead and the house ransacked.

The Tutterows' daughters determined that several things were missing from their parents' home including B.P.'s .357 Magnum pistol and a .38-caliber revolver, B.P.'s gold wedding band and gold watch, several items of jewelry, two bank bags that usually contained cash, and a bag of antique coins including some Susan B. Anthony dollars and Kennedy half-dollars.

Physical evidence in the home tied defendants Blakney and Chambers to the crime. The DNA profile of a sample drawn from one cigarette butt found in the house matched that of Chambers, and the

profile on another butt matched that of Blakney. A latent fingerprint on a money box found in one bedroom matched Chambers' left middle finger. A print obtained from another money box matched that of Blakney's left palm.

Around 11:00 p.m. on the night of the murders, Barnes, Blakney, and Chambers went to the apartment where Antonio, Sharon, and Valerie Mason lived. Blakney and Chambers told Sharon that they would pay her for the use of her car to go to Kannapolis to dispose of some guns. Although Sharon refused, Blakney gave the two women around twenty to forty dollars and gave Valerie a wedding band with one small diamond. When Valerie asked Blakney where he got the ring, he replied that "we f------ up a police" and that it was a "three-person secret." Blakney further told Valerie that he, Barnes, and Chambers had some jewelry and guns. Barnes and Chambers each then showed Valerie and Sharon a gun.

Defendants then left with Antonio to buy drugs. They bought about sixty dollars worth of crack at a nearby apartment complex and returned to the Mason apartment to smoke it, after which defendants left the apartment again. Shortly thereafter, Antonio, Sharon, and Valerie heard sirens and followed the sounds to the Tutterow home, where they learned of the murders. Valerie told an officer at the scene that "[Blakney] shouldn't have killed those people like that" and went to the police department around midnight to tell the police what she knew.

Some time after midnight, Everette Feamster, a Salisbury cab driver, drove defendants to the Bradshaw Apartments in Salisbury. Feamster and a passenger in the cab, Charles Fair, testified that they heard defendants talking about money and saw them passing money back and forth. Upon arriving at the Bradshaw Apartments, Barnes purchased three hundred dollars' worth of crack cocaine from Wayne Smith and bought more crack from Willie Peck. Barnes later sold B.P.'s .38-caliber revolver for five rocks of crack. Defendants then went to several other parties throughout the early morning, during which time they bought as much as one thousand dollars' worth of crack from Smith and varying amounts of crack from other sellers. At the home of Paula Jones, Smith saw Barnes with a pistol stuck in his pants and Blakney with a pistol in his pants. Blakney then gave his pistol to Chambers.

During the early morning of 30 October 1992, Blakney pawned two rings—a "mother's ring" with three birthstones and a wedding

band—and some antique coins. Barnes attempted to sell a gold watch with diamonds on the face to Joseph Knox. Chambers attempted to hide Mr. Tutterow's .357 Magnum pistol at the home of Carl Fleming. Barnes was taken into custody on the morning of 30 October, Blakney was arrested that afternoon, and Chambers turned himself in that afternoon.

All three defendants later made statements to police, but each denied having been involved in the killings of the Tutterows. Chambers admitted to having been in the Tutterow home and told Rachel Eberhart, "Hell yeah, I killed the m---- f-----," although he later said he was merely kidding. Blakney told police that he took items from the bedrooms but that he did not take part in the shootings. Barnes denied having seen Blakney or Chambers on 29 October 1992 and stated that he had nothing to do with the killings. Special Agent Michael Creasy testified that the palms of Barnes' hands had indications of gunshot residue on them and explained that the concentrations on Barnes' palms could have been a result of Barnes having merely handled a gun rather than having actually shot one. Gunshot residue was also found on the waistbands of Barnes' and Chambers' pants. Furthermore, during court proceedings in November, Barnes wore a gold necklace and a watch belonging to the Tutterows.

Dr. Brent Hall testified that Ruby Tutterow died as a result of multiple gunshot wounds. She suffered ten wounds in all, four of which were to the head. Hall testified that two of these wounds, one to the head and one to the back, had the potential to be rapidly fatal. Dr. Deborah Radisch testified that B.P. Tutterow also suffered multiple gunshot wounds and died as a result of a gunshot to the chest in combination with several shots to the face and head. B.P. had also been beaten and had suffered a number of defensive wounds. Special Agent Thomas Trochum testified that the Tutterows were shot with both a .357 Magnum revolver and .38-caliber revolver, although he added that he could not say whether a third gun was involved.

ARGUMENTS OF BARNES, BLAKNEY, AND CHAMBERS

We first deal with the several issues to which defendants jointly assign error. In assignments of error, defendants contend that the trial court committed an abuse of discretion by denying defendants' motion for change of venue, for individual *voir dire* of prospective jurors, and for additional peremptory challenges.

[1] With respect to the change of venue issue, defendants contend that widespread pretrial publicity "so infected the local community

that [they] could not receive a fair trial in Rowan County." Evidence presented at hearings on the change of venue motion tended to show that a number of articles were published and a number of television pieces aired in the Rowan County area about the circumstances of the murders. This coverage dealt with a number of different issues involving the murders: the resignation of an assistant district attorney because of the premature release of Chambers from jail hours before the killings; threats made against defendants and the relocation of defendants outside Rowan County because of these threats; the withdrawal of defense counsel because of the attorneys' inability to provide an effective defense because of conflicts, resulting in the trial court having to go outside Rowan County to find representation for defendants; and numerous descriptions of the good character of the victims. Defendants offered a survey taken over one year after the murders indicating that between seventy-eight and ninety-six percent of the Rowan County population knew about the murders. About one-third of the population believed that defendants were guilty and forty percent of the individuals surveyed who knew something about the murders had received at least some of their information through local word-of-mouth communication. Defendants further point out that of the 153 potential jurors, 136 had heard about the murders, 36 had formed an opinion as to the guilt of defendants, and 31 were excused for cause for being unable to set aside these opinions. At least nine of the twelve jurors who actually decided the case knew of the murders prior to their selection as jurors. Judge Walker, and later Judge Helms, denied defendants' motions to change venue.

It is axiomatic that criminal defendants have the right to be tried by an impartial jury free from outside influences. *State v. Boykin*, 291 N.C. 264, 269, 229 S.E.2d 914, 917 (1976). Motions for change of venue are governed by N.C.G.S. § 15A-957, which provides in pertinent part:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60 . . . .

N.C.G.S. § 15A-957(1) (1988). We explained the test for determining when a change of venue is warranted in *State v. Yelverton*, 334 N.C. 532, 434 S.E.2d 183 (1993):

> 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. "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." [*Id.*] 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. 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.

Yelverton, 334 N.C. at 539-40, 434 S.E.2d at 187 (citations omitted). A defendant must be afforded the opportunity to ensure the impartiality of the jury through means such as *voir dire*. *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), *cert. denied*, — U.S. —, 135 L. Ed. 2d 1080 (1996).

We have stated in many cases that defendants must ordinarily establish specific and identifiable prejudice against them as a result of pretrial publicity. *See, e.g.*, *State v. Lane*, 334 N.C. 148, 151-52, 431 S.E.2d 7, 9 (1993). In *Jerrett*, we held that for a defendant to meet his burden of showing that pretrial publicity prevented him from receiving a fair trial, he must show *inter alia* that jurors with prior knowledge decided the case, that he exhausted his peremptory challenges,

and that a juror objectionable to him sat on the jury. *Jerrett*, 309 N.C. at 255, 307 S.E.2d at 347-48. While at least nine sitting jurors in the present case had been exposed to pretrial publicity and defendants did exhaust all of their peremptory challenges, no defendant has specifically identified a single juror who was objectionable to him. In *State v. Alston*, 341 N.C. 198, 225-26, 461 S.E.2d 687, 701 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 100 (1996), we held that where "the record reveals no basis upon which to conclude that any juror based his or her decision upon pretrial information rather than the evidence presented at trial," defendant cannot carry his burden of showing specific and identifiable prejudice. As the jurors at issue in this case each stated unequivocally that they would be able to arrive at a determination of defendant's guilt or innocence based solely upon the evidence presented at trial and defendants have not offered particular objections to any individual juror, defendants have not shown any specific and identifiable prejudice necessitating a change of venue.

[2] Our examination of this issue does not conclude with this finding. We also indicated in *Jerrett* that where the totality of the circumstances reveals that a county's population is "infected" with prejudice against a defendant, we will find that the defendant fulfilled his burden of showing that he would not receive a fair trial in that county. *Jerrett*, 309 N.C. at 258, 307 S.E.2d at 349. We based this on the Supreme Court's decision in *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600 (1966). *Sheppard* involved a "trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival." *Murphy v. Florida*, 421 U.S. 794, 799, 44 L. Ed. 2d 589, 594 (1975). The Supreme Court stated in *Sheppard* that, while a defendant must ordinarily show specific prejudice, " 'at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.' " *Sheppard*, 384 U.S. at 352, 16 L. Ed. 2d at 614 (quoting *Estes v. Texas*, 381 U.S. 532, 542-43, 14 L. Ed. 2d 543, 550 (1965)).

In *Jerrett*, this Court noted that: (1) "the crime occurred in a small, rural and closely-knit county where the entire county was, in effect, a neighborhood," *Jerrett*, 309 N.C. at 256, 307 S.E.2d at 348, with a population at that time of 9,587 people, *id.* at 252 n.1, 307 S.E.2d at 346 n.1 (citing U.S. Census Report); (2) the *voir dire* showed that around one-third of the prospective jurors knew the victim or some member of the victim's family, many jurors knew potential State's witnesses, four jurors who decided the case knew

the victim's family or other relatives, six jurors who decided the case knew State's witnesses, and the foreman stated that he heard a relative of the victim discussing the case in an emotional manner, *id.* at 257, 307 S.E.2d at 348-49; and (3) the jury was examined collectively on *voir dire* rather than individually, thereby allowing potential jurors to hear that other potential jurors knew the victim and the victim's family, that some had already formed opinions in the case, and that some would be unable to give the defendant a fair trial, *id.* at 257-58, 307 S.E.2d at 349. A majority of this Court concluded that, based on the totality of the circumstances, there was a reasonable likelihood that the defendant would not be able to receive a fair trial before a local jury. *Id.*

Several factors distinguish the case *sub judice* from both *Sheppard* and *Jerrett*. With a population exceeding 110,000, *North Carolina Manual 1993-1994*, at 1083 (Lisa A. Marcus ed.), Rowan County does not constitute the small "neighborhood" type of environment at issue in *Jerrett*. While a number of prospective jurors had heard about the case prior to trial, none of the seated jurors possessed any preconceived notions about the guilt or innocence of the defendants. Furthermore, the level of familiarity that the *Jerrett* jurors had with the victim, the victim's family, and the State's witnesses is not present in this case. While the influence of the news media in cases like *Sheppard*, *Estes v. Texas*, 381 U.S. 532, 14 L. Ed. 2d 543 (1965), and *Rideau v. Louisiana*, 373 U.S. 723, 10 L. Ed. 2d 663 (1963), "pervaded the proceedings," whether in the community at large or in the courtroom, and resulted in a "circus atmosphere" *in the courtroom itself during trial*, *see Murphy*, 421 U.S. at 799, 44 L. Ed. 2d at 594 (discussing *Estes*), the record in this case does not show that the legal proceedings at issue here were merely a sideshow to the larger carnival of public spectacle. Rather, the trial court administered the proceedings in an able and commendable fashion, with the solemnity and gravity befitting a proceeding in which the fate of three defendants would be determined.

Moreover, the Supreme Court warned in *Murphy* that those cases mentioned above "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy*, 421 U.S. at 799, 44 L. Ed. 2d at 594. We have consistently held that factual news accounts with respect to the commission of a crime and the pretrial proceedings relating to that crime do not of themselves warrant

a change in venue. *See, e.g., State v. Soyars*, 332 N.C. 47, 53, 418 S.E.2d 480, 484 (1992). While at least nine of the seated jurors in this case had been exposed to some information about the killings before trial, there is no indication that these factual accounts were prejudicial to defendants. The jurors' responses themselves show that none of the seated jurors found the pretrial publicity sufficiently damning to provoke any preconceived notions about defendants' guilt or innocence. We therefore conclude that, in viewing the totality of the circumstances in this case, there is not a reasonable likelihood that pretrial publicity prevented defendants from receiving a fair trial in Rowan County and that the trial court did not err in refusing to grant defendants' motions for change of venue.

[3] Defendants further argue that this Court has virtually foreclosed appeals with respect to change of venue issues, noting that we held in *State v. Moore*, 335 N.C. 567, 586, 440 S.E.2d 797, 808, *cert. denied*, — U.S. —, 130 L. Ed. 2d 174 (1994), that a trial court does not err in refusing to allow a change of venue when "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." Defendants contend that this statement of the law with respect to change of venue motions violates *Murphy*, in which the Supreme Court held that "the juror's assurances that he is equal to [the task of setting aside his preconceived notions about a case] cannot be dispositive of the accused's rights." *Murphy*, 421 U.S. at 800, 44 L. Ed. 2d at 595. We disagree.

Our appellate courts have the power to consider the evidence and the totality of the circumstances in determining whether the trial court has erred in resolving such a motion. We continue to believe, however, that the most persuasive evidence as to whether pretrial publicity was prejudicial or inflammatory usually will be the potential jurors' responses to questions asked them during jury selection. *State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983). We presume that jurors will tell the truth; our court system simply could not function without the ability to rely on such presumptions. Absent some reason to doubt jurors' unequivocal statements that they will rely solely on the evidence presented in determining the outcome of the trial, we have no need to further examine the validity of the trial court's ruling. These arguments are without merit.

[4] Defendants next challenge the trial court's refusal to allow individual *voir dire* of prospective jurors, arguing that the collective *voir*

dire "guaranteed that the entire jury pool would be infected and tainted by the opinions of . . . [some] jurors" that the defendants were guilty. "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." N.C.G.S. § 15A-1214(j) (1988). A trial court's ruling on the issue of individual *voir dire* will not be disturbed, however, absent an abuse of discretion. *State v. Short*, 322 N.C. 783, 788, 370 S.E.2d 351, 354 (1988).

Assuming *arguendo* that the trial court's ruling in this case was error, we conclude that any error in this regard was harmless. In *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994), we held that any error in the trial court's refusal to allow individual *voir dire* was harmless, as the defendant had not been precluded from examining each of the jurors to reveal any possible prejudice resulting from pretrial publicity. *Id.* at 267-68, 439 S.E.2d at 558-59. In this case, the trial judge told defense counsel at the beginning of the proceeding that, while his practice was to deal with jury selection a panel at a time, he would entertain arguments on individual *voir dire* and would be glad to keep an open mind on the issue. As in *Lee*, the record here shows that the trial judge's ruling "was a reasoned decision by which he attempted to conserve judicial resources without foreclosing the possibility of allowing individual *voir dire* if it became necessary to ensure a fair jury selection process." *Id.* at 267, 439 S.E.2d at 558. Defendants have failed to identify any possible particular harm to them resulting from their being required to question each of the jurors in the presence of the others.

[5] Defendants also argue within this assignment of error that the trial court erred in refusing to grant defendants additional peremptory challenges, thereby preventing defendants from receiving a fair and impartial trial. N.C.G.S. § 15A-1217(a) provides that an individual defendant is entitled to fourteen peremptory challenges and that the State is entitled to fourteen challenges for each defendant. While the trial court had no authority to grant any additional peremptory challenges, *see State v. Hunt*, 325 N.C. 187, 198, 381 S.E.2d 453, 460 (1989), it nonetheless allowed each defendant an additional peremptory challenge because one juror who had been accepted by all parties was dismissed because of a family emergency. Defendants therefore enjoyed the use of a total of forty-five peremptory challenges, more than the statutory provision allows. This assignment of error is without merit.

[6] In other assignments of error, defendants contend that the trial court erred in allowing the State to exercise peremptory challenges in a racially discriminatory manner. Defendants point to the dismissal of prospective jurors Melodie Hall, Lana Jones, and Judge Cherry and argue that the prosecution struck these prospective jurors because they are African-American.

In *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), the Supreme Court created the first tentative and halting outline of an equal protection framework for the resolution of issues surrounding racial discrimination in the exercise of peremptory challenges. We recently summarized the current status of the doctrine in *State v. Lyons*, 343 N.C. 1, 468 S.E.2d 204, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996):

> In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the use of peremptory challenges to exclude a juror solely on account of his or her race. *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 83. The Supreme Court established a three-part test to determine if a prosecutor has impermissibly excluded a juror based on race. First, *the defendant must* establish a *prima facie* case of purposeful discrimination. If the defendant succeeds in establishing a *prima facie* case of discrimination, the burden shifts to the prosecutor to offer a race-neutral explanation for each challenged strike. Finally, the trial court must determine whether the defendant has proven purposeful discrimination.
>
> . . . .
>
> In order to rebut a *prima facie* case of discrimination, the prosecution must articulate legitimate reasons which are clear, reasonable and related to the particular case to be tried. The prosecutor's explanation need not, however, rise to the level justifying a challenge for cause. Furthermore, if not racially motivated, the prosecutor may exercise peremptory challenges on the basis of legitimate hunches and past experience.
>
> . . . [In explaining the reasons for the exercise of a peremptory challenge, t]he prosecutor is not required to provide an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in

> the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez [v. New York]*, 500 U.S. [352,] 360, 114 L. Ed. 2d [395,] 406 [(1991)].

Lyons, 343 N.C. at 11, 13, 468 S.E.2d at 208, 209 (citations omitted). In *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995), we observed that

> [w]here "a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination," the issue is whether the reason given by the prosecutor was legitimate or merely pretextual. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991); *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991). "Unless a discriminatory intent is inherent in the prosecutor's explanation the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406. As this determination is essentially a question of fact, the trial court's decision of whether the prosecutor had a discriminatory intent will be upheld unless that finding is clearly erroneous.

Rouse, 339 N.C. at 78, 451 S.E.2d at 553 (citations omitted). We have also noted with respect to the exercise of our review in these matters that the investigation into a prosecutor's state of mind on the demeanor and credibility of a particular juror is a matter peculiarly within the province of the trial court. *State v. Robinson*, 336 N.C. 78, 94, 443 S.E.2d 306, 313 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995). It is with these principles in mind that we turn to the issues with respect to the prosecutor's exercise of peremptory challenges in this case.

The trial court ruled that defendants failed to make a *prima facie* showing of racial discrimination in the State's exercise of peremptory challenges against prospective jurors Hall, Jones, and Cherry. With respect to prospective juror Melodie Hall, the trial court ruled that defendants had not made a *prima facie* showing of discrimination in the prosecutor's dismissal of Hall, "but out of an abundance of caution" asked the district attorney to state his reasons for excusing Hall should the information be necessary at a later time. The district attorney explained that

> she—in the first instance is the same age as these defendants, she is 32 years old according to what she stated, she is physically

> attractive and she is single. In addition to that, which I would contend that Mr. Blakney at least, has been described by his psychiatrist as attractive . . . . She has expressed that in her associations that she stated that returning a guilty verdict of first degree murder and returning a death sentence that she would be subject to criticism from her acquaintances. When I asked her the first time about whether that would affect her ability to decide this case, there was a long period of hesitation before she said there was not. That is essentially the answer that [another juror] and other people that we have exercised peremptory challenges, have been hesitant or unclear in [thei]r answers, which would lead me to conclude that they were unclear if the answer they were giving was, in fact, correct. She, I think, was rehabilitated from that position by The Court, but when I asked her those questions, she was slow. My recollection is that she would not maintain eye contact with me during the time that I was asking those questions. I would say that her hairstyle and personal appearance would indicate potentially a nonconformist or non-traditional approach to her life. She . . . works in Charlotte, therefore, is not a local person and is subject to whatever conversation she would have at that time on her job. . . . I think I mentioned that she is single and mentioned that in terms of her age group and this group of defendants and would say that her being single indicates that she is less stable in her life-style and potentially less responsible. Those are all things that are at least factors. I would point out that the State's jury selection Voir Dire was racially neutral until that subject was approached by the defense in their examination of white jurors. We did not bring this issue into this trial until it was brought out by defense counsel in the course of that Voir Dire and we contend that those are all legitimate constitutional reasons for the exercise of peremptory challenges.

After the trial court and defense counsel discussed the prosecutor's reasons, the court found that the reasons were not pretextual.

Defendants attack the reasoning of the prosecutor and the overall method by which the jury was selected in two ways: (1) that a juror or jurors of a different race from those venire members who were peremptorily excused were asked similar questions by the prosecutor, gave answers similar to those of the prospective jurors peremptorily excused, and later sat on the jury that decided the case; and (2) that there was a variation in the number of questions asked or the manner of questioning in examining those venire members

peremptorily challenged and those who actually sat on the jury. We have noted with respect to this type of argument that even if answers of a venire member of one race who is later peremptorily excused are similar to those of a juror of another race who sits in judgment of a defendant and the manner of questioning the two differs, this state of circumstances in itself does not necessarily lead to a conclusion that the reasons given by the prosecutor were pretextual. *Rouse*, 339 N.C. at 80, 451 S.E.2d at 554. It also bears repeating that jury selection is "more art than science" and that only in the rare case "will a single factor control the decision-making process," *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990), as well as that a prosecutor may rely on legitimate hunches in the exercise of peremptory challenges, *Rouse*, 339 N.C. at 79, 451 S.E.2d at 554.

In examining the prosecutor's reasoning in light of the totality of the circumstances, we cannot say that the trial court's ruling was clearly erroneous. No discriminatory intent was inherent in the prosecutor's explanations of the peremptory challenge of Hall. The prosecutor's questioning techniques throughout the jury selection process for jurors black and white alike focused on age, marital status, and circumstances involving racial sensitivity or favoritism. The trial court's determination that the dismissal of Hall was not the product of discriminatory intent was not clearly erroneous and will be upheld.

Similarly, the trial court's conclusion that no *prima facie* case of discrimination existed with respect to the prosecution's peremptory challenge of Lana Jones was not clearly erroneous. Although finding that no *prima facie* case existed, however, the trial court did ask the prosecutor to offer an explanation for the challenge "so we'll have it"; the prosecutor responded that

> [Lana Jones] is 22 years old. She stated she went to school with a State's witness, Curtis Cowan, who we know to be a convicted felon. She said that she had no prior knowledge of this case at all and my recollection is that she may be the only one that has said they haven't heard anything about this. . . . [S]he . . . had only been working since August and that would indicate a lack of stability. I would also point out at the same exercise of peremptory challenges we excused a 20 year old white male at the same time we excused [Lana] Jones.

We note again that age was one of a number of important factors in the prosecutor's strategy for the jury selection process. With

respect to the other factors, Jones' familiarity with a witness who was a convicted felon and the absence of any work history are both legitimate race-neutral reasons for the prosecutor's exercise of the peremptory challenge. The trial court's ruling as to Jones was not clearly erroneous.

With respect to the prosecutor's peremptory challenge of Judge Cherry, the trial court also concluded that defendants had not made a *prima facie* showing of racial discrimination. The trial court, however, again asked the prosecutor to explain his strike to preserve the information for the record, and the prosecutor stated as follows:

> Mr. Cherry stated that he, for a period of about two years[,] had lived in the same area as the defendant, Robert Blakney, and had known two of his brothers and had seen his two brothers, I believe he said within the last couple of years. That he also knew a person listed on the list of witnesses, Mr. Leon Melton, and that he had played softball with him. He said that he was a member of a church that as a regular part of its procedure visited with inmates at the local prisons and it's on that basis the State excused him.

Each of the prosecutor's reasons are supported by the record and are facially race-neutral. As we cannot say that the trial court's rulings with respect to venire members Hall, Jones, and Cherry were clearly erroneous, we therefore conclude that these assignments of error are without merit.

[7] Defendants next contend by assignments of error that the trial court erred in allowing the use of mannequins at trial for the purpose of illustrating the number and the direction of bullet wounds incurred by the Tutterows. Defendants argue on appeal that the demonstration, during which Dr. Deborah Radisch used colored dowels and mannequins to illustrate her testimony about the angles at which the bullets entered the bodies, was both cumulative and unfairly prejudicial.

In *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986), we held that the decision to exclude evidence pursuant to Rule 403 of the North Carolina Rules of Evidence whether based on its cumulative nature or because the danger of unfair prejudice substantially outweighs its probative value is left to the sound discretion of the trial court. The evidence presented in this case with respect to the killings was complex. In addition to Dr. Radisch's testimony concern-

ing the paths of the bullets and the medical examination that accompanied her autopsy of the Tutterows, there was also testimony accompanying the physical evidence with respect to ballistics, fiber evidence, residue at the crime scene, and blood splatter evidence. When viewed in context, such evidence supported a reconstruction of events on the night of the killings, including where the shooters and victims were positioned, how many guns were used, and the order in which the various shots were fired. The three-dimensional evidence involving the mannequins and dowels that Dr. Radisch used to illustrate her testimony was undoubtedly helpful to the jury in resolving and understanding these complex issues. The evidence concerning the bullet paths was also probative with respect to premeditation and deliberation, as the nature and number of a victim's wounds and whether wounds are inflicted after a victim has been rendered helpless are circumstances to be considered in this determination. *State v. Sierra*, 335 N.C. 753, 759, 440 S.E.2d 791, 795 (1994). Defendants have not established an abuse of discretion by the trial court, and these assignments of error are therefore overruled.

Defendants contend in several assignments of error that the trial court erred by admitting into evidence a number of hearsay statements that prejudiced them and denied them their due process and confrontation rights. We deal first with the contentions of defendant Barnes.

[8] Barnes argues that the trial court's admission into evidence of hearsay statements by defendants Blakney and Chambers violated his federal and state constitutional rights. He points to two exchanges that he argues unfairly prejudiced him: (1) Valerie Mason's testimony that when she asked Blakney about where he had acquired a ring that he gave to her, Blakney said that "it was a three-person secret" and that "we f------ up a police"; and (2) Reverend Betty Smith's testimony that Chambers told her that "I shouldn't have gone with them." Barnes argues that the trial court should have redacted both of these statements to avoid prejudicing him.

In *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968), the Supreme Court held that defendant Bruton's confrontation rights were violated by the admission into evidence of a nontestifying codefendant's confession that implicated Bruton in the crime. *Id.* at 126, 20 L. Ed. 2d at 479-80. The admission of the confession was "powerfully incriminating," *id.* at 135, 20 L. Ed. 2d at 485, and the Supreme Court explained that

> because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt, admission of [the codefendant's] confession in this joint trial violated [Bruton's] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

Id. at 126, 20 L. Ed. 2d at 479. The Supreme Court also noted in *Bruton* that no recognized exception to the hearsay rule applied in that case. *Id.* at 128 n.3, 20 L. Ed. 2d at 480-81 n.3. Here, at least two firmly established exceptions apply.

We stated in *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991), that statements falling within an exception to the hearsay rule may be admitted without violating a defendant's confrontation rights if the evidence is reliable. We also held in *State v. Fox*, 274 N.C. 277, 291, 163 S.E.2d 492, 502 (1968), that before a confession of a nontestifying codefendant is admitted into evidence in a consolidated trial, all portions of the confessions implicating another defendant must be deleted. *See also* N.C.G.S. § 15A-927(c)(1) (1988). We further noted in *State v. Littlejohn*, 340 N.C. 750, 755, 459 S.E.2d 629, 632 (1995), that the *Bruton* rule may be invoked when, although the implicated codefendant is not mentioned by name, it is clear that the statement refers to him.

With respect to Blakney's statements that "it was a three-person secret" and "we f----- up a police," these statements fall within the exception enumerated in Rule 804(b)(3), which provides that a declarant's statement, accompanied by clear corroborating circumstances, may be admitted when it "at the time of its making . . . so far tended to subject him to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." N.C.G.S. § 8C-1, Rule 804(b)(3) (1992). Blakney's conversation with Valerie Mason tended to subject him to criminal liability, and he no doubt knew the consequences of acknowledging his involvement in an attack on a law enforcement officer. His statements therefore fit within the hearsay exception in Rule 804(b)(3).

Barnes argues further that the Supreme Court's decision in *Williamson v. United States*, 512 U.S. 594, 129 L. Ed. 2d 476 (1994), mandates the conclusion that the statements were inadmissible under the federal analogue to our Rule 804(b)(3) insofar as they were non-self-inculpatory. In *Williamson*, the Supreme Court held

that under federal Rule 804(b)(3), statements of a codefendant declarant are admissible as long as they are self-inculpatory. *Id.* at ——, 129 L. Ed. 2d at 483-84. The Supreme Court explained that

> Rule 804(b)(3) is founded on the common-sense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. . . .
>
> . . . .
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> . . . "Due to [a codefendant's] strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."

Id. at ——, ——, 129 L. Ed. 2d at 482, 483 (quoting *Lee v. Illinois*, 476 U.S. 530, 541, 90 L. Ed. 2d 514, 526 (1986)). While we do not here rule on any issues concerning the scope of North Carolina's Rule 804(b)(3) hearsay exception for statements against penal interest, we conclude that the *Williamson* test is satisfied in this case and that Blakney's statements would not violate federal Rule 804(b)(3). Blakney's statements in this case were completely self-inculpatory, as the comment that "*we* f----- up a police" directly and obviously incriminated Blakney. Blakney's comments do not have the taint of "special suspicion" reserved for those statements aimed at implicating another defendant while exonerating the declarant and therefore do not violate the *Williamson* rule.

[9] Blakney's statements also fit within the exception for statements of a coconspirator found in Rule 801(d)(E), which provides that a statement may be admitted as a hearsay exception "if it is offered against a party and it is . . . a statement by a coconspirator of such party during the course and in furtherance of the conspiracy." N.C.G.S. § 8C-1, Rule 801(d)(E) (1992). A criminal conspiracy is an express or implied agreement between two or more persons to do an unlawful act, to do a lawful act in an unlawful way, or to do a lawful act by unlawful means. *State v. Gibbs*, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994). It is not necessary for the prosecution to establish the existence of the conspiracy before the admission of a hearsay statement falling within this exception as long as the existence of the conspiracy is eventually established. *State v. Polk*, 309 N.C. 559, 565-66, 308 S.E.2d 296, 299 (1983).

Evidence presented at trial tended to show that while at the convenience store with Antonio Mason, defendants planned to rob the Tutterows. They went to the Tutterow house and robbed and killed the victims. They then went to Valerie Mason's apartment, where they offered Sharon Mason money if she would let them take her car to get rid of some guns, and they gave away some of the Tutterows' belongings while at the Mason apartment. The jury could find from the evidence that defendants' conduct up to and including the robbery at the Tutterows was part of a conspiracy. The jury also could find that the subsequent actions of defendants were in the course of and in furtherance of the conspiracy, as Blakney's remarks and the actions of defendants were designed to conceal their involvement in the crimes. In *State v. Willis*, 332 N.C. 151, 420 S.E.2d 158 (1992), we reaffirmed that the statement of a coconspirator during the course of and in furtherance of the conspiracy is admissible and is not barred by *Bruton*. *Id.* at 167-68, 420 S.E.2d at 165. Blakney's statements were therefore admissible against Barnes, and this argument is without merit.

[10] With respect to the statement of Chambers that "I shouldn't have gone with them," Barnes argues that this statement was "particularly significant" and therefore prejudicial and that it also violated his due process and confrontation rights. In *Bruton*, the Supreme Court held that the introduction of a codefendant's hearsay statement "posed a substantial threat to petitioner's right to confront the witnesses against him" and therefore constituted reversible error. *Bruton*, 391 U.S. at 137, 20 L. Ed. 2d at 485. The Supreme Court noted that

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Id. at 135-36, 20 L. Ed. 2d at 485.

We find the situation in the case *sub judice* to be distinguishable from that in *Bruton*. The statement about which Barnes complains is not "powerfully incriminating," especially when viewed in the context of the evidence against him. Chambers' reference to "them" was not made in the context of any specific statements about the killings,

and the trial court cautioned the jury with respect to Chambers' statement. The Supreme Court observed in *Bruton* that "[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions . . . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information." *Id.* at 135, 20 L. Ed. 2d at 484-85. We conclude that Chambers' statements did not clearly identify Barnes or create a substantial risk that the jury would ignore the trial court's instructions in its determination of Barnes' guilt. Therefore, Barnes' arguments are without merit.

Defendant Blakney also argues that Reverend Smith's testimony that Chambers stated that "I shouldn't have gone with them" prejudiced him and violated his due process rights. For the reasons previously discussed, Blakney's assignments of error in this regard are also overruled.

Defendant Chambers contends that Valerie Mason's testimony with respect to Blakney's statements violated the *Bruton* rule. As discussed previously, these statements were admissible against Chambers, as they were against Barnes, as exceptions to the hearsay rule under Rules 804(b)(3) (statements against penal interest) and 804(d)(E) (statements of a coconspirator in the course of and in furtherance of the conspiracy). This argument is without merit.

We therefore conclude that these assignments of error by defendants are without merit.

In other assignments of error, defendants argue that the trial court committed reversible error by joining their cases for both trial and sentencing. We deal with these contentions in turn.

[11] Defendant Barnes contends that the trial court abused its discretion in joining his case with that of the other codefendants. He argues (1) that hearsay testimony concerning statements from the nontestifying codefendants unfairly prejudiced him, and (2) that the extreme disparity in the evidence against him as compared with that against the other codefendants mandated separate trials. At trial, Barnes objected to four statements: (1) the testimony of Valerie Mason that defendant Blakney told her on the night of the murders that "we f—— up a police"; (2) testimony that defendant Chambers told his minister that "I shouldn't have gone with them"; (3) testimony that Chambers stated that he "wasn't going back to jail without . . .

killing somebody"; and (4) that, upon being told about news reports of murders committed by another person, Chambers said, "everybody have [sic] to die sometime," and, "it wasn't your momma and daddy." Barnes argues that although the trial court gave a limiting instruction that these statements should not be considered as evidence against Barnes, the risk that they would unfairly prejudice him warranted severance.

The governing law with respect to issues involving severance provides:

> (b) Severance of Offenses.—The court, on motion of the prosecutor or on motion of the defendant, must grant a severance of offenses whenever:
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> (1) If before trial, it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense; or
>
> (2) If during trial, upon motion of the defendant . . . , it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.
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> (c) Objection to Joinder of Charges against Multiple Defendants for Trial; Severance.
>
> (1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him . . . , the court must require the prosecutor to select one of the following courses:
>
> a. A joint trial at which the statement is not admitted into evidence; or
>
> b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or
>
> c. A separate trial of the objecting defendant.

> (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, . . . it is found necessary to achieve a fair determination of the guilt or innocence of that defendant.

N.C.G.S. § 15A-927(b), (c)(1), (2). We review the trial court's decision in this regard under the abuse-of-discretion standard. *State v. Porter*, 303 N.C. 680, 688, 281 S.E.2d 377, 383 (1981).

There is a strong policy in North Carolina favoring the consolidation of the cases of multiple defendants at trial when they may be held accountable for the same criminal conduct. *State v. Paige*, 316 N.C. 630, 643, 343 S.E.2d 848, 857 (1986). Severance is not appropriate merely because the evidence against one codefendant differs from the evidence against another. *See, e.g.*, *State v. Nelson*, 298 N.C. 573, 586-88, 260 S.E.2d 629, 640-41 (1979), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980). The differences in evidence from one codefendant to another ordinarily must result in a conflict in the defendants' respective positions at trial of such a nature that, in viewing the totality of the evidence in the case, the defendants were denied a fair trial. *Id.* at 587, 260 S.E.2d at 640. However, substantial evidence of the defendants' guilt may override any harm resulting from the contradictory evidence offered by them individually. *Id.* at 588, 260 S.E.2d at 641.

With respect to the testimony involving statements made by Barnes' codefendants, we noted in *Paige* that "we often rely on the common sense of the jury, aided by appropriate instructions of the trial judge, not to convict one defendant on the basis of evidence which relates only to the other." *Paige*, 316 N.C. at 643, 343 S.E.2d at 857. While Barnes contends that the limiting instructions given by the trial court were ineffective in preventing the jury from using the statements as substantive evidence against him, thereby precluding a

fair determination of his guilt, he has failed to show that the trial court abused its discretion. We explained in *Paige* that if introduction of some evidence incriminating only one codefendant always "required a severance of the defendants' trials, we would in effect be ruling that co-defendants may not be joined for trial in this state. It would be unusual for all evidence at a joint trial to be admissible against [all] defendants . . . ." *Id.* The trial court here offered limiting instructions at the times the statements were introduced. As Barnes has failed to show an abuse of discretion in the trial court's actions, this argument is therefore without merit.

[12] Barnes' contention that the differences in the evidence against him when compared with evidence against his codefendants prevented a fair determination of his guilt is equally unpersuasive. Barnes contends that the "overwhelming" evidence incriminating Blakney and Chambers—including DNA and fingerprint evidence, the numerous inculpatory statements made by both codefendants, and testimony that both codefendants were seen the night of the murders with articles belonging to the Tutterows and sold one of the Tutterow guns used in the murders—created a substantial risk that jurors overlooked the weakness of the State's case against him. We find no error in this regard.

Evidence is relevant, and therefore generally admissible, "if it has any logical tendency, however slight, to prove a fact in issue." *Moore*, 335 N.C. at 601, 440 S.E.2d at 816. Similarly, evidence may be admissible where it is not directly probative of the crime charged if it pertains to the " 'chain of events explaining the context, motive and setup of the crime . . . [and is] linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.' " *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)) (second alteration in original). Evidence may also be admissible under the principle of *res gestae*, which provides for the admission of evidence involving a continuing criminal transaction that is " 'so closely connected to [an] occurrence or event in both time and substance as to be a part of the happening.' " *State v. Baker*, 336 N.C. 58, 63, 441 S.E.2d 551, 554 (1994) (quoting *Black's Law Dictionary* 1305 (6th ed. 1990)). Much of the evidence that Barnes contends overwhelmed the jurors, thereby compelling them to disregard the weak case against him, would have been admissible against him in a separate trial under such rules. In any event, assuming

arguendo that some of the aforementioned evidence would not have been admissible against Barnes in a separate proceeding, this fact nonetheless did not entitle Barnes to severance. Again, we "rely on the common sense of the jury, aided by appropriate instructions of the trial judge, not to convict one defendant on the basis of evidence which relates only to the other." *Paige*, 316 N.C. at 643, 343 S.E.2d at 857. Barnes' arguments are therefore without merit.

[13] Similarly, defendant Chambers has not shown an abuse of discretion in the trial court's denial of his motion for severance. Chambers argues that Blakney's statements (discussed above with regard to the arguments of Barnes) prejudiced him, thereby preventing a fair determination of his guilt. We again note the strong policy favoring the consolidated trials of defendants accused of collective criminal behavior. Given the limited evidence at issue in this assignment of error, our trust in the common sense of the jury, and the limiting instructions of the trial court, we conclude that Chambers' argument is without merit.

[14] Defendant Blakney contends that the introduction of his statements in a sanitized or redacted form denied him a fair trial. Blakney argues that admitting the confessions in their original form would have demonstrated that he was merely a passive participant in the crimes. He contends that the admission of the redacted statements resulted in the jury's (1) inferring that he did not cooperate with the police in identifying his codefendants; and (2) inferring that he, rather than his codefendants, committed some of the acts that he described in his statements to police.

As noted previously, the Supreme Court's decision in *Bruton* provides that in joint trials of defendants, extrajudicial confessions of nontestifying defendants should be excluded unless all portions implicating codefendants other than the declarant-defendant can be removed without prejudice either to the declarant-defendant or to the State. *See Bruton*, 391 U.S. at 126, 135-36, 20 L. Ed. 2d at 479, 485; *Fox*, 274 N.C. at 291, 163 S.E.2d at 502. If the removal of those portions in this manner is not possible, the State may either choose not to introduce the confession or may try the defendants separately. *Id.* Again, we examine the trial court's actions under the abuse-of-discretion standard. *Porter*, 303 N.C. at 688, 281 S.E.2d at 383.

While Blakney frames his participation in the crimes here as passive, the evidence against him at trial was sufficient for a finding of guilt on the theory of acting in concert. Any passivity on the part of

Blakney was a consideration more appropriate for sentencing. While Blakney cites *State v. Boykin*, 307 N.C. 87, 296 S.E.2d 258 (1982), and *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, *death sentence vacated*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976), in support of his argument for severance, we find those cases to be inapposite. Those cases dealt with circumstances in which the refusal of the trial court to grant severance interfered with a defendant's opportunity to use a confession to his advantage where the defendants had antagonistic defenses. *See Boykin*, 307 N.C. at 91-92, 296 S.E.2d at 260-61 (defendant was unable to explain that he gave false statements to protect his codefendant brother); *Alford*, 289 N.C. at 385-89, 222 S.E.2d at 231-33 (defendant was unable to use confession of codefendant more fully to support his alibi).

In this case, Blakney merely argues that, notwithstanding other evidence presented at trial, his own unredacted confession could have been used to show that he was a passive participant in the crimes. The redaction here does not rise to the level of the exclusion of the statements in *Boykin* or *Alford*, both of which involved severely censored statements going to the heart of the accused's defense that would have been available had the cases not been joined. We therefore conclude that the trial court's ruling denying severance to Blakney was not "so arbitrary that it could not have been the result of a reasoned decision," *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985), and find Blakney's argument to be without merit.

[15] The final matter for our examination in these assignments of error concerns the trial court's denial of motions by defendants Barnes and Chambers for severance at the capital sentencing proceeding. Barnes and Chambers argue that the testimony of their codefendant Blakney at sentencing prejudiced them, thereby denying them their respective rights to a fair capital sentencing proceeding. Blakney testified at sentencing that he did not shoot the Tutterows, that Barnes and Chambers did shoot the Tutterows while he was in another room, and that he had not planned to kill anyone during the robbery. Neither Barnes nor Chambers testified during the sentencing hearing.

The capital sentencing proceeding in this case did not involve a contest between defendants viewed passively by the State. Barnes and Chambers did not testify at sentencing, nor did they put forth any evidence challenging the testimony of their codefendant. We have

noted that in a case involving one codefendant who testified while the other did not, the silent defendant "was not forced to accept [the other's] story tacitly or otherwise. [He] had a right to tell his own story, a right which for whatever reason he freely chose not to exercise." *State v. Belton*, 318 N.C. 141, 149, 347 S.E.2d 755, 760 (1986). This reasoning applies with even greater force where the silent defendants had already been convicted and were facing sentencing.

Barnes and Chambers rely on *State v. Pickens*, 335 N.C. 717, 440 S.E.2d 552 (1994), in support of their argument for severance. *Pickens* involved a situation in which each defendant put forth evidence indicating that the other defendant was the guilty party, thereby creating an irreconcilable conflict in the evidence through antagonistic defenses. *Id.* at 726-28, 440 S.E.2d at 557-58. The differences in evidence in this capital sentencing proceeding did not result in such antagonistic defenses as to deny a fair capital sentencing proceeding; each defendant could show why he should not receive the death penalty without arguing that the others should. These assignments of error are overruled.

[16] In another assignment of error, defendants contend that the trial court abused its discretion in its handling of a juror who volunteered that he had spoken with his brother about defendants Blakney and Chambers during the trial. During the State's presentation of evidence, a juror informed the trial court that "[i]t was brought to my attention yesterday by my brother that he had known Mr. Blakney and Mr. Chambers while he served time in prison. And he had known them fairly well. I just thought that I should," at which point the trial court thanked the juror. The trial court asked whether the juror and his brother had discussed the case, to which the juror responded that they had not. The trial court made no further inquiry into this incident, and defendants did not object at trial.

While there is no statutory provision in North Carolina dealing with challenges to a juror after the jury has been impaneled, *see State v. Richardson*, 341 N.C. 658, 672-73, 462 S.E.2d 492, 502 (1995), trial courts have the discretion to supervise the jury after jury selection and may excuse a juror and substitute an alternate when necessary, *State v. Lovin*, 339 N.C. 695, 715-16, 454 S.E.2d 229, 241 (1995). In *State v. Garner*, 340 N.C. 573, 601, 459 S.E.2d 718, 733 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 872 (1996), we held that in dealing with an outside contact with a juror, the trial court's duty is to determine whether the contact at issue resulted in substantial and

irreparable prejudice to the defendant and that the scope of the inquiry is within the discretion of the trial court.

After the juror volunteered the information, the trial court in this case asked whether the juror had discussed the case with his brother. The trial court was in a position to observe and scrutinize the juror's credibility with respect to the juror's response to the question and was satisfied that the juror had not been tainted by the contact with the brother. We cannot say that the trial court's actions in this respect were so arbitrary that they could not have been the result of a reasoned decision. *Richardson*, 341 N.C. at 673, 462 S.E.2d at 502. Therefore, this assignment of error is overruled.

[17] In related assignments of error, defendants argue that the trial court abused its discretion in its disposition of other issues concerning juror misconduct. After the jury returned its sentencing recommendations, defense counsel made an assertion to the trial court that a juror had taken a Bible into the jury room and read to the jury members from it before deliberations and that another juror called a minister to ask a question about the death penalty. The following exchange took place:

> THE COURT: No evidence that anybody discussed the particular facts of this case with anybody outside the jury. Is that correct?
>
> [DEFENSE COUNSEL]: No evidence that they did or did not as far as the conversation with the minister is concerned.
>
> THE COURT: No evidence that they did though. Is that correct?
>
> [DEFENSE COUNSEL]: No, sir.
>
> THE COURT: All right. Well, I'm going to deny the request to start questioning this jury about what may or may not have taken place during their deliberations of this trial.

Defense counsel moved for a mistrial, new trial, new sentencing, to set aside the verdict, and for appropriate relief, and the trial court denied the motions.

Defendants contend that the trial court erred in failing to conduct an investigation to determine what, if any, prejudice resulted from the alleged events. In *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991), we held that "[t]he determination of the existence and effect

of jury misconduct is primarily for the trial court[,] whose decision will be given great weight on appeal." We noted in *State v. Williams*, 330 N.C. 579, 583, 411 S.E.2d 814, 817 (1992), that the trial court has the responsibility to conduct investigations to this effect, including examination of jurors when warranted, to determine whether any misconduct has occurred and has prejudiced the defendant. An inquiry into possible misconduct is generally required only where there are reports indicating that some prejudicial conduct has taken place. *State v. Harrington*, 335 N.C. 105, 115, 436 S.E.2d 235, 240-41 (1993). The scope of this inquiry is within the sound discretion of the trial court. *Willis*, 332 N.C. at 173, 420 S.E.2d at 168.

In this case, defense counsel simply made a conclusory statement, without giving any source, that a juror read passages from the Bible aloud in the jury room prior to deliberations and prior to the trial court's instructions to the jury. It is well established that a defendant has the right to a trial by an impartial jury and a verdict based only on the evidence developed at trial. *Turner v. Louisiana*, 379 U.S. 466, 471-72, 13 L. Ed. 2d 424, 428-29 (1965). Courts throughout the United States have generally concluded that a jury's reliance on extraneous sources during deliberations is error. *See, e.g., Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1980) (jury consulted medical text concerning blood types and medication), *cert. denied*, 450 U.S. 1035, 68 L. Ed. 2d 231 (1981); *Kirby v. Rosell*, 133 Ariz. 42, 648 P.2d 1048 (1982) (jury consulted business law text); *Alvarez v. People*, 653 P.2d 1127 (Colo. 1982) (jury consulted dictionary); *Brockie v. Omo Construction, Inc.*, 255 Mont. 495, 844 P.2d 61 (1992) (jury consulted library books dealing with subject of technical expert's testimony). Rule 606(b) of the North Carolina Rules of Evidence indicates that a juror may testify as to matters occurring during deliberation with respect to the question "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." N.C.G.S. § 8C-1, Rule 606(b) (1992). "Extraneous information" is information dealing with the defendant or the case at bar that reaches a juror without being introduced into evidence. *State v. Rosier*, 322 N.C. 826, 832, 370 S.E.2d 359, 363 (1988).

Courts in other jurisdictions have dealt with the issue before us in a number of ways. In *People v. Mincey*, 2 Cal. 4th 408, 827 P.2d 388, 6 Cal. Rptr. 2d 822, *cert. denied*, 506 U.S. 1014, 121 L. Ed. 2d 567 (1992), the California Supreme Court concluded that there was no substantial likelihood that defendant was prejudiced by jurors read-

ing a Bible in the jury room during deliberations where the judge admonished the jury before deliberations resumed to decide the case solely on the evidence. *Id.* at 467, 827 P. 2d at 425, 6 Cal. Rptr. 2d at 859. Similarly, in *People v. Vigil*, 718 P.2d 496, 501-02 (Colo. 1986), the Colorado Supreme Court found no abuse of discretion where the trial court concluded that defendant had not been prejudiced by a juror reading aloud from a Bible in the jury room. In *Jones v. Francis*, 252 Ga. 60, 61, 312 S.E.2d 300, 303, *cert. denied*, 469 U.S. 873, 83 L. Ed. 2d 157 (1984), the Georgia Supreme Court held that allowing a Bible in the jury room during deliberations was harmless error where defense counsel used biblical references in closing argument.

In this case, we are faced with an unsubstantiated assertion that a juror read Bible verses before deliberations began. The trial court instructed the jury before deliberations and after the allegation concerning the Bible reading as follows:

> It is now your duty to decide from all the evidence presented in both phases what the facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or as you might like it to be. This is important because justice requires that everyone who is sentenced for first-degree murder have the sentence recommendation determined in the same manner and have the same law applied to him.
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> . . . .
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> . . . [Y]ou've heard the evidence and the arguments of counsel for the State and for the defendant. I have not summarized the evidence in this case, but it's your duty to remember all of the evidence, whether it's been called to your attention or not. If your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your own independent recollection of the evidence in your deliberations. Now, I have not reviewed the contentions of the State or those of the defendant[s], but it is your duty not only to consider all of the evidence, but also to consider all the arguments, the contentions and positions urged by the attorneys in their speeches to you, and any other contention that arises from the evidence, and to weigh them in light of your own common sense, and, as best as you can, to make your recommendation as to punishment.

Assuming *arguendo* that defense counsel's assertions were accurate, there still was no assertion that the juror's reading from the Bible was accomplished in the context of any discussion about the case itself or that it involved extraneous influences as defined by this Court. The issue, therefore, is whether the trial court abused its discretion by failing to inquire further into the alleged Bible-reading incident when faced with the mere assertion that a juror read the Bible aloud in the jury room prior to the commencement of deliberations and prior to the trial court's instructions to the jury. As there is no evidence that the alleged Bible reading was in any way directed to the facts or governing law at issue in the case, we cannot say that the trial court's actions were an abuse of discretion.

With respect to a juror's alleged actions in calling a clergy member, a similar analysis applies. The trial court was faced with the mere unsubstantiated allegation that a juror called a minister to ask a question about the death penalty. Nothing in this assertion involved "extraneous information" as contemplated in our Rule 606(b) or dealt with the fairness or impartiality of the juror. There is no evidence that the content of any such possible discussion prejudiced defendants or that the juror gained access to improper or prejudicial matters and considered them with regard to this case. We cannot say under the particular circumstances of this case that the trial court's actions in failing to probe further into the sanctity of the jury room was an abuse of discretion. These assignments of error are therefore without merit.

[18] Defendants next contend that the trial court committed prejudicial error in instructing the jury on the doctrine of acting in concert with regard to premeditated and deliberate first-degree murder. The trial court offered the same basic substantive instruction on acting in concert with respect to all three defendants:

> [T]here is a [principle] in our law known as acting in concert. For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime, each of them is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the others in pursuance of the common purpose or as a natural or probable consequence of the common purpose.

Now, I charge that for you to find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, the State must prove five things to you and prove each of them beyond a reasonable doubt. First, that the defendant, *or someone with whom he was acting in concert*, intentionally and with malice killed the victim with a deadly weapon. . . . [M]alice means not only hatred, ill will or spite as it is ordinarily understood, but it also means that condition of mind that prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death, without just cause, excuse or justification. If the State proves beyond a reasonable doubt that the defendant, *or someone with whom he was acting in concert*, intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon, that proximately caused his death, you may infer first that the killing was unlawful, and second, that it was done with malice, though you are not compelled to do so. . . . [S]econd[,] the State must prove that the defendant's act *or the act of someone with whom he was acting in concert* was a proximate cause of the victim's death. . . . Third, the State must prove that the defendant, *or someone with whom he was acting in concert*, intended to kill the victim.

. . . Fourth, that the defendant, *or someone with whom he was acting in concert*, acted after premeditation. . . . [F]ifth, that the defendant, *or someone with whom he was acting in concert*, acted with deliberation, which means that he acted while he was in a cool state of mind. Now, this does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant, *or someone with whom he was acting in concert*, was in a state of passion or excited when the intent was carried into effect. Now, neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by proof of circumstances from which they may be inferred, such as the lack of provocation by the victim, the conduct of the defendant before, during and after the killing, the use of grossly excessive force, the infliction of lethal wounds after the victim is felled, the brutal or vicious circumstances of the killing, and the manner in which or means by which the killing was done.

(Emphasis added.) Defendants argue that this instruction violates North Carolina law as defined in this Court's ruling in *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), by permitting the jury to find defendants guilty of premeditated and deliberate first-degree murder without specific findings that they individually possessed the requisite *mens rea* to commit that crime. For the reasons that follow, we now overrule *Blankenship* and its progeny.

This Court's decision in *Blankenship* was its latest major effort in its recent sinuous course of jurisprudence with respect to the law on acting in concert and overruled long-settled law. At the time of this Court's decision in *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972), the law was clear. In *Westbrook*, the trial court

> charged the jury correctly that the mere presence of a person at the scene of a crime at the time of its commission does not make him guilty of the offense, but that if two persons are acting together, in pursuance of a common plan and common purpose to rob, and one of them actually does the robbery, both would be equally guilty within the meaning of the law and if "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose; that is, the common plan to rob, or as a natural or probable consequence thereof."

Id. at 41-42, 181 S.E.2d at 586. This Court held that these instructions were proper. *Id.* In *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987), however, a majority of this Court deviated from the course set in *Westbrook*. The majority in *Reese* cited *Westbrook*, but then stated by *dicta* in a footnote and without reference to any authority that *Westbrook* did not "change the rule that, for crimes requiring a specific *mens rea*, that *mens rea* must be shown as to each defendant." *Id.* at 141-42 n.8, 353 S.E.2d at 370 n.8. The *Reese* majority concluded that there was no evidence suggesting that the defendant knew that the killer he acted in concert with had intended to kill the victim and that defendant therefore could not be found guilty of first-degree murder on a theory of acting in concert. *Id.* at 144-45, 353 S.E.2d at 371-72.

This Court again examined instructions involving the acting in concert doctrine in *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280

(1991). In *Erlewine*, we reexamined the law in the context of a trial court's instructions to the jury that "you should be aware of the law which provides that for a person to be guilty of a crime it is not necessary that he himself do all the acts necessary to constitute that crime. If two or more persons act together *with a common purpose to commit a crime* each of them is held responsible for the acts of the others done in the commission of that crime." *Id.* at 635, 403 S.E.2d at 285. The defendant in *Erlewine* argued that those instructions improperly relieved the State of its burden to prove that the defendant had the required *mens rea* for both first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. We held that "the correct statement of the law," *id.* at 637, 403 S.E.2d at 286, was set out by the trial court in *Westbrook* as follows:

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

Id. at 637, 403 S.E.2d at 286 (quoting *Westbrook*, 279 N.C. at 41-42, 181 S.E.2d at 586) (alterations in original).

Three years after *Erlewine*, this Court dealt once more with instructions on acting in concert in *Blankenship*. In that case, we concluded that the acting in concert doctrine did not encompass a defendant who was at the scene of a murder acting in concert with another with whom he shared a common plan to commit a crime, but who did not have the specific intent to kill the victim. *Blankenship*, 337 N.C. at 560-62, 447 S.E.2d at 738-39. While we have since ruled in accordance with *Blankenship* in a number of cases involving instructions on acting in concert, *see, e.g.*, *State v. Straing*, 342 N.C. 623, 466 S.E.2d 278 (1996), today we overrule our decision in *Blankenship* and, returning to a body of law which was well established and long-standing in this jurisdiction prior to *Reese* and *Blankenship*, conclude that the instructions given in the case *sub judice* were not erroneous.

The first instances in which this Court dealt with the concerted actions of multiple defendants date back at least 160 years. In *State v. Haney*, 19 N.C. 390 (1837), we noted that "where a privity and community of design has been established, the act of any one of those who have combined together for the same illegal purpose, done in

furtherance of the unlawful design, is, in the consideration of law, the act of all." *Id.* at 395. We ruled similarly in *State v. Simmons*, 51 N.C. 21, 24-25 (1858), finding it "a well established principle[] that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, *or* in furtherance of the common purpose." (Emphasis added.) Following the doctrine of *stare decisis*, we continued to follow the "well established principle" of *Haney* and *Simmons* in all of the years prior to the *Reese* decision. *See, e.g., State v. Butler*, 269 N.C. 733, 736-37, 153 S.E.2d 477, 481 (1967); *State v. Kelly*, 243 N.C. 177, 181, 90 S.E.2d 241, 244 (1955); *State v. Smith*, 221 N.C. 400, 405, 20 S.E.2d 360, 364-65 (1942); *State v. Davis*, 203 N.C. 13, 28, 164 S.E. 737, 745, *cert. denied*, 287 U.S. 649, 77 L. Ed. 561 (1932); *State v. Oxendine*, 187 N.C. 658, 661-62, 122 S.E. 568, 570 (1924); *State v. Knotts*, 168 N.C. 173, 180-81, 83 S.E. 972, 979 (1914); *State v. Finley*, 118 N.C. 1162, 1171, 24 S.E. 495, 499 (1896); *State v. Gooch*, 94 N.C. 987, 1014 (1886). In more recent cases, after *Reese* but prior to *Blankenship*, we continued to follow the doctrine as stated in our prior cases and as reaffirmed in *Westbrook*. *See, e.g., State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993); *State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618-19 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990); *State v. Oliver*, 309 N.C. 326, 362, 307 S.E.2d 304, 327 (1983); *State v. Joyner*, 297 N.C. 349, 357-58, 255 S.E.2d 390, 395-96 (1979).

The instructions in this case are identical in substance to those found defective in *Blankenship*. The trial court instructed the jurors in the case *sub judice* with respect to all three defendants that the law on acting in concert was as follows:

> If two or more persons act together with a common purpose to commit a crime, each of them is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the others in pursuance of the common purpose or as a natural or probable consequence of the common purpose.

In *Blankenship*, the trial court gave the following charge to the jury with respect to the acting in concert doctrine:

> For a person to be guilty of a crime, it is not necessary that he, himself, do all the acts necessary to constitute the crime. If a defendant is present, with one or more persons, and acts together with a common purpose to commit murder, *or* to commit kidnap-

> ping, each of them is held responsible for the acts of the others, done in the commission of the murder *or* kidnapping, as well as any other crime committed by the other in furtherance of that common design.

Blankenship, 337 N.C. at 555, 447 S.E.2d at 734-35. The instructions both in this case and in *Blankenship* informed the jurors that in applying the doctrine of acting in concert, they would find a defendant guilty of premeditated murders committed by another if they found that the defendant acted with the other in a common purpose to commit a crime and that the murders were committed by the other as a probable consequence of that common purpose.

We now overrule *Blankenship* and conclude that the trial court's instructions in this case were not erroneous. The correct statement of the doctrine of acting in concert in this jurisdiction is that enumerated in *Westbrook* and *Erlewine*:

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

Erlewine, 328 N.C. at 637, 403 S.E.2d at 286 (quoting *Westbrook*, 279 N.C. at 41-42, 181 S.E.2d at 586) (alterations in original). To the extent that *Blankenship*, *Reese*, and their progeny are inconsistent with this opinion, they are hereby overruled.

As this Court has stated in another context, "This decision is hardly novel or revolutionary. Rather, the Court merely reverts . . . to a well established principle of law, thoroughly familiar to generations of lawyers and jurists. Nothing in our above-cited cases . . . indicates that this long-standing principle has proven inscrutable or unworkable." *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988). "[N]othing is settled [under the doctrine of *stare decisis*] until it is settled right." *Rabon v. Hospital*, 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967). We return today to the law as it was stated and applied in *Westbrook* and our earlier cases and as reapplied in *Erlewine*.

[19] We now turn to the issue of the application of our decision to overrule *Blankenship* to this case. The return to the acting in concert instructions as enumerated in *Erlewine* does not act as an *ex post facto* law in this case. An *ex post facto* law may be defined, as rele-

vant here, as a law that "allows imposition of a different or greater punishment than was permitted when the crime was committed." *State v. Vance*, 328 N.C. 613, 620-21, 403 S.E.2d 495, 500 (1991). There are two critical elements to an *ex post facto* law: that it is applied to events occurring before its creation and that it disadvantages the accused that it affects. *Id.* While the *ex post facto* law as constitutionally defined involves only legislative enactments, *see* U.S. Const. art. I, § 10; N.C. Const. art. I, § 16, the Supreme Court held in *Marks v. United States*, 430 U.S. 188, 191-92, 51 L. Ed. 2d 260, 264-65 (1977), that the Fifth and Fourteenth Amendments to the Constitution of the United States also forbid the retrospective application of an unforeseeable judicial modification of criminal law to the detriment of the defendant in the case at issue. *Accord Vance*, 328 N.C. at 620-21, 403 S.E.2d at 500; *State v. Waddell*, 282 N.C. 431, 446, 194 S.E.2d 19, 29 (1973).

The crimes at issue in this case were committed on 29 October 1992, and defendants were sentenced for those crimes on 10 March 1994. The certification date of our decision in *Blankenship* did not occur until the later date of 29 September 1994. Therefore, the law on acting in concert in North Carolina at all relevant times during the disposition of this case was the rule as stated in *Erlewine*, which we reaffirm today. Our ruling today that with regard to this case, the trial court's instructions on acting in concert were proper therefore does not violate the constitutional prohibitions against *ex post facto* laws, and these defendants' assignments of error are without merit.

ARGUMENTS OF DEFENDANTS BARNES AND CHAMBERS

[20] Defendants Barnes and Chambers contend in other assignments of error that the trial court erred in its peremptory instructions on nonstatutory mitigating circumstances in the capital sentencing proceeding, arguing that the instruction as given could have been interpreted to place a higher evidentiary burden on defendant than was proper. The trial court instructed the jury with respect to one of the nonstatutory mitigators that "[y]ou would find this mitigating circumstance if you find that the defendant's father [or mother] abused alcohol, and all of the evidence tends to show that this is true, and if you find that this circumstance has mitigating value." Barnes and Chambers argue that this instruction could be interpreted to mean that a juror could find the circumstance only after the juror herself found that all of the evidence showed that the fact at issue was true. In *State v. Buckner*, 342 N.C. 198, 235, 464 S.E.2d 414, 435 (1995),

cert. denied —— U.S. ——, 136 L. Ed. 2d 47 (1996), we noted that the peremptory instructions for nonstatutory mitigators differ from those for statutory mitigators in that a juror may consider a nonstatutory mitigator found by her to be without mitigating value. A peremptory instruction for a nonstatutory mitigating circumstance should reflect this distinction. *Id.* The construction offered by Barnes and Chambers is contrary to the syntax of the sentence, and the trial court explained this syntax using verbal punctuation:

> THE COURT: I'm saying if you find that his mother abused alcohol, comma, and all the evidence tends to show that this is true, comma.
>
> [DEFENSE COUNSEL]: Okay. So you're not telling them that the evidence does in fact show that?
>
> THE COURT: I'm telling them it tends to show that. I'm not telling them that's what it does show. It's for them to accept or reject.
>
> . . . .
>
> [PROSECUTOR]: Your Honor, I don't feel that it is [ambiguous] either, although it's hard to get the inflection on the record. It's quite clear the Court is saying the evidence tends to show all of this is true.

The peremptory instructions in this case therefore were legally correct, as they reflected the distinction between the statutory and nonstatutory mitigators, advised the jury that all of the evidence in the case tended to support the nonstatutory mitigating circumstance, and allowed but did not require the jury to find the circumstance. These assignments of error are without merit.

[21] By another assignment of error, defendants Barnes and Chambers argue that the trial court erred by failing to give a limiting instruction on the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance, that each murder was especially heinous, atrocious, or cruel. By this assignment, Barnes and Chambers do not argue that the (e)(9) circumstance was inapplicable in this case. Rather, they contend that the instruction given by the court permitted the jury to find vicariously the aggravating circumstance for one defendant based on the actions and specific intent of another defendant. Defendants argue that the trial court should have instructed the jury that it had to consider each defendant's individual behavior and intent in determining

whether the (e)(9) circumstance aggravated that defendant's culpability for the murders.

While Barnes and Chambers raised a general objection to the submission of the heinous, atrocious, or cruel circumstance, neither requested a limiting instruction on the circumstance. Thus, we review this alleged instructional error under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

We conclude that the instruction given by the trial court, based on N.C.P.I.—Crim. 150.10, was neither an error that had an impact on the jury's findings nor a mistake so fundamental as to amount to a miscarriage of justice. *Id.* at 660, 300 N.C. at 378. The instruction at issue here, which we have said to be correct as a matter of law, *State v. Syriani*, 333 N.C. 350, 388-91, 428 S.E.2d 118, 139-40, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993), apprised the jury with respect to what it must find for each murder to have been "especially heinous, atrocious, or cruel." The trial court instructed the jury separately for each defendant, enumerating the aggravating and mitigating circumstances individually for each murder count. Moreover, the court premised its capital sentencing instructions to the jury with the following limiting instruction:

> Members of the Jury, I am now going to instruct you on the law which you are to follow as you decide what the appropriate punishment shall be in these cases. I want to once again caution you that all of these cases have been joined for trial to be tried at the same time for various reasons. However, in your consideration as to the appropriate punishment in each of these cases, you are to consider each case and each individual defendant separately. That is, you are to determine the appropriate punishment on the merits as you find them to be under the instructions which I will give you as to each individual separately.

Our conclusion is also supported by the jury's factual findings relating to accomplice liability. During the guilt-innocence phase of the trial, the jury determined that for both murder counts, Barnes and Chambers each (1) killed or attempted to kill the victim, (2) intended to kill the victim, (3) intended that deadly force would be used in the course of the underlying felony, or (4) was a major participant in the underlying felony and exhibited reckless indifference to human life. Furthermore, the jury failed during the sentencing proceeding to find the existence of the N.C.G.S. § 15A-2000(f)(4) mitigating circumstance, that defendant was an accomplice in or accessory to the cap-

ital felony committed by another person and his participation was relatively minor, for either Barnes or Chambers. The jury did find, however, that the (f)(4) mitigating circumstance existed with respect to Blakney. These findings tend to show that, for capital sentencing purposes, the jury adhered to the trial court's instruction to consider each defendant's involvement and culpability distinctly and that the jury did not find facts vicariously against one defendant based on the actions or intent of another. We cannot conclude that the instruction with respect to the (e)(9) aggravating circumstance was plain in error. This assignment of error is therefore overruled.

ARGUMENTS OF DEFENDANTS BARNES AND BLAKNEY

[22] In another assignment of error, defendants Barnes and Blakney contend that the trial court committed reversible constitutional error in overruling Barnes' objections to closing arguments made by the State during the capital sentencing proceeding. We note that Barnes and Blakney made no constitutional claims at trial concerning the State's closing arguments and will not be heard on any constitutional grounds now. N.C. R. App. P. 10(b)(1); *see, e.g., State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988).

[23] A defendant is not entitled to a new trial because of an improper prosecutorial comment, properly objected to, unless the comment amounted to prejudicial error. *State v. Ingle*, 336 N.C. 617, 650-51, 445 S.E.2d 880, 898 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 222 (1995). Barnes first contends that the prosecutor acted with gross impropriety during closing argument by lying on the floor to demonstrate a previous crime allegedly committed by Barnes. At the sentencing proceeding, the State introduced evidence tending to show that Barnes had committed an attempted robbery of a sixteen-year-old girl, Terry Hull. During her closing argument, assistant district attorney Symons, while lying on the floor, described Barnes' encounter with Ms. Hull:

> And they went skipping up the hill, hand in hand, these two sisters, and Mr. Barnes grabbed Terry [Hull] from behind, dragged her across the street with little sister Melissa still holding her hand, and he flung her down on the ground. And they fought and she screamed for help and he pinned her down with his knees on her arms, and he put his hands around her neck like this and choked her. Terry [Hull] told you that her breath was cut off. Terry [Hull] told you her eyes started to go. Her vision went; she couldn't see. She told you her head was red and felt like it was

going to explode. And she told you he would have killed me if that man didn't pull him off. It's a felony involving the use of violence.

[DEFENSE COUNSEL]: Objection to Ms. Symons['] argument from the floor.

THE COURT: Overruled.

Barnes maintains that Ms. Symons' act of lying on the floor served only to inflame the jury and detract jurors from their duty to reasonably weigh the sentencing evidence. We disagree.

Nothing in the record suggests that Ms. Symons did anything other than lie on the floor and describe Barnes' attack on Terry Hull. Defendant has failed to show why or how this was an improperly prejudicial "theatrical, inflammatory demonstration." We therefore conclude that the act did not amount to prejudicial error.

[24] Barnes and Blakney next argue that the prosecutor erroneously disregarded instructions by the trial court and argued to the jurors that they could use the same evidence to support the existence of more than one aggravating circumstance. Specifically, over Barnes' objection, the prosecutor encouraged the jury to consider Mr. Tutterow's "psychological torture," caused by observing Mrs. Tutterow's death, in determining the existence of the heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9) (1988) (amended 1994). The prosecutor encouraged the jury later in her argument to use the same evidence, the death of Mrs. Tutterow, to find the existence of the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11).

"Double-counting" occurs when two aggravating circumstances are based on the same evidence. *State v. Howell*, 335 N.C. 457, 474-75, 439 S.E.2d 116, 126 (1994). Nonetheless, some overlap in the evidence is permissible; aggravating circumstances are not redundant unless there is a complete overlap of evidence supporting them. *State v. Moseley*, 338 N.C. 1, 54, 449 S.E.2d 412, 444 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995).

Barnes and Blakney concede that the trial court correctly instructed the jury not to find two or more aggravating circumstances from the same evidence. We fail to see any impropriety. The argument did not conflict with any of the trial court's instructions and did not

encourage the jury to ignore the instruction about not using the same evidence for finding two or more aggravating circumstances.

[25] Finally, Barnes and Blakney contend that the prosecutor misstated the law on mitigating circumstances. The prosecutor argued to the jury as follows:

> [R]ecall that each defendant has a separate set of mitigating circumstances and they have to prove them to you. The State does not have to disprove the mitigating circumstances. The defendant has to prove their existence. Now, here is the definition of mitigating circumstances. And each time you consider a mitigating circumstance say to yourself, does it reduce the moral culpability of the killing? Because you must find that to find that a circumstance has mitigating value.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

"While the jury must accord mitigating value to a statutory mitigating circumstance found by it, the jury may deem a nonstatutory mitigating circumstance found by it to be without mitigating value." *Buckner*, 342 N.C. at 235, 464 S.E.2d at 435. Barnes maintains that the prosecutor's argument erroneously informed jurors that it was up to them to decide whether every mitigating circumstance, both statutory and nonstatutory, carried mitigating value.

Prosecutorial arguments are not examined in an isolated vacuum on appeal but must be considered in the context in which they were made. *Ingle*, 336 N.C. at 646, 445 S.E.2d at 895. Immediately after the trial court overruled Barnes' objection, the prosecutor went on to differentiate between statutory and nonstatutory mitigators. She stated that the jurors had to give some mitigating value to any statutory mitigating circumstance which they found to exist. Therefore, the argument was correct, and defendant was not prejudiced. For the foregoing reasons, we conclude that the arguments of the prosecutor during the capital sentencing proceeding in this case did not amount to prejudicial error. Accordingly, these assignments of error are overruled.

ARGUMENTS OF DEFENDANT BARNES

[26] Defendant Barnes contends in an individual assignment of error that the trial court erred in not limiting its instruction on the doctrine of possession of recently stolen property to the burglary and robbery

charges. The trial court instructed the jury with respect to this doctrine that

> the State seeks to establish the defendants' guilt in part by the doctrine of recent possession. For this doctrine to apply, the State must prove three things beyond a reasonable doubt. First, that property was stolen; second, that the defendant had possession of this same property. Now, a person possesses property when he is aware of [its] presence and has, either by himself or together with others, both the power and intent to control its disposition or use. [Third], that the defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly. Now, if you find these things from the evidence beyond a reasonable doubt, you may consider them together with all other facts and circumstances in deciding whether or not the defendant is guilty of the crimes charged.

In *State v. Joyner*, 301 N.C. 18, 269 S.E.2d 125 (1980), we held that the trial court properly instructed the jury that it could consider as a relevant circumstance defendant's recent possession of stolen property in the determination whether defendant "was guilty of all the crimes charged against him, where, as here, all of the crimes . . . occurred as a part of the same criminal enterprise." *Id.* at 29, 269 S.E.2d at 132. We have used the "same criminal enterprise" test in several different contexts, including a felony murder in which the underlying felony was armed robbery. *See State v. Wilson*, 313 N.C. 516, 537, 330 S.E.2d 450, 463-64 (1985). Furthermore, in *State v. Mlo*, 335 N.C. 353, 377, 440 S.E.2d 98, 110, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 841 (1994), we noted that "[t]estimony concerning defendant's sudden and unprecedented possession of the victim's personal property immediately after the victim's murder is relevant to the issue of whether defendant was involved in the killing."

Barnes argues on appeal that the instructions allowed the jury to infer premeditation and deliberation from the fact that he had stolen goods in his possession shortly after the time of the murders. We do not agree.

As we stated in *Joyner*,

> "possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others[,] affords presumptive evidence that the person in possession is

himself the thief, and the evidence is stronger or weaker[] as the possession is nearer to or more distant from the time of the commission." *State v. Patterson*, 78 N.C. 470, 472-473 (1878). While the fact of recent possession has been said to raise a "presumption," it is more accurately deemed to raise a permissible inference that the possessor is the thief. *State v. Frazier*, 268 N.C. 249, 150 S.E.2d 431 (1966). "The presumption, or inference as it is more properly called, is one of fact and not of law. The inference derived from recent possession 'is to be considered by the jury merely as an evidentiary fact along with other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.' " *State v. Fair*, 291 N.C. 171, 173, 229 S.E.2d 189, 190 (1976) [(quoting *State v. Baker*, 213 N.C. 524, 526, 196 S.E. 829, 830 (1938)]. The inference which arises, however, is that the possessor is the thief. *Id.*

Joyner, 301 N.C. at 28-29, 269 S.E.2d at 132. Therefore, the instruction informed the jurors that they were permitted, but not required, under the doctrine of recent possession to make the inference that Barnes stole the property in their determination whether Barnes committed the other crimes at issue. They were allowed, however, to use any such inference only to the extent appropriate according to the other instructions of the trial court in determining the guilt or innocence of the defendant with respect to the other crimes charged. For example, the trial court's instructions on the doctrine of recent possession in no way imply that the inference that a defendant stole property can be substituted for the jury's specific and independent findings as to whether Barnes premeditated and deliberated the killings. This assignment of error is therefore without merit.

[27] In another assignment of error, defendant Barnes contends that the trial court erred in denying his motion to dismiss the charges of first-degree murder as to him. Barnes argues that there was insufficient evidence to show premeditation and deliberation.

When ruling on a motion to dismiss, the trial court is to 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. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). If substantial evidence of each element is presented, the motion to dismiss is properly denied. *State v. Quick*, 323 N.C. 675, 682, 375 S.E.2d 156, 160 (1989). "Substantial evidence is relevant evi-

dence that a reasonable mind might accept as adequate to support a conclusion." *Olson*, 330 N.C. at 564, 411 S.E.2d at 595. The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *Id.*

First-degree murder is the unlawful killing of a human being with malice, premeditation, and deliberation. *State v. Skipper*, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836.

Taken in the light most favorable to the State, the gunshot residue evidence tended to show that Barnes shot the Tutterows. The evidence revealed that Barnes had fired a handgun or had handled a handgun soon after it was fired within a period close to the time of the killings. Furthermore, the fact that Barnes disposed of one of the murder weapons permits a reasonable inference that he had fired the weapon. The State's evidence also tended to show that Barnes demonstrated a willingness to kill someone at different times on the day of the murders. Barnes told Maurice Alexander that he would do anything he had to do to make a living and asked him if he had any enemies that he wanted Barnes to take out. Barnes threatened to shoot Robert Beatty and described a pistol in his possession as the one he had used to shoot Gil Gillespie a couple of weeks earlier. Based on this evidence, the jury could reasonably find that Barnes killed the victims after premeditation and deliberation. This assignment of error is therefore overruled.

ARGUMENTS OF DEFENDANT BLAKNEY

[28] Defendant Blakney contends in an individual assignment of error that the trial court erred in its determination that he knowingly and intelligently waived his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), before making statements to police.

After he was arrested, Blakney confessed to the police both on 30 October 1992 and on 2 November 1992. The trial court conducted a suppression hearing on 24 January 1994 and concluded that Blakney "was in full understanding of his Constitutional right to remain silent and right to counsel and all other rights [when he confessed], and that he freely, knowingly, intelligently and voluntarily waived each of those rights and made statements to the officers." The trial court denied Blakney's motion to suppress, overruled his objection to the admission of the statements, and admitted redacted versions of the statements through the testimony of the police officers.

Blakney does not argue on appeal that the warnings given to him by police were somehow insufficient, nor does he argue that his statements were involuntary. Rather, he contends that he could not have understood his *Miranda* rights and that he therefore could not have waived them knowingly and intelligently. In *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985), this Court stated that the validity of a waiver as knowingly and intelligently executed depends on the specific facts and circumstances of the particular case, including the background, conduct, and experience of the accused. A defendant's waiver is valid if it is determined that his decision not to rely on his rights was not the product of coercion, that he was aware at all times that he could remain silent and request counsel, and that he was cognizant of the intention of the prosecution to use his statements against him. *Patterson v. Illinois*, 487 U.S. 285, 296-97, 101 L. Ed. 2d 261, 275 (1988). While the burden of showing a knowing and intelligent waiver is on the State, *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59, evidence indicating that the accused did not fully appreciate the ramifications resulting from the waiver will "not defeat the State's showing that the information it provided to him satisfied the constitutional minimum." *Patterson*, 487 U.S. at 294, 101 L. Ed. 2d at 273.

Dr. John Frank Warren III, a psychologist, testified that he believed that Blakney's mental retardation, in addition to difficulties related to Blakney's consumption of alcohol in the period before his arrest, rendered him unable fully to understand his *Miranda* rights on 30 October 1992. Blakney, however, testified at the hearing that he understood that he had the right to talk to an attorney and the right to remain silent and reaffirmed this on cross-examination, further explaining that he had previous experience with the criminal justice system. Blakney also acknowledged having again been advised of his rights on 2 November 1992 and signing a form stating that he understood his rights at that time.

At the suppression hearing, the trial court found with respect to Blakney's statements that

> he was not under the influence of any alcoholic beverages at that time; that the defendant was taken to headquarters and he was advised of each of his rights; that the defendant was subdued at that time; he was not . . . in an excited condition; that he was in custody. He was taken to the Salisbury Police Department to an interrogation room; . . . that at that time he was advised of his rights by Detective Rodgers and advised of each of the rights [on the rights form]; that Detective Rodgers asked the defendant if he understood his rights and the defendant acknowledged that he did and that thereafter he signed a waiver of his rights[] [and that] all these had been read to him by Detective Rodgers; and that he agreed to talk with Detective Rodgers without an attorney being present; that the defendant appeared to understand what Detective Rodgers was talking about when he did talk with him; that he appeared to be in touch with his surroundings; that there is no evidence that any threats were made against the defendant by anyone at that time or that any promises were made to him. The defendant thereafter made a statement and that later on November 2, 1992, the [d]efendant, Robert Blakney, was once again questioned by Detective Rodgers and Detective Beck in the Cabarrus County Jail; that prior to questioning they read his rights to him as shown on [the rights form]. The defendant indicated that he did understand his rights and signed a waiver of his rights as shown on [the rights form] . . . . [That] he did complete the eighth grade of school; that he does, in fact, know how to read; that he could read the documents that had been previously referred to . . . ; that he did in fact know what it meant when he read his rights and his waiver of his rights; that the defendant understood that he had a right to talk to a lawyer before he answered any questions on each of these dates; that he knew that he had a right to remain silent on each of those dates; . . . that the defendant knew he didn't have to talk to the officers during the questioning; that on October 30th, the officers went back over with him what they had written down and that the defendant agreed that what they read back to him was right and that was what he had told them and, thereafter, he signed a statement . . . on October 30th, 1992; that on that statement the defendant, in fact, initialed a change that was made on that statement to correct an error which he thought was on the statement[,] which

> indicated that he was aware of everything taking place on that day; that on November 2, the defendant basically told the officers the same things he had told them on October 30th in addition to a few questions which were of different things; that there is no evidence of any promises, offers of reward or inducement by law enforcement officers for the defendant to make a statement on either of those dates. . . . [T]here was never any indication by the defendant that he desired to stop talking or that he ever asked for an attorney.

As Blakney has not excepted to any of these findings of fact, they are conclusive and not reviewable on appeal. *State v. Watkins*, 337 N.C. 437, 438, 446 S.E.2d 67, 68 (1994). The trial court's conclusions of law, however, are fully reviewable on appeal and will be upheld if correct when viewed in light of the findings of fact. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994).

Blakney now argues that the totality of the circumstances shows that because of his mental retardation and the circumstances surrounding his statements, he could not have comprehended the *Miranda* warnings as given to him by the officers. This Court has stated that while they are factors to be considered, intoxication and subnormal mentality do not of themselves necessarily cause a confession to be inadmissible because of involuntariness or the ineffectiveness of a waiver. *State v. McKoy*, 323 N.C. 1, 21-24, 372 S.E.2d 12, 23-24 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). We do not believe that these factors as presented by Blakney here are sufficient to render his confession inadmissible. The trial court's thorough findings were amply supported by the evidence presented at the suppression hearing, and the conclusion that Blakney knowingly and intelligently waived his constitutional rights and made the statements voluntarily was a correct conclusion of law in light of the findings. In viewing the findings and conclusions of the trial court, we therefore conclude that the trial court's actions in this regard were not erroneous. This assignment of error is overruled.

[29] In another assignment of error, defendant Blakney argues that the trial court erred by allowing into evidence eighteen photographs that depicted the crime scene. Although Blakney candidly concedes that the photographs illustrated the testimony of investigating officers with respect to the position of the victims' bodies, he argues that the photographs were cumulative and that the State introduced them

only to "inflame the jury's passions." "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 issues of whether photographs are excessive or repetitive and whether the probative value of photographic evidence is substantially outweighed by the tendency of such evidence to prejudice the jury are within the sound discretion of the trial court. *Id.* at 285, 372 S.E.2d at 527.

We conclude that Blakney has failed to establish that the trial court abused its discretion in admitting the photographs in this case. All eighteen photographs illustrated Agent Bonds' testimony with respect to the nature, number, and location of the victims' wounds. Furthermore, after the admission of the photographs, the trial court specifically noted for the record that it had examined the photographic evidence and determined that the probative value of all the photographs was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. We also note that during Agent Bonds' testimony, the trial court excluded two of the eighteen exhibits from publication to the jury as duplicative in nature and prohibited the State from introducing two other photographs for presentation to Agent Bonds or for admission into evidence. Because defendant has failed to establish that the trial court abused its discretion with respect to the admission of photographic evidence, this assignment of error is overruled.

ARGUMENTS OF DEFENDANT CHAMBERS

[30] In another assignment of error, defendant Chambers argues that the trial court erred by allowing Howard Crabb to testify during the sentencing proceeding that Chambers had previously assaulted and robbed Crabb. The State presented Crabb to support the submission of the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance, that defendant had been previously convicted of a felony involving the use or threat of violence to the person. Crabb testified that on 3 June 1992, he was bound, robbed, and severely beaten by an intruder he knew as "Richard Chambers." When asked to identify his assailant in the courtroom, Crabb failed to point to Chambers. However, the State then introduced certified copies of the indictment, transcript of plea, and judgment in which Chambers pled guilty to breaking and entering Crabb's residence on 3 June 1992.

Defendant first argues that Crabb's testimony was insufficient to establish that Chambers was Crabb's assailant since Crabb was unable to either visually identify Chambers in the courtroom or verbally state that Frank Junior Chambers (instead of "Richard Chambers") committed the crime. However, we have previously held that "the most appropriate way to show the 'prior felony' aggravating circumstance would be to offer duly authenticated court records," *State v. Silhan*, 302 N.C. 223, 272, 275 S.E.2d 450, 484 (1981), or to introduce "the judgment itself into evidence," *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). Because the State introduced into evidence certified copies of the transcript of plea and judgment against Chambers for breaking and entering Crabb's residence on 3 June 1992, a proper in-court identification was unnecessary to establish that Chambers committed the prior felony.

In a related argument, defendant contends that the charge of breaking and entering to which he pled guilty was not a sufficient "prior felony" to support the submission of the (e)(3) aggravating circumstance because breaking and entering does not include an element of force or the threat of force against another person. We disagree. In *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983), we stated:

> By using "involving" instead of language delimiting consideration to the narrow class of felonies in which violence is an element of the offense, we find the legislature intended the prior felony in N.C.G.S. 15A-2000(e)(3) to include any felony whose commission involved the use or threat of violence to the person. Thus we hold that for purposes of N.C.G.S. 15A-2000(e)(3), a 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.

McDougall, 308 N.C. at 18, 301 S.E.2d at 319. Crabb testified that Chambers entered Crabb's bedroom; bound Crabb's wrists and feet with strips of towels; repeatedly struck Crabb; and eventually stole Crabb's microwave oven, television, VCR, and vehicle. Crabb's testimony was corroborated by photographs illustrating his injuries and by the testimony of Sergeant Steve Whitley regarding his investiga-

tion of the assault on Crabb and the bindings that Chambers used to restrain Crabb during the assault. This evidence, in conjunction with Chambers' guilty plea to breaking and entering, supports the conclusion that violence against Crabb was an integral part of the commission of the breaking and entering of Crabb's residence. Therefore, the trial court did not err by concluding that Chambers' prior conviction for breaking and entering was an appropriate prior felony upon which to submit the N.C.G.S. § 15A-2000(e)(3) aggravator to the jury. This assignment of error is overruled.

[31] In another assignment of error, defendant Chambers contends that the trial court erred in admitting the testimony of four witnesses regarding his release from jail a few hours before the murders were committed. At the outset, we note that Chambers discusses the testimony of two of the witnesses, J.D. Barber and Donna Lowman, but fails to argue against the testimony of Teresa Scott or Greg Pullman. Therefore, the assignments of error relating to Ms. Scott and Mr. Pullman are deemed abandoned. N.C. R. App. P. 28(b)(5).

Chambers argues that the fact that he was incarcerated in the Rowan County jail until approximately 5:00 p.m. on the day of the murders should have been excluded from the evidence because it was irrelevant and highly prejudicial. We disagree.

The evidence involving Chambers' tenure in jail and his release on the day of the murders was relevant under a number of different theories. First, the evidence tended to show that Chambers knew Mr. Tutterow and had targeted him for the robbery. Chambers had met Mr. Tutterow while incarcerated at the Rowan County jail, where Mr. Tutterow cooked part-time and served as a deputy sheriff. Mr. Tutterow was known to carry significant amounts of money in his wallet and had given Chambers money to buy cigarettes and food while he was in jail. This fact helped to establish premeditation and deliberation as well as a motive for the killings: A reasonable inference is that Chambers decided to rob the Tutterows after getting to know Mr. Tutterow and did not want Mr. Tutterow to identify him later on.

Furthermore, the evidence tended to show that Chambers had no money and that he wanted money when he was released from jail. Shortly after his release from jail, Chambers met up with defendant Blakney and Antonio Mason at a nearby convenience store. Chambers told Blakney and Mason that he had been released from jail without any money, that he knew someone who lived nearby who

had plenty of money, and that he was willing to kill someone if it was necessary to get some money. Accordingly, this assignment of error is overruled.

PRESERVATION ISSUES

Defendants bring forward ten additional assignments of error that they concede have been previously decided contrary to their positions by this Court. They raise these issues to give this Court the opportunity to reexamine its prior holdings, as well as to preserve these assignments of error for any potential further judicial review of this case. We have carefully considered the arguments of defendants on these issues and find no compelling reason to depart from our prior holdings. We therefore overrule these assignments of error.

PROPORTIONALITY REVIEW

[32] Having determined that defendants' trial and separate capital sentencing proceeding were free from error, we now turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. It is our duty in this regard to ascertain (1) whether the record supports the jury's findings of the aggravating circumstance on which the sentences of death for defendants Barnes and Chambers were based; (2) whether the respective death sentences were entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the respective death sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the individual defendants. N.C.G.S. § 15A-2000(d)(2). After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the four aggravating circumstances found by the jury with respect to both Barnes and Chambers. Furthermore, we find no indication that the sentences of death in this case were imposed under the influence of passion, prejudice, or any other arbitrary consideration. We therefore turn to our final statutory duty of proportionality review.

Defendants Barnes and Chambers were convicted of two first-degree murders both on the theory of premeditation and deliberation and under the felony murder rule. The jury found four aggravating circumstances as to both Barnes and Chambers: (1) that both Barnes and Chambers previously had been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); (2) that the murders were committed for pecuniary gain, N.C.G.S.

§ 15A-2000(e)(6); (3) that the murders were part of a course of conduct including other violent crimes, N.C.G.S. § 15A-2000(e)(11); and (4) that the murders were especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). In its recommendations as to punishment for both murders, one or more jurors found the following circumstances to be mitigating with respect to defendant Barnes: (1) when he was young, Barnes observed his mother being abused by his mother's companion; (2) Barnes was constructively abandoned by his parents; (3) Barnes' father was significantly absent from his life and had no significant role in his upbringing; (4) Barnes was adversely affected by the absence and lack of concern of his father; (5) Barnes' mother was convicted of manslaughter when he was three, and he was separated from her two to three years while she was incarcerated; (6) Barnes was adversely affected by the forced separation from his mother during his formative years; (7) Barnes' mother failed to assume the parental role upon her release from prison; (8) Barnes had no significant role models during his formative years; (9) Barnes was a neglected child; and (10) as a result of the factors of his background, Barnes never developed into an adequately adjusted adult. The jurors did not find any mitigating circumstances with respect to defendant Chambers.

In our proportionality review, it is proper to compare the instant case with other cases in which this Court has concluded that the death penalty was disproportionate. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162. This Court has found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We do not find this case, with respect to either Barnes or Chambers, to be substantially similar to any of those cases.

A number of salient considerations weigh in favor of upholding the death sentences in these cases. We have repeatedly stated that a conviction based upon both the theories of premeditation and deliberation and felony murder is significant, with a finding of the former theory evincing " 'a more calculated and cold-blooded crime.' " *E.g.*, *State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994) (quoting *Lee*, 335 N.C. at 297, 439 S.E.2d at 575), *cert. denied*, —— U.S. ——, 131

L. Ed. 2d 752 (1995). Of the aggravating circumstances found in this case, three of the four—(e)(3), previous felony conviction involving the use or threat of violence; (e)(9), especially heinous, atrocious, or cruel; and (e)(11), course of conduct including other violent crimes—are most often found in death cases upheld by this Court on appeal. *State v. Bacon*, 337 N.C. 66, 129, 446 S.E.2d 542, 577-78 (1994) (Exum, C.J., dissenting), *cert. denied*, — U.S. —, 130 L. Ed. 2d 1083 (1995). Also, we have noted that the presence of any of these three aggravators is sufficient to sustain a death sentence when only a single aggravator has been submitted to and found by the jury. *Id.* at 110 n.8, 446 S.E.2d at 566 n.8. We also have yet to make a finding of disproportionality in a case in which the jury found the (e)(3) circumstance in recommending a death sentence. *State v. Bishop*, 343 N.C. 518, 560-61, 472 S.E.2d 842, 865 (1996). Furthermore, we have stated that the murder of multiple victims is to be weighed heavily against defendant and that we have never found disproportionate a death sentence imposed in a case involving multiple murders. *State v. McLaughlin*, 341 N.C. 426, 466, 462 S.E.2d 1, 22 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 879 (1996).

In this case, defendants Barnes and Chambers robbed and viciously murdered two elderly victims. In the course of the murders and the events that followed, Barnes and Chambers showed an utter disregard for the value of human life. While the jury did find a number of mitigating circumstances with respect to defendant Barnes, we cannot say that the death sentences as recommended by the jury and as imposed on defendants Barnes and Chambers by the trial court in this case are disproportionate. The case *sub judice* is therefore distinguishable from the seven cases in which this Court has found the death sentence to be disproportionate and entered a sentence of life imprisonment.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. It also bears mentioning that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* It suffices to say at this time that we conclude that the present case with respect to both Barnes and Chambers is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the death penalty to be disproportionate or those in which juries have consistently returned recommendations of life imprisonment. Accordingly, we conclude that the sentences of death

recommended by the jury for Barnes and Chambers and ordered by the trial court in the present case are not disproportionate.

For the foregoing reasons, we hold that defendants Barnes, Blakney, and Chambers received a fair trial, free from prejudicial error, and that their respective sentences of death or life imprisonment entered in the present case must be and are left undisturbed.

NO ERROR.

Justice FRYE dissenting.

In *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), this Court held that the trial court erred in its instructions on acting in concert. We held that those instructions were likely to be understood by the jury to permit convicting a defendant of premeditated and deliberate murder, which requires a specific intent to kill, when the only purpose shared between the defendant and the accomplice was to kidnap the victims, and when only the accomplice actually shot and killed the victims with the requisite specific intent to kill. In doing so, this Court resolved an apparent conflict between our opinion in *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987) (holding that although it is not necessary for defendant to be actually present in order to be convicted of premeditated and deliberate murder under the acting in concert theory, the requisite *mens rea* - willfulness, premeditation, and deliberation - must still be shown), and our later decision in *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991) (holding that it was not necessary that defendant share the intent or purpose to commit the crime of assault with a deadly weapon with intent to kill inflicting serious injury before the jury could apply the law of acting in concert to convict the defendant of that crime). Because the decision in *Erlewine* created a possible conflict in the law with the decision in *Reese*, the doctrine of *stare decisis* had no application in *Blankenship*. *See State v. Mobley*, 240 N.C. 476, 487, 83 S.E.2d 100, 108 (1954).

Until today, this Court and, I presume, the lower courts of this State, have followed our opinion in *Blankenship*. This Court followed *Blankenship* last year in a unanimous opinion for the Court written by the Chief Justice, when this Court was presented with instructions identical in substance to those in *Blankenship* and in the instant case. *State v. Straing*, 342 N.C. 623, 466 S.E.2d 278 (1996). That opinion contains, in footnote 1, the following statement: "The author of

this opinion dissented in *State v. Blankenship*. Although the author of this opinion still believes that *Blankenship* was wrongly decided, he is now required by *stare decisis* to apply that precedent in the case *sub judice*." 342 N.C. at 627, 466 S.E.2d at 280. However, today, the Chief Justice writes for a majority of the Court, ignoring *stare decisis* and overruling a recent opinion of this Court which resolved an apparent conflict in the law by returning to the principles articulated in *Reese*.

As we have said, "[t]his Court has never overruled its decisions lightly. No court has been more faithful to *stare decisis*." *State v. Lynch*, 334 N.C. 402, 410, 432 S.E.2d 349, 352 (1993) (quoting *Rabon v. Hospital*, 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967)). "This Court has always attached great importance to the doctrine of *stare decisis*, both out of respect for the opinions of our predecessors and because it promotes stability in the law and uniformity in its application." *Wiles v. Construction Co.*, 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978) (citations omitted).

Although the doctrine of *stare decisis* will not be applied to preserve and perpetuate error and grievous wrong, *see Rabon v. Hospital*, 269 N.C. at 15, 152 S.E.2d at 498, that is not what is involved here. The majority states no good or sufficient reasons for departing from this Court's precedent in *Blankenship* and *Straing*, and I see no new conditions or superior reasoning in the majority's opinion which would justify this Court's ignoring the doctrine of *stare decisis*. A proper regard for *stare decisis* and the adherence to case precedents required by that doctrine compel me to follow the law established in *Reese*, *Blankenship*, and *Straing*.

The acting in concert instructions in the instant case are identical in substance to *Straing* and, as the majority concedes, are identical in substance to those found defective in *Blankenship*. Nevertheless, today, in this death case, the majority now overrules *Blankenship* and concludes that the trial court's instructions were not erroneous. I believe that *Blankenship* was properly decided and, in any event, I am now required by *stare decisis* to apply that precedent in the instant case. Accordingly, I must register my dissent to this opinion which overrules a case that I thought had settled the law in a manner that was easily understood by our trial court judges.

Justices WHICHARD and PARKER join in this dissenting opinion.

STATE OF NORTH CAROLINA v. SAMMY CRYSTAL PERKINS

No. 60A94

(Filed 10 February 1997)

1. Jury §§ 223, 226 (NCI4th)— capital trial—jury selection—death penalty views—excusal for cause—rehabilitation not allowed

The trial court did not err in excusing a prospective juror for cause based on the juror's answers to the court's death-qualification questions where the juror told the court that he could follow the law as explained to him by the court with respect to the sentencing procedure, but he also stated that he did not know whether he "could vote on the death penalty" and that he was "unable to respond" to a question asking whether he would be able or unable to recommend a death sentence if the State proved its case beyond a reasonable doubt. Nor did the trial court err in refusing to allow defendant to attempt to rehabilitate this juror since the juror did not know his position on the issue, and it cannot be concluded that he would likely have answered the dispositive questions differently if the court had allowed defendant to ask him additional questions.

Am Jur 2d, Jury § 279.

Comment note on beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.

2. Jury § 226 (NCI4th)— capital trial—jury selection—death penalty views—excusal for cause

The trial court did not err in excusing for cause in a capital trial three prospective jurors who were unequivocal about their inability to vote for the death penalty without allowing defendant to attempt to rehabilitate the jurors since additional questioning by defendant would not likely have procured different responses.

Am Jur 2d, Jury § 279.

Comment note on beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.

3. Jury § 232 (NCI4th)— capital trial—death penalty views—excusal for cause—larger percentage of blacks excluded—no violation or equal protection or fair cross-section

Defendant's rights to equal protection and to a jury selected from a fair cross-section of the community were not violated by the fact that only five percent of white veniremen were excused for their opposition to the death penalty while thirty-five percent of black veniremen were so excused where defendant did not prove that any prospective juror was excluded on the basis of his or her race. Merely showing a disproportionate impact on the racial composition of the jury is not sufficient to establish a violation of federal or state constitutional rights.

Am Jur 2d, Criminal Law § 684; Jury § 244.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 AL43d 14.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-*Batson* state cases. 20 ALR5th 398.

4. Jury § 215 (NCI4th)— capital trial—jury selection—juror "more than likely" to vote for death—rehabilitation—denial of challenge for cause

The trial court did not err by failing to excuse for cause a prospective juror who asserted during individual *voir dire* about pretrial publicity that he would "more than likely" vote for death if defendant were convicted where, later in the *voir dire* after the jury's duties had been more fully explained, the juror stated that he would not automatically vote for the death penalty regardless of the evidence if defendant were convicted of first-degree murder, and the juror also told the court that he would follow the law of North Carolina as the court would explain it as to the sentence recommendation to be made by the jury.

Am Jur 2d, Criminal Law § 685.

Comment note on beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.

5. Jury § 201 (NCI4th)— jury selection—all elements not proven—hesitancy to return not guilty verdict—ability to follow law—denial of challenge for cause

The trial court did not err by its denial of defendant's challenge for cause of a juror who stated that he might be hesitant about returning a verdict of not guilty if the State proved three of the four elements of a crime and the three heavily outweighed the one where, during the colloquy about finding defendant not guilty if all the elements of the crime were not proven, the juror stated unequivocally that he would follow the law as explained to him by the court, and the juror subsequently stated unequivocally that even if he thought defendant might be guilty but was not satisfied beyond a reasonable doubt, he would not hesitate to find defendant not guilty. The prospective juror's answers did not demonstrate that he would be unable to properly apply the law on the presumption of innocence or that he would not be a fair and impartial juror.

Am Jur 2d, Jury §§ 226, 291.

6. Jury § 203 (NCI4th)— jury selection—knowledge of another murdered girl—strong feelings—ability to be impartial—denial of challenge for cause

The trial court in a prosecution for the first-degree murder and rape of a seven-year-old girl did not err by the denial of defendant's challenge for cause of a prospective juror who stated during *voir dire* that he had known a young girl who was murdered and that he had strong feelings about it which he would likely take into the jury room where the juror thereafter told the court that his strong feelings would not prevent him from being a fair and impartial juror.

Am Jur 2d, Jury §§ 226, 291.

Fact that juror in criminal case, or juror's relative or friend, has previously been victim of criminal incident as ground of disqualification. 65 ALR4th 743.

7. Criminal Law § 78 (NCI4th Rev.)— pretrial publicity—denial of venue change

The trial court in a prosecution for the first-degree murder and rape of a seven-year-old girl did not err in denying defendant's motion for a change of venue on the ground of pretrial pub-

licity where ten prospective jurors who indicated that they had formed an opinion based on pretrial publicity were excused; several of the jurors selected to serve had not heard of the case; and those jurors who had learned of the case through television, newspapers, or word of mouth stated that they had not formed an opinion about the case and that they could set aside any such information. N.C.G.S. § 15A-957.

Am Jur 2d, Criminal Law §§ 389, 390, 688, 841; Homicide § 204; Venue § 59.

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

8. Criminal Law § 532 (NCI4th Rev.)— alleged juror misconduct—conversation with baby-sitter—mistrial denied

The trial court in a first-degree murder case did not err by the denial of defendant's motion for a mistrial or, in the alternative, for the removal of a juror for misconduct when it was reported to the court during the trial that the juror had told her baby-sitter that the jury had decided that defendant was guilty and, except for one holdout, believed that defendant should be put to death where the court conducted a hearing out of the presence of the jury; the evidence was unclear regarding when the purported conversation took place and what, if anything, was said about the case; the juror testified that she had not been to the baby-sitter's home the day the conversation allegedly took place; upon extensive examination by the court, all jurors denied having formed or expressed any opinion as to defendant's guilt or the sentence to be imposed if he were found guilty; and the trial court found that it could not determine the content of the conversation between the juror and her baby-sitter, that all jurors denied having formed an opinion as to the guilt or innocence of defendant or the punishment to be imposed, and that no juror misconduct had occurred. Even if the incident happened as described by the baby-sitter, no outside influence was exerted on the jury.

Am Jur 2d, Criminal Law § 914.

Contacts between alternate and other jurors or outsiders as reversible error. 84 ALR2d 1288.

9. Evidence and Witnesses § 3070 (NCI4th)— videotaped interview—admissibility for impeachment—exclusion not prejudicial error

Assuming that a child psychologist's videotaped interview of a seven-year-old murder and rape victim's brother, who was present in the room when his sister died, was properly authenticated and admissible to impeach a juvenile investigator's testimony that the brother had told her that defendant had bitten his finger, watched a "nasty" tape, and "made [the victim] dead," and that he mentioned a pillow, defendant was not prejudiced by the trial court's exclusion of the videotape where the videotape shows that, although the brother did have some difficulty expressing himself and answering questions, he did state that defendant put a "pillow on [the victim's] head" and "her died," which comments were consistent with the investigator's testimony; defendant admitted placing a pillow on the victim's face; the physical evidence suggested the victim had been smothered and raped; the victim's cousin testified that he saw defendant on top of the victim, that a pillow was on the victim's face, and that defendant was having sex with her; and no reasonable possibility exists that the result would have been different but for the trial court's failure to admit the videotape.

Am Jur 2d, Appellate Review § 759; Constitutional Law § 848; Criminal Law § 196; Homicide § 560.

10. Evidence and Witnesses § 929 (NCI4th)— statements by victim's brother—admissible as excited utterances

In a prosecution for the murder and rape of a seven-year-old girl, statements made by the victim's three-year-old brother to a juvenile investigator that defendant had bitten him while he was on the bed with the victim, that defendant made him watch a "nasty tape," that "mommy woke up and [the victim] was dead," and that defendant "made her dead" were properly admitted under the excited utterance exception to the hearsay rule where the statements were made ten hours after the murder and one hour after the body was discovered; the brother had been through the startling experience of witnessing the victim's death; and his statements were spontaneous and not fabricated or the result of second-hand information.

Am Jur 2d, Evidence §§ 861, 865, 879, 882.

Instructions to jury as to credibility of child's testimony in criminal case. 32 ALR4th 1196.

11. Criminal Law § 460 (NCI4th Rev.)— capital trial—closing argument—consideration of both theories of first-degree murder—greater sentencing options—impropriety cured by instructions

Any impropriety in the prosecutor's closing argument that the jury should find defendant guilty under both theories of first-degree murder because "that gives the judge a greater option with regard to punishment" and any error in the trial judge's failure to intervene were cured by the trial court's correct instruction to the jury on the legal standard it was to apply in determining guilt and on the effect of the State's failure to carry its burden of proving guilt beyond a reasonable doubt. It does not appear that the jury rendered a guilty verdict based on the prosecutor's argument about the potential for greater punishment rather than on the overwhelming evidence of defendant's guilt.

Am Jur 2d, Trial §§ 587, 711.

12. Evidence and Witnesses § 2965 (NCI4th)— defense psychologist—cross-examination proper to show bias—allegation of misconduct—cross-examination not prejudicial error

The State's cross-examination of a forensic psychologist who testified for defendant as to whether he had been fired, removed, or transferred from the forensic unit at Dorothea Dix Hospital for misconduct was relevant to show that the witness may have been biased against the State. Assuming *arguendo* that the trial court erred by permitting the prosecutor to inquire into an allegation that the witness had made improper advances to a patient, this error was not prejudicial to defendant in light of the witness's denial of any misconduct and the overwhelming evidence of defendant's guilt of the crimes charged.

Am Jur 2d, Evidence § 495; Expert and Opinion Evidence § 95.

13. Criminal Law § 1337 (NCI4th Rev.); Evidence and Witnesses § 281 (NCI4th)— capital sentencing—character evidence—rebuttal—cross-examination of witness—accusation against defendant

Defendant placed his character in issue in a capital sentencing proceeding when a defense witness read from letters defendant had written to her in which defendant stated that he was a "pretty good person," that he thought "about the Lord daily," and that he knew he should give his life to the Lord. Therefore, the State was entitled to rebut this evidence of good character by asking the witness on cross-examination whether she had accused defendant of raping her daughter in 1978.

Am Jur 2d, Evidence § 431.

Prejudicial effect of prosecutor's comment on character or reputation of accused, where accused has presented character witnesses. 70 ALR2d 559.

14. Criminal Law § 1342 (NCI4th Rev.)— capital sentencing—evidence of prior conviction—time actually served—absence of prejudice

Evidence elicited by the prosecutor on cross-examination of defendant in a capital sentencing proceeding that defendant had been sentenced to fifteen years in prison for attempted first-degree rape was admissible to establish the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence to the person. Assuming *arguendo* that evidence of the length of time served by defendant pursuant to this conviction was not relevant in a capital sentencing proceeding, defendant was not prejudiced by the admission of such evidence where evidence that defendant received the fifteen-year sentence in 1981 and killed the victim in this case in 1992 demonstrated that defendant obviously did not serve his entire sentence, the State presented substantial evidence establishing defendant's guilt and supporting each of the aggravating circumstances, and no reasonable possibility exists that a different result would have been reached at trial if the trial court had excluded this evidence.

Am Jur 2d, Criminal Law § 598; Evidence §§ 341, 445; Rape § 71.

Necessity and sufficiency of cautionary instructions, in prosecution for rape, as to evidence of other similar offense. 77 ALR2d 906.

Supreme Court's views as to what comments by prosecuting attorney constitute violation of accused's privilege against self-incrimination under Federal Constitution's Fifth Amendment. 99 L. Ed. 2d 926.

15. Criminal Law § 1348 (NCI4th Rev.)— capital sentencing—prior conviction—length of time served—parole issue not raised

The prosecutor's cross-examination of defendant in a capital sentencing proceeding about the length of time he served for a prior attempted rape conviction did not raise the issue of defendant's eligibility for parole in the event the jury recommended a life sentence and did not entitle defendant to an instruction on parole eligibility.

Am Jur 2d, Criminal Law § 918; New Trial § 247; Trial § 575.

Prejudicial effect of statement or instruction of court as to possibility of parole or pardon. 12 ALR3d 832.

16. Criminal Law § 453 (NCI4th Rev.)— capital sentencing—closing argument—jurors in place of victim—no due process violation

The prosecutor's closing argument in a capital sentencing proceeding asking the jurors to put themselves in the position of the seven-year-old rape and murder victim was improper, but this argument did not deny defendant due process where the argument did not manipulate or misstate the evidence; the argument did not implicate any specific rights of the accused, such as the right to counsel or the right to remain silent; the State's evidence was overwhelming that defendant raped and smothered the victim and strongly supported each of the aggravating circumstances found by the jury; and it is unlikely that the jury's decision was influenced by this argument.

Am Jur 2d, Homicide §§ 463, 560; Trial § 706.

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

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.

17. Criminal Law § 468 (NCI4th Rev.)— capital sentencing—closing argument not supported by evidence—no due process violation

Even if the evidence did not support the prosecutor's closing argument in a capital sentencing proceeding that defendant killed the victim to prevent her from testifying against him, this argument did not violate defendant's right to due process.

Am Jur 2d, Appellate Review §§ 713, 753.

Propriety and prejudicial effect of prosecuting attorney's arguing new matter or points in his closing summation in criminal trial. 26 ALR3d 1409.

Whether admission of evidence at criminal trial in violation of Federal Constitutional rule is prejudicial error or harmless error, Supreme Court cases. 31 L. Ed. 2d 921.

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.

18. Criminal Law § 439 (NCI4th Rev.)— capital sentencing—closing argument—remarks about defendant

The trial court did not err by overruling defendant's objections to remarks of the prosecutor in his closing argument in a capital sentencing proceeding that "to describe [defendant] as a man is an affront to us all" and that the rules of the court prevented the prosecutor from saying "what he really is," since the prosecutor did not call defendant an "animal" or refer to him by another disparaging name, and these remarks were isolated.

Am Jur 2d, Homicide § 463; Trial § 554.

19. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—closing argument—defendant mean rather than mentally disturbed—no gross impropriety

The prosecutor's closing argument in a capital sentencing proceeding to the effect that the evidence supported the conclu-

sion that defendant was "just plain mean" rather then under the influence of a mental or emotional disturbance fell within the wide latitude generally afforded counsel during closing argument and was not so grossly improper as to require *ex mero motu* intervention by the trial court.

Am Jur 2d, Homicide § 463; Trial § 554.

20. Criminal Law § 1346 (NCI4th Rev.)— capital sentencing—same evidence for more than one circumstance—failure to give limiting instruction—no plain error

In a capital first-degree murder sentencing proceeding wherein the trial court submitted the aggravating circumstances that the murder was committed while defendant was engaged in the commission of a first-degree rape and that the murder was especially heinous, atrocious, or cruel, any error in the trial court's failure to give the jury a limiting instruction informing it not to consider the rape when determining the existence of the especially heinous, atrocious, or cruel aggravating circumstance did not rise to the level of plain error where the evidence at trial established that defendant raped the seven-year-old victim while he smothered her with a pillow; the medical examiner testified that it would have taken ten to twenty minutes for the victim to die and that the victim would have been conscious for three to seven minutes during this period; and defendant raped and smothered the victim while her grandmother and three-year-old brother were in the same bedroom and while the brother watched.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554; Trial § 1760.

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.

21. Criminal Law § 1066 (NCI4th Rev.)— capital sentencing—no right of allocution

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.

Am Jur 2d, Criminal Law § 531; Homicide § 550.

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.

Resentencing because of error with respect to question to defendant as to whether he has anything to say why sentence should not be pronounced against him. 96 ALR2d 1337.

22. Criminal Law § 1402 (NCI4th Rev.)— death sentence not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant was found guilty on theories of felony murder and premeditation and deliberation; defendant had been dating the seven-year-old victim's grandmother for two months at the time of the killing; the victim and her three-year-old brother lived with their grandmother, slept in their grandmother's bedroom, and knew defendant; the murder occurred during the commission of a rape; and the jury found the especially heinous, atrocious, or cruel aggravating circumstance.

Am Jur 2d, Criminal Law § 628; Homicide § 556.

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.

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.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed. 51 L. Ed. 2d 886.

Justice WEBB dissenting.

Justice FRYE joins in this dissent.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Sumner, J., at the 15 November 1993 Criminal Session of Superior Court, Pitt County,

upon a verdict of guilty of first-degree murder. Defendant was also found guilty of first-degree rape and was sentenced to a consecutive term of life imprisonment. Defendant's motion to bypass the Court of Appeals as to the rape conviction was allowed 23 November 1994. Heard in the Supreme Court 21 June 1995.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine M. Crawley, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant Sammy Crystal Perkins was tried capitally on indictments charging him with first-degree murder and first-degree rape. The jury found defendant guilty as charged. Following a capital sentencing proceeding, the jury recommended a sentence of death; and the trial court entered judgment accordingly. The trial court also imposed a consecutive sentence of life imprisonment for first-degree rape. For the reasons discussed herein, we conclude that the jury selection, guilt-innocence phase, and capital sentencing proceeding of defendant's trial were free from prejudicial error and that the death sentence is not disproportionate.

The State presented evidence tending to show that during the early morning hours on 19 April 1992, defendant sexually assaulted seven-year-old LaSheena Renae "JoJo" Moore and smothered her to death.

On 18 April 1992 defendant was living with his mother in Greenville. After visiting with his family and drinking several beers, defendant went to the home of Theia Esther Moore, a woman he had been dating for two months and had known for ten or eleven years. Moore lived in the house with her two children and four grandchildren, one of whom was the victim. Moore shared a room with two of her grandchildren, three-year-old Michael "Champ" Moore and the victim, who slept together on a daybed.

After leaving the Moore house for a short time, defendant returned and drank more beer and smoked crack cocaine. At approximately 3:00 a.m. on 19 April, defendant entered Moore's bedroom, where she and her two grandchildren were present. Defendant watched a pornographic video and then tried to have sex with Moore, who was surprised that he was in the room. Moore discovered a large

butcher knife under her pillow, and defendant explained that he had used it to open a can of beer.

Moore ordered defendant out of the house. As she walked him to the door, Champ rose from his bed and claimed that defendant had bitten his finger. After defendant left, he called Moore twice to insist that he had not bitten Champ. Moore then went to sleep; when she awoke at around 9:00 a.m., she observed that Champ's finger was swollen. At approximately 11:30 a.m., while the family was preparing to go to church for Easter services, Moore discovered that JoJo was dead.

The evidence tended to show that sometime early that morning, defendant had mounted the victim, held a pillow over her face, and had sex with her. The medical examiner determined that the victim died of suffocation and estimated that the victim's mouth and nose were covered for a period of between three to seven minutes before she became unconscious.

Defendant testified that on the night and morning in question, he had been drinking and smoking crack cocaine. He stated that JoJo awoke while he was having sex with Moore. He put a pillow over her face so that she would not see them. He said that he administered CPR, which he thought was successful in resuscitating her. He then went to the kitchen for a beer, used a knife to open the can, and placed the knife by Moore's bed. Sometime in the morning, he took Champ to the bathroom. Champ stuck his finger in defendant's mouth, and defendant bit it. He said Moore threw him out of the house after discovering the knife and the biting incident.

Defendant, who was in a wheelchair by the time of trial, explained that he suffers from a debilitative muscular disease called myasthenia gravis. His disability precluded him from having sexual intercourse in any position where he would have to support himself with his arms. On cross-examination defendant admitted that he had a prior conviction for attempted rape in 1981 and was released from prison in 1986. He also had prior convictions for possession with intent to sell and deliver heroin and cocaine in 1988 and 1989.

The jury found defendant guilty of first-degree rape and guilty of first-degree murder under the theories of premeditation and deliberation and felony murder. The jury found all three submitted aggravating circumstances: (i) that defendant had been previously convicted of a felony involving the use or threat of use of violence;

(ii) that the murder was committed by defendant while defendant was engaged in the commission of or an attempt to commit first-degree rape; and (iii) that the murder was especially heinous, atrocious, or cruel. The jury also found one statutory and five non-statutory mitigating circumstances. The jury found that the mitigating circumstances did not outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. The jury recommended the death penalty.

Additional facts will be presented as necessary to address specific issues.

JURY SELECTION

[1] In his first assignment of error, defendant contends that the trial court erroneously excused a prospective juror for cause based on the juror's answers to the court's death-qualification questions. He argues that excusing the juror for cause violated the principles set out in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968). He further contends that the trial court abused its discretion in failing to allow defendant to attempt to rehabilitate the juror. *See State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993). We disagree with both contentions.

During death-qualification the trial court explained to prospective juror William E. Jackson the basic principles of the presumption of innocence and the burden of proof and outlined the capital sentencing procedure. Jackson stated that he understood the law as presented by the court. The following colloquy then occurred:

> THE COURT: Please listen very carefully, Mr. Jackson, to the following questions. Consider your responses carefully before you respond. If you are selected to serve as a juror in this case, can and will you follow the law as it will be explained to you by the Court in deciding whether the defendant is guilty or not guilty of first-degree murder or of any other lesser offense?
>
> JUROR: Yes, sir.
>
> THE 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 even though you know that death is one of the possible penalties?
>
> JUROR: Yes, sir.

THE COURT: Considering your personal beliefs . . . 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: I don't know whether I could vote on the death penalty.

THE COURT: Is that response an able or an unable response, sir?

JUROR: Unable to respond to that.

THE COURT: Unable. Thank you.

Mr. Staten—Jackson, excuse me. If the defendant is convicted of first-degree murder, 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?

JUROR: Yes, sir.

The State challenged Jackson for cause. Defendant then requested that he be allowed to ask a few questions of Jackson, and the court denied his request. The court excused the juror for cause on the grounds that

> as a matter of conscience regardless of the facts and circumstances . . . he would be unable to render a verdict with respect to the charge . . . and . . . that the juror's views concerning the death penalty would prevent or substantially impair the performance of his duties as a juror in accordance with the Court's instructions and the juror's oath.

Defendant first contends that Jackson was improperly excused because his responses to the questions asked did not support the conclusions of the court and did not render him unqualified to serve.

> The standard for determining when a potential juror may be excluded for cause because of his views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)); *accord State v. Davis*,

> 325 N.C. 607, 621-22, 386 S.E.2d 418, 425 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). Prospective jurors with reservations about capital punishment must be able to "state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986); *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993). However, a prospective juror's bias or inability to follow the law does not have to be proven with unmistakable clarity. *State v. Locklear*, 331 N.C. [239,] 248, 415 S.E.2d [726,] 731-32 [(1992)]; *State v. Davis*, 325 N.C. at 624, 386 S.E.2d at 426. "[T]here will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." *Wainwright v. Witt*, 469 U.S. at 426, 83 L. Ed. 2d at 852-53.

State v. Conaway, 339 N.C. 487, 511-12, 453 S.E.2d 824, 839-40, *cert. denied*, — U.S. —, 133 L. Ed. 2d 153 (1995).

Jackson told the court that he could follow the law as explained to him by the court with respect to the sentencing procedure. However, he also stated that he did not know whether he "could vote on the death penalty" and that he was "[u]nable to respond" to a question asking whether he would be able or unable to recommend a death sentence if the State proved its case beyond a reasonable doubt. Under *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992), general "follow the law" questions are not sufficient to "detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." *Id.* at 734-35, 119 L. Ed. 2d at 506. The judge heard Jackson's tone of voice and observed his demeanor. Jackson's inability to respond to a dispositive question was sufficient to permit the court to conclude that Jackson's views with respect to the death penalty would prevent or substantially impair the performance of his duties as a juror. Accordingly, the trial court did not err in excusing him for cause.

Defendant also contends that the trial court committed reversible error by not permitting him to question Jackson further. "Both the defendant and the State have the right to question prospective jurors about their views on capital punishment." *Brogden*, 334 N.C. at 43, 430 S.E.2d at 908. "The manner and extent of inquiry on *voir dire* is within the trial court's discretion." *State v. Taylor*, 332 N.C. 372, 390,

420 S.E.2d 414, 425 (1992). When the challenge for cause is supported by the prospective juror's answers to questions propounded on *voir dire*, the defendant must show that further questioning "would likely have produced different answers" to establish that the trial court abused its discretion by refusing to allow the defendant to rehabilitate the challenged juror. *State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981); *accord Brogden*, 334 N.C. at 44, 430 S.E.2d at 908.

In *Brogden* we held that the trial court committed reversible error by failing to exercise its discretion in deciding whether to allow the defendant to rehabilitate a prospective juror. The trial court in that case ruled that it would not allow rehabilitation of prospective jurors, informing counsel that "the Supreme Court of North Carolina stated that such is a waste of valuable time." *Brogden*, 334 N.C. at 40, 430 S.E.2d at 906. In determining that the court committed reversible error, we noted that prospective juror Hall had consistently indicated that he would listen to the evidence and make his decision based on it, not on some predisposition to vote one way or the other. Hall told the court that he would vote for death if the State proved its case and that he was not "totally" either for or against the death penalty. Further, Hall stated that he believed that he could vote for the death penalty in the appropriate case. Hall, like the prospective juror in the present case, also gave conflicting responses which justified the exercise of a challenge for cause. When asked whether "[his] feelings about the death penalty would prevent or substantially impair the performance of [his] duty as a juror," Hall responded that his feelings would "partially" and "to some extent prevent or substantially impair" the performance of his duties as a juror. *Id.* at 52, 430 S.E.2d at 913. Hall also expressed uncertainty about whether he could be qualified under the law. The defendant argued, and we agreed, that "Hall would likely have answered the dispositive questions differently if the court had acceded to defendant's request to attempt to rehabilitate him." *Id.* at 52, 430 S.E.2d at 912. We determined that it was likely that Hall was confused about the meaning of the phrase "prevent or substantially impair" and that, except for the responses which supported excusing Hall for cause, Hall's entire *voir dire* suggested that he was a qualified juror. *Id.*

After considering prospective juror Jackson's *voir dire* in its entirety, we conclude that there is very little to suggest that he was qualified other than his response that he would follow North Carolina law with respect to the sentencing procedure. Jackson stated

unequivocally that he did not know whether he "could vote on the death penalty" and that he was "[u]nable to respond" to a question asking whether he could recommend the death penalty if the State proved its case. Since Jackson did not know his position on the issue, we cannot conclude that he would likely have answered the dispositive questions differently if the court had allowed defendant to ask him additional questions. Accordingly, we conclude that the trial court did not abuse its discretion by declining defendant's request to question Jackson further. This assignment of error is overruled.

[2] Defendant next assigns error to the removal of three additional prospective jurors on the ground that their excusal violated the *Witherspoon* rule. These prospective jurors unambiguously stated that they would not recommend a sentence of death even if the State proved its case beyond a reasonable doubt. Accordingly, the trial court did not err by excusing them for cause. *See State v. Ward,* 338 N.C. 64, 87-88, 449 S.E.2d 709, 721-22 (1994), *cert. denied,* —— U.S. ——, 131 L. Ed. 2d 1013 (1995).

Defendant also contends that the trial court erred by refusing to allow defendant to rehabilitate the prospective jurors. In response to questions propounded by the trial court, the prospective jurors at issue were unequivocal about their inability to vote for the death penalty. Additional questioning by defendant would not likely have produced different responses. Accordingly, we hold that the trial court did not abuse its discretion by refusing to allow defendant to question these jurors further. *See id.*

[3] Under this assignment of error, defendant also argues that the trial court violated various federal and state constitutional provisions by excluding the prospective jurors who could not be death-qualified. He contends that the excusal of these prospective jurors denied defendant the right to a jury selected from a fair cross-section of the community, in violation of the Sixth Amendment to the United States Constitution and Article I, Sections 19, 23, and 24 of the North Carolina Constitution. He also contends that the excusal of these jurors violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 19, 23, and 26 of the North Carolina Constitution. Defendant notes that only five percent of white veniremen were excused for their opposition to the death penalty, while thirty-five percent of black veniremen were so excused. He argues the jury selected was far less representative of the community than the venire originally called.

The excusal of a prospective juror does not violate the Equal Protection Clause solely because of its impact on the racial composition of the jury. *See Hernandez v. New York*, 500 U.S. 352, 359-60, 114 L. Ed. 2d 395, 406 (1991). " 'Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.' " *Id.* at 360, 114 L. Ed. 2d at 406 (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265, 50 L. Ed. 2d 450, 464 (1977)). The Sixth Amendment does not guarantee a "defendant the right to a jury composed of members of a certain race or gender." *State v. Norwood*, 344 N.C. 511, 527, 476 S.E.2d 349, 355 (1996), *cert. denied*, — U.S. —, — L. Ed. 2d —, 65 U.S.L.W. 3665 (1997). In the present case the trial court properly excluded the prospective jurors at issue. The record discloses that the prosecutor asked the court to excuse these jurors on the basis of their inability to recommend a death verdict if the State proved its case. Defendant has not proved that any prospective juror was excluded on the basis of his or her race. Merely showing disproportionate impact on the racial composition of the jury is not sufficient to establish a violation of defendant's federal or state constitutional rights. This assignment of error is overruled.

Defendant next assigns error to the court's failure to excuse for cause two jurors, Michael Parker and Charles Ayers, who defendant contends indicated an inability to render a fair decision.

[4] As to Parker, defendant first argues that Parker should have been removed for cause pursuant to *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492. While Parker was being questioned during individual *voir dire* about pretrial publicity, defendant's attorney asked him if he had formed any opinion concerning the punishment defendant should receive if he were convicted. Parker stated that he had formed such an opinion and that, if defendant were convicted, he would "more than likely" vote for death. The court reminded counsel that the individual *voir dire* was limited to pretrial publicity and did not allow further questions regarding the death penalty at that time.

Later during the jury *voir dire*, Parker told the court that he would follow the law in making his decision and that he would not automatically vote for the death penalty regardless of the evidence in mitigation. The court offered to allow defendant to ask further questions. Defendant declined to do so and exercised a peremptory challenge to remove Parker.

Defendant argues that Parker's assertion that he would "more than likely" recommend the death penalty required the trial court to

exclude him for cause pursuant to *Morgan*. We disagree. Later in the jury *voir dire*, after the jury's duties had been more fully explained, Parker said that if defendant were convicted of first-degree murder, he would not automatically vote for the death penalty regardless of the evidence. Parker also told the court that he would follow the law of North Carolina as the court would explain it as to the sentence recommendation to be made by the jury. These answers were sufficient for the court to conclude that defendant had not established that Parker's views would prevent or substantially impair the performance of his duties as a juror. Further, we note that defendant did not challenge Parker for cause based on *Morgan* and has, therefore, not preserved this argument for review.

[5] Defendant also argues that the trial court erred by not allowing the challenge for cause to Parker on the basis that his *voir dire* showed he would be unable to properly apply the law on the presumption of innocence. During the jury *voir dire*, the following colloquy occurred:

> [DEFENSE COUNSEL]: Do you [Mr. Parker] have an understanding in a general way of what is meant when I say that the defendant is presumed to be innocent?
>
> JUROR: (Nods head), yes, sir.
>
> [DEFENSE COUNSEL]: Um, do you have some idea in a general way of what I mean when I say that when a crime is charged the State has to prove sometimes . . . five or six elements?
>
> JUROR: (Nods head).
>
> . . . .
>
> [DEFENSE COUNSEL]: Um, if the Judge instructed you that the State had to prove four elements or facts beyond a reasonable doubt to prove a charge and the State proved three, would you have any hesitation about returning a verdict of not guilty?
>
> JUROR: Depending on the facts, I would try to go by that, but, I mean, depending on the facts I may be hesitant. I mean, I don't know about the case. But I would try.
>
> [DEFENSE COUNSEL]: You would try what?
>
> JUROR: To make all four elements be proved before I said he was guilty.

[DEFENSE COUNSEL]: Would—would that—are you saying—I mean, I don't want to put words in your mouth, but you seem to have some hesitancy in that regard?

JUROR: Well, as I said, it depends on the facts. If three heavily outweighed one, I may be hesitant. I'm sure I would try to go according to the law.

THE COURT: Mr. Parker, was your last response that you would try to follow the law; is that what you said?

JUROR: Uh-huh.

After a bench conference, defense counsel challenged Parker for cause. The court then asked Parker the following questions:

THE COURT: All right. Mr. Parker, I—you haven't done anything wrong. I just want to ask you a couple of questions myself.

JUROR: Okay.

[THE COURT]: Are you able to sit in that seat, sir, if you are chosen as a juror, would you be able to listen to the evidence in this case, sir, listen to arguments of counsel at the conclusion of the evidence and listen to the law that I give you in reaching a verdict, and would you be able to reach a fair and impartial verdict, sir?

JUROR: Yes, sir.

[THE COURT]: Would you be able to follow the law as I explain it to you, sir?

JUROR: Yes, sir.

[THE COURT]: All right. Thank you.

Challenge is denied.

Defendant, relying on *State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993), and *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992), argues that this colloquy shows that Parker was willing to forego holding the State to its burden of proof on certain elements if he thought a majority of the elements had been proven to his satisfaction. In *Cunningham* after several explanations of the law pertaining to presumption of innocence, the prospective juror continued to equivocate about defendant proving his innocence. We concluded

that the jury *voir dire* demonstrated that the challenged venire person was confused or had a fundamental misunderstanding of the presumption of innocence or was simply reluctant to apply those principles if the defense did not present evidence of defendant's innocence. In that case, for whichever reason, the juror's answers amply supported a conclusion that she would not be able to render a verdict in accordance with the law of North Carolina. In *Hightower* the prospective juror said that he would try to follow the law but that the defendant's failure to testify might "stick in the back of [his] mind." 331 N.C. at 639, 417 S.E.2d at 239. In this case Parker stated unequivocally that he would follow the law as explained to him by the court. This answer was given during the colloquy in regard to finding defendant guilty even if all the elements of the crime are not proved. Moreover, later on *voir dire*, Parker stated unequivocally that even if he thought defendant might be guilty but was not satisfied beyond a reasonable doubt, he would not hesitate to find defendant not guilty. Unlike in *Cunningham* and *Hightower*, Parker's answers do not demonstrate that he could not return a verdict in accordance with the law of North Carolina or would not be a fair and impartial juror. N.C.G.S. § 15A-1212(8) and (9) (1988). We conclude the trial court did not err in denying the challenge for cause to Parker.

[6] Defendant also contends under this assignment of error that the trial court erred by refusing to allow his challenge for cause to prospective juror Charles Ayers. Ayers stated on jury *voir dire* that he had known a young girl who was murdered and that he had strong feelings about it which he would likely take into the jury room. The court asked Ayers whether his strong feelings would prevent him from being a fair and impartial juror, and he said they would not. We conclude that the trial court did not err by denying the challenge for cause to Ayers. This assignment of error is overruled.

[7] In his next assignment of error, defendant contends that pretrial publicity surrounding the homicide was so extensive as to require a change of venue or a special venire from another county. He argues that this publicity made it impossible for him to receive a fair trial by a Pitt County jury.

"N.C.G.S. § 15A-957 provides that if there is so great a prejudice against a defendant in the county in which he is charged that he cannot receive a fair trial, the court must transfer the case to another county or order a special venire from another county." *State v. Best*, 342 N.C. 502, 510, 467 S.E.2d 45, 50, *cert. denied*, —— U.S. ——, 136

L. Ed. 2d 139 (1996). Under this statute the burden is on the moving party to show that " 'it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed.' " *State v. Gardner*, 311 N.C. 489, 497, 319 S.E.2d 591, 597-98 (1984) (quoting *State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347 (1983)), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). Relevant to this determination is testimony by prospective jurors that they can decide the case based on the evidence presented and not on pretrial publicity or any other evidence received outside the courtroom. *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).

Our review of the record in this case reveals the trial court did not err in denying the motion for a change of venue. After questioning, ten jurors who indicated they had formed an opinion based on pretrial publicity were excused. Several of the jurors selected to serve had not heard of the case. Those jurors selected who had seen something about the case on television, read about it in the newspapers, or heard about it by word of mouth had not formed an opinion about the case and said they could set aside any such information. The record discloses that no juror who sat on the case was biased against defendant or in favor of the prosecution by reason of what was reported by newspapers or television. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[8] Defendant next assigns error to the court's denial of his motion for a mistrial or, in the alternative, for the removal of a juror for misconduct. During the trial, Nancy Letchworth, a deputy clerk of superior court, told the presiding judge that she had been told by Tammy Beachum, another deputy clerk of court, that Beachum and Alecia Staton, a juror in this case, had the same baby-sitter. When Beachum picked up her child, the baby-sitter, Wendy Clark, told Beachum that juror Staton had told Clark that the jury had decided defendant was guilty and, except for one holdout, felt defendant should be put to death.

The court held a hearing out of the presence of the jury. Clark testified that juror Staton had told her the jurors believed defendant was guilty and, except for one juror, believed he should be put to death. Beachum testified that this information is what Clark had told her,

and Letchworth corroborated the testimony of Beachum. Each of the jurors was questioned separately; and each of them, including Staton, denied having formed an opinion as to the guilt of defendant. Juror Staton denied telling Clark that the jurors believed defendant was guilty or that they favored a death sentence.

The superior court found as facts (i) that Staton did have a conversation with her baby-sitter, (ii) that the court could not determine the content of the conversation, (iii) that all fourteen jurors denied having formed an opinion as to the guilt or innocence of defendant, and (iv) that the jurors denied having formed an opinion on punishment. The court refused to declare a mistrial or to excuse juror Staton.

The decision to grant a mistrial on the ground of juror misconduct rests largely within the discretion of the trial court. The court's decision will not be disturbed unless there is a clear showing that the court abused its discretion. *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991).

Upon inquiry by the trial court, Clark stated that juror Staton never indicated when or where the communication among the jurors occurred. Clark stated that the holdout juror was never identified. Furthermore, the evidence was unclear regarding when the conversation between juror Staton and Clark took place and what, if anything, was said about the case. Juror Staton testified that she had not even been to Clark's home the day the alleged conversation took place; instead, her husband dropped off and picked up their child on that day. Even more significant is that upon extensive examination by the court, juror Staton and each of the other jurors denied having formed or expressed any opinion regarding the guilt of defendant or the sentence to be imposed if he were found guilty. The court made findings of fact consistent with the evidence and concluded that there had been no juror misconduct. Moreover, if the incident happened as described by Clark, no outside influence was exerted on the jury. We hold that the court did not abuse its discretion by refusing to declare a mistrial or to excuse juror Staton. This assignment of error is overruled.

[9] Next, defendant assigns error to the trial court's failure to allow into evidence a videotaped interview of three-year-old Michael "Champ" Moore conducted by child psychologist Dr. Raymond Webster. Defendant argues that the videotape was properly authenticated and that it should have been admitted to impeach the hearsay

testimony of a statement by Champ Moore, who was present in the room when his sister died.

Juvenile Investigator Connie Elks testified at trial about statements Champ made to her on 19 April 1992, prior to the videotaped interview with Dr. Webster. She testified that Champ told her defendant had bitten his finger, watched a "nasty" videotape, and "made [the victim] dead." He mentioned the pillow, but would not respond to further questioning. These statements were admitted under the spontaneous utterance exception to the hearsay rule. *See* N.C.G.S. § 8C-1, Rule 803(2) (1992).

Defendant attempted to introduce the videotape of an interview that took place between Champ and Dr. Webster approximately ten days after the killing. Defendant argues this videotape would have impeached Elks' testimony and that Detective Ricky Best properly authenticated the tape by identifying the two participants and by keeping the tape in his continuous custody since its making. *See State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991).

Even assuming *arguendo* that the videotape was properly authenticated and should have been admitted, defendant has failed to show that a reasonable possibility exists that the result would have been different but for the trial court's failure to admit the tape. We have carefully reviewed the videotape. While Champ Moore had some difficulty expressing himself and answering questions, he did state that defendant put a "pillow on [the victim's] head" and "her died." These comments and others were consistent with Elks' testimony. Moreover, defendant admitted placing a pillow on the victim's face; and the physical evidence suggested the victim had been smothered and raped. The victim's cousin, Stem Moore, testified that he saw defendant on top of the victim, that a pillow was on the victim's face, and that defendant was having sex with her. This assignment of error is overruled.

[10] In a related assignment of error, defendant contends that the trial court erred by admitting under the excited utterance exception to the hearsay rule the testimony of Elks as to what Champ told her. Defendant argues that Champ did not witness the death of his sister and that there was ample time for him to have acquired secondhand information about his sister's death prior to making his alleged statements. Defendant argues that the admission of this testimony violated his Confrontation Clause rights and prejudiced him at

the guilt-innocence phase and in the sentencing proceeding of his trial.

Elks testified that on 19 April 1992 at approximately 1:00 p.m., Champ Moore told her that "Sea Dog," defendant, had bitten him while he was on the bed with "Doe-Doe," his sister. Champ said that defendant had made him watch a "nasty" tape. He also stated that "[m]ommy woke up and Doe-Doe was dead" and that "Sea Dog made her dead." The trial court admitted these statements under the excited utterance exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(2). The scope of this exception has been expanded where children are the hearsay declarants. *See State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 860 (1995); *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). In this case the child made his statements approximately ten hours after the murder and one hour after the body had been discovered. He had been through a startling experience—witnessing his sister's death—that suspended reflective thought. Furthermore, his statements were spontaneous; nothing in the record supports defendant's contention that the statements were fabricated or the result of secondhand information. *See Smith*, 315 N.C. at 86-90, 337 S.E.2d at 841-43. To the contrary, Champ's Uncle Hotrod testified that Champ came into his room about 10:00 a.m. on 19 April and mentioned defendant had done something to the victim. Hotrod had difficulty understanding Champ and ignored him. This assignment of error is overruled.

[11] Defendant next assigns error with respect to the following portion of the prosecutor's closing argument:

> As I say, you'll be able to consider both types of murder in the first degree and I say to you that in this case that it's important that you look at both and you can return a verdict of guilty under both theories of murder in the first degree. And the impact of your consider—-should you find the defendant guilty of murder in the first degree under both theories, that gives the judge a greater option with regard to punishment. So again I say to you that it's important to consider both.

Defendant contends that by making this argument the prosecutor improperly urged the jury to convict defendant of both theories of first-degree murder based on the potential for greater punishment rather than the evidence presented at trial. *See State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988). Defendant argues that the trial court

erred by not giving a curative instruction to the jury and by denying defendant's motion for a mistrial.

We note at the outset that defendant did not object to the argument when it was made and did not make his motion for a mistrial until after the jury had retired. Where a defendant does not object at trial to an allegedly improper jury argument, the trial court need not intervene *ex mero motu* unless the argument is "so grossly improper as to be a denial of due process." *State v. Zuniga*, 320 N.C. 233, 257, 357 S.E.2d 898, 914, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). A prosecuting attorney is allowed wide latitude in arguing to the jury. *Martin*, 322 N.C. at 240, 367 S.E.2d at 624. Furthermore, the decision whether to grant a mistrial lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Johnson*, 295 N.C. 227, 244 S.E.2d 391 (1978).

Assuming *arguendo* that this argument was improper, we must decide whether the trial court's failure to intervene denied defendant a fair trial. "It is largely in the discretion of the trial court to decide when and how it will correct the potential effects of an improper argument by counsel, either by stopping the argument or by proper instructions to the jury." *State v. Scott*, 314 N.C. 309, 314, 333 S.E.2d 296, 299 (1985).

The trial court correctly instructed the jury on the legal standard it was to apply in determining guilt and on the effect of the State's failure to carry its burden of proving guilt beyond a reasonable doubt. We are not persuaded that the jury rendered a guilty verdict under both theories of first-degree murder based on the prosecutor's argument rather than on the overwhelming evidence of defendant's guilt. We conclude that any impropriety in the prosecutor's argument or error in the trial judge's failure to intervene was cured by the subsequent instructions on the law. The argument in this case was not so improper as to require the judge to intervene *ex mero motu* or to declare a mistrial. This assignment of error is overruled.

[12] In his next assignment of error, defendant contends that the trial court erred by allowing certain questions propounded on cross-examination to one of defendant's witnesses. Dr. Billy Royal, a forensic psychologist, testified that defendant's capacity to distinguish right from wrong and to premeditate his actions was diminished at the time of the killing.

On cross-examination the following colloquy occurred between Dr. Royal and the prosecutor:

Q: I believe you testified and said you worked for awhile in the forensic unit at Dorothea Dix hospital; is that right, sir?

A: I did.

Q: And you were fired from that unit, weren't you, sir?

A: No.

Q: You were removed from that unit?

A: I transferred from that unit.

. . . .

Q: For misconduct; isn't that true, sir?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A: No, that's not true.

. . . .

A: Over a period of time, ah, [Dorothea Dix psychiatrist] Doctor Rollins and I had some, ah, disagreement, um, because he felt that I kept patients too long . . . .

Um, after some five or six years, um, of that, ah, there had been some, um, discussion about that, and on one occasion one patient made a complaint, ah, ah, to the administration related to my contact with the patient . . . .

And, ah, I discussed that with the hospital administrator and decided in terms of my continuing conflict with Doctor Rollins to transfer to another division which I did. . . .

. . . .

Q: And . . . with regard to leaving the forensic unit at Dorothea Dix you said some patient made a complaint that caused you to then leave; that related to you making some—allegations that you had made improper advances to a patient; isn't that true, sir?

[DEFENSE COUNSEL]: Objection.

A: No.

THE COURT: Overruled. You may answer.

A: (Shakes head).

Q: What was the nature of it then, sir?

A: The patient made a complaint. I have never been familiar with the total complaint.

Q: You are not familiar with the complaint?

A: No.

Specific instances of misconduct of a witness may, in the discretion of the trial court, be inquired into on cross-examination if probative of truthfulness or untruthfulness. N.C.G.S. § 8C-1, Rule 608(b) (1992). Even if we assume *arguendo* that the trial court erred by permitting the prosecutor to inquire into the allegation that Royal had made improper advances to a patient, defendant must still show prejudice. "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) (1992); *accord State v. Lee*, 335 N.C. 244, 271, 439 S.E.2d 547, 560, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994); *see* 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 154 (4th ed. 1993). A witness may be impeached by showing that he or she is biased. *State v. McKeithan*, 293 N.C. 722, 730, 239 S.E.2d 254, 259 (1977). The questions asking whether Royal had been fired, removed, or transferred for misconduct were relevant to show that Royal may have been biased against the State. Royal testified that he had not been fired, removed, or transferred for misconduct. He denied making any improper advances to a patient. In light of the overwhelming evidence against defendant and Royal's express denial of any misconduct, we conclude that defendant cannot show that, had the trial court excluded the prosecutor's inquiry into the details of the allegation, a reasonable possibility exists that a different outcome would have resulted at trial. *See* N.C.G.S. § 15A-1443(a) (1992). This assignment of error is overruled.

SENTENCING PROCEEDING

[13] Defendant next contends that the trial court erred by allowing the prosecutor to elicit irrelevant and highly prejudicial information during his cross-examination of defense witness Sudie Davis. In the course of the direct testimony of Sudie Davis for defendant, Davis read from letters defendant had written to her while he was in jail. Defendant wrote in the letters that he was a "pretty good person," thought "about the Lord daily," and knew he should give his life to the Lord. The prosecutor asked Davis on cross-examination whether she had accused defendant of raping her daughter in 1978. The court

overruled an objection to this question. Defendant argues that this question should not have been allowed on the bases that (i) it was irrelevant and inadmissible evidence of bad character; (ii) it concerned an unsubstantiated accusation of crime; and (iii) its probative value was outweighed by the danger of unfair prejudice under N.C.G.S. § 8C-1, Rule 403.

"Where a defendant in a capital sentencing proceeding has placed his character at issue by having witnesses testify favorably with regard to it, the State may offer evidence to rebut this testimony." *State v. Williams*, 339 N.C. 1, 49, 452 S.E.2d 245, 273-74 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995). Davis read from letters in which defendant stated that he was a "pretty good person," that he thought "about the Lord daily," and that he knew he should give his life to the Lord. This evidence tended to enhance defendant's reputation and show good character. Accordingly, we conclude that the prosecutor was entitled to elicit information from Davis to rebut it. This assignment of error is overruled.

[14] In his next assignment of error, defendant contends that the trial court erred by allowing the prosecutor to cross-examine defendant about the length of time he served for a prior conviction. On cross-examination the prosecutor elicited testimony that in 1981 defendant had been sentenced to fifteen years in prison for attempted first-degree rape. The prosecutor asked defendant how long he served; and, after the court overruled defendant's objection, defendant stated that he had been released in 1986 or 1987. Defendant also stated that he had been sentenced to ten years in prison for drug convictions in 1988 and to two ten-year sentences and a consecutive five-year sentence for drug-related charges in 1989.

Defendant contends that the prosecutor's cross-examination with respect to the length of the time he actually served for attempted rape exceeded the proper limits of impeachment by evidence of a prior conviction and improperly injected the issue of parole eligibility into the sentencing proceeding. Defendant also argues that the admission of this evidence entitled him to an instruction on parole eligibility.

"The permissible scope of inquiry into prior convictions for impeachment purposes is restricted . . . to the name of the crime, the time and place of the conviction, and the punishment imposed." *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993); *see* N.C.G.S. § 8C-1, Rule 609(a) (1992). However, the Rules of Evidence do not apply at capital sentencing proceedings. Any evidence that the

trial court deems relevant to sentencing may be introduced in the sentencing proceeding. N.C.G.S. § 15A-2000(a)(3) (1988) (amended 1994); *State v. Daughtry*, 340 N.C. 488, 517, 459 S.E.2d 747, 762 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 739 (1996). Evidence showing that defendant had been previously convicted of attempted first-degree rape was admissible to establish the aggravating circumstance that "[t]he 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); *see State v. Holden*, 338 N.C. 394, 450 S.E.2d 878 (1994). Even if we assume *arguendo* that evidence of the length of time served by a defendant pursuant to a prior conviction is not relevant at a capital sentencing proceeding, we conclude that defendant cannot show any prejudicial error in the admission of such evidence. The court properly admitted evidence of the prior conviction. This evidence showed that defendant had been sentenced to a term of fifteen years' imprisonment for attempted rape in 1981. Defendant killed the victim in this case in 1992. These facts demonstrate that defendant obviously did not serve his entire fifteen-year sentence. The State presented substantial evidence establishing defendant's guilt and supporting each of the aggravating circumstances. In light of these circumstances, defendant cannot show that a reasonable possibility exists that a different result would have been reached at trial had the trial court precluded the challenged inquiry. *See* N.C.G.S. § 15A-1443(a).

[15] Defendant also contends that the prosecutor's inquiry highlighted the gap between defendant's sentence and the amount of time served, thereby raising the possibility that defendant might be paroled if sentenced to a term of life imprisonment. He argues that the court erred by permitting the prosecutor's inquiry and that this inquiry entitled him to an instruction on parole eligibility. We have repeatedly held that, as to crimes committed prior to 1 October 1994, evidence with respect to parole eligibility is not relevant in a capital sentencing proceeding. *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). After careful review of the record, we conclude that the prosecutor's inquiry did not raise the issue of defendant's eligibility for parole in the event the jury recommended a sentence of life imprisonment. Accordingly, defendant was not entitled to an instruction on parole eligibility. This assignment of error is overruled.

In his next assignment of error, defendant contends that the trial court erred by overruling defendant's objections to various argu-

ments made by the prosecutor during his sentencing proceeding closing argument and by failing to intervene *ex mero motu* with an additional argument.

> As a general proposition, counsel is allowed wide latitude in the jury argument during the capital sentencing proceeding. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). In order for a defendant to receive a new sentencing proceeding, the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986).

State v. McCollum, 334 N.C. 208, 223-24, 433 S.E.2d 144, 152 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

[16] Defendant argues that the following argument improperly put the jurors in the place of the victim:

> Put yourselves back on that 19th day of April of 1992, in that back bedroom, a little old red night light on, and Jo-Jo in a little daybed with her three year old brother, in the middle of the night. Just put yourself in her shoes—
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> ([The prosecutor] continues)
>
> —for just a minute. Put yourselves, for just a minute, put yourselves where she was. And you're in that little daybed in the middle of the night and for some reason you wake up and you sit up in bed. Something had startled you or something and you had sat up and there is [defendant] and he pushes you down on the bed, covers your little face with a pillow, starts to suffocate you, smother you, and rape you. And you're twisting and turning and gasping for breath, and he continues and he continues and he continues. And not only are you gasping for breath, your legs are spread apart and he's pushing his penis into you. A seven year old child. And it goes on and it goes on and it goes on until you're unconscious.

"An argument 'asking the jurors to put themselves in place of the victims will not be condoned . . . .' " *Id.* at 224, 433 S.E.2d at 152 (quoting *United States v. Pichnarcik*, 427 F.2d 1290, 1292 (9th Cir. 1970)). The portion of the prosecutor's argument asking the jurors to put themselves in the position of the victim was improper. Accordingly, we must decide whether this portion of the prosecutor's closing argument denied defendant due process. *Id.*

In *McCollum* we concluded that the defendant's due process rights had not been violated where (i) the prosecutor's arguments did not manipulate or misstate the evidence, (ii) the prosecutor's arguments did not implicate the defendant's right to counsel or right to remain silent, (iii) the trial court instructed the jury to make its decision on the basis of the evidence alone and that the arguments of counsel were not evidence, and (iv) the weight of the evidence supporting the aggravating circumstances was heavy. *Id.* In the present case the prosecutor's argument did not manipulate or misstate the evidence. The argument did not implicate any specific rights of the accused, such as the right to counsel or the right to remain silent. The State's evidence was overwhelming that defendant raped and smothered the victim, and the evidence strongly supported each of the aggravating circumstances found by the jury. On this record we conclude that it is not likely that the jury's decision was influenced by the portion of the prosecutor's argument asking the jurors to put themselves in the position of the victim. Therefore, the prosecutor's argument did not deny defendant due process.

[17] Defendant next argues, citing *Williams*, 317 N.C. 474, 346 S.E.2d 405, that the court erred by overruling his objection to a portion of the prosecutor's argument suggesting that defendant killed the victim to prevent her from testifying against him. Defendant argues that there was no evidence to support this argument. Even if we assume *arguendo* that this portion of the prosecutor's argument was improper, we conclude that it did not violate his right to due process. In light of the overwhelming evidence showing defendant's guilt and supporting the imposition of the death penalty, it is unlikely that this portion of the prosecutor's argument influenced the jury's sentencing recommendation.

[18] Defendant next argues that the trial court erred by overruling his objections to the following argument:

> He's just sorry. I'm going to tell you just like it is. Just basic right down tell you, the man is sorry. The word—to describe him as a man is an affront to all of us.

[DEFENSE COUNSEL]: Objection, improper argument.

THE COURT: Overruled.

([The prosecutor] continues)

I wish I could say what he really is, but the rules of this court prevent me from saying it.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

([The prosecutor] continues)

But you know in your heart of hearts, you know how sorry he is. . . .

We have stated "that we do not sanction comparisons of criminal defendants to members of the animal kingdom." *State v. Richardson*, 342 N.C. 772, 793, 467 S.E.2d 685, 697, *cert. denied*, — U.S. —, 136 L. Ed. 2d 160 (1996); *accord State v. Hamlet*, 312 N.C. 162, 173, 321 S.E.2d 837, 845 (1984). By making the argument at issue, the prosecutor did not call defendant an "animal" or refer to him by any other disparaging term. The remarks at issue were isolated, and we conclude that the trial court did not err by overruling defendant's objection to them.

[19] Defendant next argues that the trial court erred by failing to intervene *ex mero motu* in the following argument:

> "A capital felony was committed while the defendant was under the influence of mental or emotional disturbance." Well, you know, they used to call that just plain mean. He's just plain mean. They can't even find the category to put it in, so they call it an emotional or mental disturbance.

Defendant did not object to this argument at trial. Therefore, this argument is reviewable only to determine whether it was so grossly improper that the trial court erred by failing to intervene *ex mero motu* to correct any error. *State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 478 (1996). In context it is apparent that the prosecutor was not attempting, as defendant argues, to define the mental or emotional disturbance mitigating circumstance. Rather, the prosecutor was arguing that the evidence supported the conclusion that defendant was mean rather than mentally disturbed. We conclude that this argument falls

within the wide latitude generally afforded counsel during closing argument and that it was not so grossly improper as to require *ex mero motu* intervention by the trial court. This assignment of error is overruled.

[20] Next, defendant argues that the trial court committed plain error by failing to give the jury a limiting instruction informing it not to consider the rape when determining whether the especially heinous, atrocious, or cruel aggravating circumstance existed. The trial court submitted to the jury the aggravating circumstances that the murder was committed while defendant was engaged in the commission of or an attempt to commit first-degree rape, N.C.G.S. § 15A-2000(e)(5), and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). Defendant concedes that the evidence was sufficient to permit the jury to find the existence of both circumstances. He argues only that the trial court erred by permitting the jury to consider evidence showing that defendant raped the victim as support for both circumstances. Defendant did not object to the instruction given by the court or request a limiting instruction. Accordingly, our review is limited to determining whether the court's instructions constituted plain error.

"In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 862, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 436 (1995); *accord State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). We have previously concluded that a trial court did not commit plain error by failing to instruct the jury that evidence that the defendant raped and sexually assaulted the victim should not be considered in finding the especially heinous, atrocious, or cruel circumstance. *State v. Moseley*, 338 N.C. 1, 56, 449 S.E.2d 412, 445 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995).

The evidence at trial established that defendant raped the seven-year-old victim while he smothered her with a pillow. The medical examiner testified that it would have taken ten to twenty minutes for the victim to die and that the victim would have been conscious for three to seven minutes during this period. The victim shared a room with her grandmother and her three-year-old brother, and defendant apparently raped and smothered the victim while they were present and while the victim's brother watched. On this record we conclude

that any error in failing to limit the jury's consideration of the evidence did not rise to the level of plain error. *See id.* Accordingly, this assignment of error is overruled.

[21] Defendant next contends that the trial court erred by denying defendant's request to address the jury prior to sentencing. Defendant concedes that we have 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. *Green*, 336 N.C. 142, 443 S.E.2d 14. We decline to reconsider our prior holding on this issue. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant brings forth eight additional issues for this Court's review. In his brief defendant candidly concedes that these issues have previously been decided by this Court adversely to his position. Nevertheless, defendant asks us to reevaluate these prior decisions. Having considered defendant's arguments, we are not persuaded to abandon our prior holdings. These assignments of error are overruled.

PROPORTIONALITY

Having found defendant's trial and capital sentencing proceeding to be free from prejudicial error, we must undertake our statutory duty to determine whether (i) the evidence supports the aggravating circumstances found by the jury; (ii) passion, prejudice, or any other arbitrary factor influenced the imposition of the death sentence; and (iii) the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

Defendant was convicted of first-degree murder based on both felony murder and premeditation and deliberation. He was also convicted of first-degree rape. The jury found all three of the aggravating circumstances submitted for its consideration: (i) 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); (ii) the murder was committed by defendant while defendant was engaged in the commission of or an attempt to commit first-degree rape, N.C.G.S. § 15A-2000(e)(5); and (iii) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). The jury found the statutory mitigating circumstance that the capacity of defendant to appre-

ciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6), and rejected the circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2).

[22] We have reviewed the evidence supporting each of the aggravating circumstances and conclude that the evidence supports each of them. We further conclude from our review of the record that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We must now determine whether the sentence of death in this case is excessive or disproportionate.

One purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another purpose is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We compare this case to others in the pool, which we defined in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995), that "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).

"In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate." *State v. Burke*, 343 N.C. 129, 162, 469 S.E.2d 901, 918, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 409 (1996). This Court has determined that the sentence of death was disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We find the instant case distinguishable from each of these seven cases.

"None of the cases found disproportionate by this Court involved the murder of a child." *State v. Elliott*, 344 N.C. 242, 288, 475 S.E.2d 202, 224 (1996), *cert. denied*,— U.S. —, — L. Ed. 2d —, 65 U.S.L.W. 3598 (1997); *see State v. Kandies*, 342 N.C. 419, 455, 467 S.E.2d 67, 87, *cert. denied*, — U.S. —, 136 L. Ed. 2d 167 (1996); *State v. Walls*, 342 N.C. 1, 71, 463 S.E.2d 738, 776-77 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 794 (1996). "Further, we have never found a death sentence disproportionate in a case involving a victim of first-degree murder who also was sexually assaulted." *Kandies*, 342 N.C. at 455, 467 S.E.2d at 87; *see State v. Payne*, 337 N.C. 505, 537, 448 S.E.2d 93, 112 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995).

We conclude that this case is most analogous to cases in which this Court has held the death penalty not to be disproportionate. In *Kandies* the defendant was found guilty of murdering the four-year-old daughter of his fiancée. In upholding the death penalty, we emphasized that the defendant was found guilty on the bases of both the felony murder rule and premeditation and deliberation; that the jury found the murder to be especially heinous, atrocious, or cruel; that the victim knew and trusted the defendant; that the murder occurred during the commission of a sexual assault; and that the victim suffered great physical pain in that she was brutally beaten, strangled, and raped. *Kandies*, 342 N.C. at 454, 467 S.E.2d at 87. In *Elliott* we upheld the death penalty where the defendant had assumed a parental role in caring for the young victim; the defendant had brutally beaten the victim; the defendant was convicted of first-degree murder on the basis of premeditation and deliberation; and the jury found the sole aggravating circumstance that the murder was especially heinous, atrocious, or cruel. 344 N.C. at 289-90, 475 S.E.2d at 225; *see also State v. Burr*, 341 N.C. 263, 461 S.E.2d 602 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996).

In the present case defendant was found guilty on the bases of both the felony murder rule and premeditation and deliberation; defendant had been dating the victim's grandmother for two months at the time of the killing; the seven-year-old victim and her little brother lived with their grandmother, slept in their grandmother's bedroom, and knew defendant; the murder occurred during the commission of a rape; and the jury found the especially heinous, atrocious, or cruel aggravating circumstance. After comparing this case to similar cases in the pool used for proportionality review, we conclude that defendant's death sentence is not excessive or disproportionate.

We hold that defendant received a fair trial and capital sentencing hearing free from prejudicial error. Comparing defendant's case to similar cases in which the death penalty was imposed and considering both the crime and defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive.

NO ERROR.

Justice WEBB dissenting.

I dissent. I believe it was error to excuse prospective juror William E. Jackson for cause. Mr. Jackson was excused based on the following colloquy:

> THE COURT: Please listen very carefully, Mr. Jackson, to the following questions. Consider your responses carefully before you respond. If you are selected to serve as a juror in this case, can and will you follow the law as it will be explained to you by the Court in deciding whether the defendant is guilty or not guilty of first-degree murder or of any other lesser offense?
>
> JUROR: Yes, sir.
>
> THE 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 even though you know that death is one of the possible penalties?
>
> JUROR: Yes, sir.
>
> THE COURT: Considering your personal beliefs . . . 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: I don't know whether I could vote on the death penalty.
>
> THE COURT: Is that response an able or unable response, sir?
>
> JUROR: Unable to respond to that.

THE COURT: Unable. Thank you.

Mr. Staten—Jackson, excuse me. If the defendant is convicted of first-degree murder, 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?

JUROR: Yes, sir.

The majority, relying on *Morgan v. Illinois*, 504 U.S. 719, 734-35, 119 L. Ed. 2d 492, 506 (1992), says "general 'follow the law' questions are not sufficient to 'detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath.' " I submit that in the context of the colloquy in this case, the questions to Mr. Jackson were far more than general follow the law questions.

Mr. Jackson was asked questions concerning the death penalty. He said that he would return a verdict of guilty of first-degree murder if he was satisfied beyond a reasonable doubt of those things necessary to constitute first-degree murder although he knew death would be a possible penalty. He then said he was unable to respond to a question as to his ability to vote for the death penalty if he was satisfied beyond a reasonable doubt of those things which require the death penalty. The court then asked Mr. Jackson whether he could follow the law as to the sentence recommendation if the defendant were found guilty of first-degree murder. Mr. Jackson said, "Yes, sir."

The last question asked Mr. Jackson was not a general "follow the law" question. It was a specific "follow the law" question directed at his ability to vote for the death penalty. Mr. Jackson had been told that there would be a trial to determine guilt and then a proceeding to determine whether the penalty would be death. He had to know when questioned about the sentencing proceeding that he was being asked whether he could vote for the death penalty, and he said that he could do so.

It appears to me that Mr. Jackson gave an ambiguous answer when he said he was unable to respond to the question about his ability to impose the death penalty. He then answered "Yes" with no ambiguity when he was asked a question which could only be interpreted as asking him whether he would vote for the death penalty if it was required by law. I believe it was error to excuse Mr. Jackson on this showing.

I vote for a new sentencing proceeding. *State v. Rannels*, 333 N.C. 644, 655, 430 S.E.2d 254, 260 (1993).

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. DARRELL CHRISTOPHER WOODS

No. 228A95

(Filed 10 February 1997)

1. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—absence of acknowledgement of wrongdoing—not a comment on failure to testify

There was no error in a capital sentencing hearing where defendant contended that the prosecutor improperly commented on his decision not to testify where defendant gave at least two different accounts of his involvement to law enforcement officials within two days of the murder. In context, the prosecutor's comment was not directed to defendant's failure to testify, but was an effort to convince the jury that there was no evidence of an acknowledgement of wrongdoing within two days of the murder. The prosecutor's argument here was not reasonably comparable to arguments which have been held to be improper comments on a defendant's failure to testify.

Am Jur 2d, Trial §§ 577-582.

Supreme Court's views as to what comments by prosecuting attorney violate accused's privilege against self-incrimination under Federal Constitution's Fifth Amendment. 99 L. Ed. 2d 926.

2. Criminal Law § 467 (NCI4th Rev.)— capital sentencing—forcible entry into victim's apartment—prosecutor's argument—permissible inference

There was no error in closing arguments in a capital sentencing hearing where defendant contended that there was no evidence to support the State's argument that defendant had forced entry into the victim's apartment, but there was sufficient evidence from which a juror could find that defendant either forced

his way into the victim's apartment or used some pretext or threat of harm to gain entry. The prosecutor's argument was a reasonable inference to be drawn from the evidence.

Am Jur 2d, Trial § 632.

3. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—memory of victim's infant daughter

There was no error in a capital sentencing proceeding where the prosecutor argued that the victim's 14-month-old daughter, who witnessed her mother's murder, would find out about the murder from the public record or a flashback. In view of the holding in *State v. Reeves*, 337 N.C. 700, and the evidence suggesting that the infant was painfully aware of what was happening to her mother, the prosecutor did not engage in improper argument.

Am Jur 2d, Trial § 632.

4. Criminal Law § 453 (NCI4th Rev.)— capital sentencing—prosecutor's argument—victim's family

The prosecutor's closing argument in a capital sentencing proceeding was not so grossly improper as to require intervention *ex mero motu* where defendant contended that the argument improperly suggested that the jury would be accountable to the victim's family. The argument was a plea for the jury to give serious consideration to the victim's death and the unique loss to her family; these types of arguments have been held not improper.

Am Jur 2d, Trial §§ 664-667.

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

5. Evidence and Witnesses § 2954 (NCI4th)— capital sentencing—cross-examination of defense mental health expert about fees

There was no abuse of discretion in a capital sentencing proceeding where the prosecutor cross-examined the defense mental health expert about his fees. Defendant did not make a showing that the cross-examination had an improper influence on the jury.

Am Jur 2d, Trial § 695; Witnesses § 888.

Cross-examination of expert witness as to fees, compensation, and the like. 33 ALR2d 1170.

6. Criminal Law § 447 (NCI4th Rev.)— capital sentencing—prosecutor's argument—defense mental health diagnosis

There was no error in a capital sentencing proceeding where defendant contended that the prosecutor's argument as to the defense mental health expert's testimony distorted the evidence regarding the diagnosis of schizoid personality disorder and led the jury to infer that the witness did not know much about his business. The prosecutor was attempting to show that the characteristics of schizoid personality disorder are not that unusual and are likely to be exhibited by any number of people; his argument was supported by the evidence and was entirely appropriate to support the State's position that the jury should not find the mental or emotional disturbance mitigating circumstance.

Am Jur 2d, Trial §§ 609, 611.

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.

7. Criminal Law § 471 (NCI4th Rev.)— capital sentencing—prosecutor's argument—defense mental health tests—underscoring of weaknesses

The prosecutor's argument in a capital sentencing proceeding was proper and supported by the evidence where defendant contended that the prosecutor had suggested that "the house and tree and person test" was the sole basis of the defense mental health expert's opinion, but a review of the evidence demonstrates that the prosecutor referred to other tests during cross-examination. The prosecutor is free to underscore during closing argument those points of defendant's case which he or she perceives as weak.

Am Jur 2d, Trial § 611.

8. Criminal Law § 447 (NCI4th Rev.)— capital sentencing—prosecutor's argument—nonstatutory mitigating circumstance—drug dependence

There was no gross impropriety requiring intervention *ex mero motu* in a capital sentencing hearing where the prosecutor

legitimately made the point that while defendant denied using cocaine and defense witnesses who knew defendant all denied any knowledge of drug use by defendant, the defense mental health expert found him to be a cocaine addict. The State was entitled to point out the absence of evidence to support the non-statutory mitigating circumstance of drug dependence and to challenge the credibility of the expert's opinion.

Am Jur 2d, Evidence § 1443; Witnesses § 1032.

9. Criminal Law § 444 (NCI4th Rev.)— capital sentencing—prosecutor's argument—defendant as "thing"—no error

There was no error in a capital sentencing proceeding where the prosecutor in his argument referred to defendant as a "thing." While the prosecutor's choice of language is not condoned, the argument can reasonably be characterized as urging the jury to recognize the especially cruel nature of this murder.

Am Jur 2d, Trial § 681.

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.

10. Evidence and Witnesses § 2797 (NCI4th)— capital sentencing—cross-examination—defense mental health expert—defendant not called liar

The trial court did not err in a capital sentencing proceeding where defendant contended that the prosecutor improperly called him a liar during cross-examination of the defense mental health expert. The prosecutor did not call defendant a liar, but rather asked a meaningful question about the significance of test results that were the basis for an expert opinion.

Am Jur 2d, Trial §§ 499, 500; Witnesses §§ 743, 746, 750.

11. Criminal Law § 446 (NCI4th Rev.)— capital sentencing—defense witnesses—prosecutor's argument

There was no error in a capital sentencing hearing where defendant contended that the prosecutor in his closing argument expressed his opinion that defendant's mother, his sisters, and another witness (who all testified to defendant's stepfather's absence during most of defendant's childhood and adolescence) were liars. The prosecutor was arguing to the jury that it should

not find the submitted circumstance that defendant grew up without a father figure during his formative years. Defendant's mother testified that defendant never knew his natural father and that she married his stepfather when defendant was an infant and it was thus reasonable to infer that defendant's biological father might still be alive. Moreover, the trial court sustained the objection to the extent that the prosecutor's comment was not supported by the evidence.

Am Jur 2d, Trial §§ 692, 693.

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases. 88 ALR4th 209.

12. Criminal Law § 467 (NCI4th Rev.)— capital sentencing—prosecutor's argument—victim's final words—inference from evidence

A portion of the prosecutor's closing argument in a capital sentencing proceeding was not so inflammatory and unsupported by the evidence as to require intervention *ex mero motu* where the prosecutor cast the victim's final words as having been spoken to her daughter. Although the prosecutor's argument touched upon facts not specifically testified to, it was reasonable to infer from the evidence that the victim's last words would have been to express her love for her child. Assuming error, it was not so grossly improper as to require intervention *ex mero motu*.

Am Jur 2d, Trial §§ 632, 649, 664-667.

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

13. Criminal Law § 456 (NCI4th Rev.)— capital sentencing—prosecutor's argument—general fear of crime

The prosecutor in a capital sentencing proceeding did not make an improper argument based on the general public's fear of violent crime and on the jurors' own fears of violent crimes where the prosecutor held up a picture of the exterior of the victim's apartment building and argued that, of all the pictures, that one was the most grotesque because "she was where we all think we can go and be safe," continued to argue the sanctity of the home, and ended with "and that's why this is grotesque, cause it

tells each and every one of you you are safe nowhere now. You're safe nowhere." The prosecutor's argument was within the wide latitude afforded counsel in hotly contested cases, was amply supported by the evidence, and the trial court did not err by failing to intervene *ex mero motu*.

Am Jur 2d, Trial § 654.

14. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—State held to a higher burden

There was no prejudicial error in a capital sentencing proceeding where defendant contended that the prosecutor improperly argued that the State was disadvantaged by the law governing capital sentencing. The prosecutor's argument emphasized that the jury must hold the State to a higher burden than it holds defendant and the jury found two statutory mitigating circumstances as well as two nonstatutory mitigating circumstances. The argument concerning stacked rules was not so grossly improper as to require intervention *ex mero motu*.

Am Jur 2d, Trial §§ 625, 632-639.

15. Criminal Law § 461 (NCI4th Rev.)— capital sentencing—prosecutor's argument—what life sentence would be like—deterrent value of death

There was no error in a capital sentencing proceeding where the prosecutor made several arguments, to which defendant did not except, referring to what a life sentence would be like and stating that it would not be adequate to deter other murders. Defendant's general deterrence argument has previously been rejected, and the argument about the conditions of life in prison emphasized the State's position that defendant deserved death rather than a comfortable life in prison.

Am Jur 2d, Trial §§ 609 et seq.

Propriety and prejudicial effect of prosecutor's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present. 90 ALR3d 646.

16. Criminal Law § 480 (NCI4th Rev.)— capital sentencing—prosecutor's argument—cumulative effect—not prejudicial

The cumulative effect of the arguments of the prosecutor in a capital sentencing hearing did not create prejudicial error where

the comments did not so infect the trial with unfairness as to make the result a denial of due process and did not stray so far from the bounds of propriety as to impede the defendant's right to a fair trial.

Am Jur 2d, Trial § 1613.

17. Jury § 229 (NCI4th)— capital murder—jury selection—ambivalent answers about death penalty

The trial court properly excused a prospective juror for cause from a capital first-degree murder prosecution where defendant contended that the juror was fit to serve because he stated at one point that he would apply the law as it was given to him, but, after receiving ambivalent responses, the trial court questioned the juror and excused him for cause.

Am Jur 2d, Trial §§ 1693 et seq.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

18. Criminal Law § 1348 (NCI4th Rev.)— capital sentencing—life without parole—not submitted—crime committed prior to 1 October 1996

The trial court did not err in a capital sentencing hearing by denying defendant's motion to allow the jury to consider life without parole as a sentencing option. The legislature intended for N.C.G.S. § 15A-2002 to become effective 1 October 1994 and to be applied prospectively; this crime occurred on 1 April 1994.

Am Jur 2d, Criminal Law §§ 598 et seq.

Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence. 8 ALR4th 1028.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.

19. Criminal Law § 1402 (NCI4th Rev.)— death sentence—not disproportionate

A death sentence was proportionate where the record supported the jury's findings of aggravating circumstances, the sen-

tence was not entered under the influence of passion, prejudice, or other arbitrary consideration, and the sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Defendant inflicted wounds on the victim consistent with torture before leaving her to bleed to death, the victim was murdered a few feet from where her infant daughter sat, and the victim was bound, gagged, cut, stabbed, and burned and would have suffered tremendously before dying. We can imagine the helplessness and terror the victim must have felt as she endured the torture, knowing that she was going to die, leaving her fourteen month old child in the hands of her killer.

Am Jur 2d, Criminal Law §§ 609 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by DeRamus, J., on 22 May 1995 in Superior Court, Forsyth County. Heard in the Supreme Court on 14 November 1996.

Michael F. Easley, Attorney General, by Gail E. Weis, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

MITCHELL, Chief Justice.

Defendant Darrel Christopher Woods was indicted on 17 January 1995 for the first-degree murder of Trae Devon Gibson. Prior to selection of the jury, defendant entered a plea of guilty to first-degree murder. After a separate capital sentencing proceeding, the jury recommended a sentence of death, and the trial court sentenced defendant accordingly.

The State's evidence tended to show *inter alia* that on 2 April 1994, Steven Carter, boyfriend of the victim and father of their child, left their apartment on Brownsboro Road at about 7:45 a.m. to go to work. Carter testified that he met defendant outside the apartment in the parking lot. Defendant asked Carter if he could borrow a screwdriver to remove a radio from a car, and Carter brought defendant one from the apartment. In about five minutes, defendant returned the screwdriver, explaining that it was the wrong type. Carter then drove to work.

Casey Greene, a friend of defendant's, testified that at around 8:00 a.m. on 2 April 1994, he saw defendant borrow a screwdriver to get the radio out of a white car outside the apartments on Brownsboro Road. Mr. Greene left the area at around 9:00 a.m., and when he returned, at around noon, he saw defendant again in front of the apartments. They spoke for about five minutes, and Greene left to go to his girlfriend's house across the street. He did not see defendant again.

Shawn Ratliff, a neighbor of Carter and Gibson's, who had gone to high school with defendant, testified that he was leaving his apartment at around 9:00 a.m. and saw defendant. Ratliff told defendant he was going to run an errand and would be right back. When Ratliff returned at about 10:00 a.m., he saw defendant with Greene, standing in front of the stairwell near Carter and Gibson's apartment. Trae Gibson was standing in her doorway talking to a man in a black car whom Ratliff did not know. Defendant told Ratliff that he was going to try to make some money and showed Ratliff two pieces of crack cocaine. Ratliff asked defendant if he needed money, and defendant told him no. Ratliff left and did not see defendant again.

Randy Lee Webster, Gibson's cousin, testified that he saw her between 9:30 and 10:00 a.m. in her burgundy Toyota MR-2, with her baby Yo Yo, on her way to the laundromat. At about 11:00 a.m., he saw her again at home. She stood in the doorway of her apartment talking to Webster, who was in his black Talon automobile. While Webster was there, defendant approached the car and said he was trying to raise money for a hotel room. Webster saw no conversation take place between defendant and Gibson. Webster told Gibson he would see her later and left. He never saw Gibson again.

At 3:00 p.m., Carter arrived at home and noticed that Gibson's Toyota was not in the parking lot. He spoke with a neighbor for about thirty minutes before walking into the apartment. The apartment was unlocked, which was unusual. When Carter entered, he saw that it had been ransacked. Carter went to the bedroom and found Gibson's naked body lying on the floor. She was bound and gagged and had been cut and stabbed. Carter ran out of the apartment screaming for his neighbor, Shawn Ratliff, to call 911. Tammy May, who was dating Carter's brother and who had spent a lot of time with Carter, Gibson, and their daughter Yo Yo, was present and saw Steve Carter come running out of his apartment. May's immediate concern was the baby, and she ran into the apartment, where she saw Gibson's body. The

baby was lying on the bed, a few feet away from her mother's body. She was not moving. May lifted Yo Yo's head and saw that her eyes were swollen and red as though she had cried herself to sleep. May had kept Yo Yo on the weekends before and had never seen her eyes look like that. As Carter was too hysterical to take care of the baby, May held her until Gibson's parents arrived.

Officer Chris Bullard of the Winston-Salem Police Department was the first officer to arrive at the crime scene. He testified that there was no sign of forced entry into the apartment. Dr. Donald Jason, who performed the autopsy on Gibson's body, testified that there were twenty stab wounds to the neck; eight incise wounds to the neck; five stab wounds to the midchest; and burns on the lower back, right buttock, and left upper thigh. The burns were consistent with having been inflicted by a curling iron. The incise wounds appeared to have been made in order to cut the skin off the neck, consistent with torture. Trae Gibson bled to death; the stabbings would have caused her great pain and suffering. Dr. Jason testified that death would have occurred in fifteen to thirty minutes.

Officer Mark Triplett of the Hickory Police Department got a call regarding a car matching the description of Gibson's car. Triplett and two other officers chased and stopped the car and found a man named J.D. Williams in the car by himself. Williams told Officer Triplett the whereabouts of the person who gave him the car. He did not know the person's name, but identified defendant from a photographic array. When defendant was arrested at 5:00 a.m. on 3 April 1994, he was wearing orange pants stained with blood that was later found to match the victim's blood.

By his first assignment of error, defendant contends that the prosecutor engaged in overly zealous conduct in closing argument and during the presentation of evidence and that this deprived defendant of a fair capital sentencing proceeding. Defendant cites eight instances in which he contends the prosecutor engaged in overzealous conduct that prejudiced him in this case. We address each instance in turn.

[1] First, defendant argues that the prosecutor improperly commented on defendant's decision not to testify during trial. Regarding the submitted nonstatutory mitigating circumstance that defendant had acknowledged wrongdoing within two days of the commission of the murder, the prosecutor argued as follows:

> Of course, after this terrible accident where he nicked her one time with the knife, he freaked out and he drove to Hickory. That's his acknowledgment of wrong doing. Have you heard one word in this trial about any remorse this man has shown at any time? None. Have you ever said you're sorry?

Defendant contends that this comment violated his Fifth Amendment right against compelled self-incrimination as well as his rights under Article I, Section 23 of the North Carolina Constitution. We disagree.

Any reference by the State regarding a defendant's failure to testify violates an accused's constitutional right to remain silent. *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106 (1965). However, in this case, the prosecutor made no such reference. After reviewing the context in which the prosecutor's comment was made, we conclude that the comment was not directed to defendant's failure to testify, but was an effort to convince the jury that there was no evidence of an acknowledgement of wrongdoing by defendant within two days of the murder which would support the submitted mitigating circumstance.

Defendant gave at least two different accounts of his involvement in the incident to law enforcement officials within two days of the murder. In his first statement, given on 3 April 1994, the day after the murder, defendant stated that he found Gibson's door open, went inside, and found her body bound and gagged. In his statement given on 4 April 1994, defendant stated that he had sex with Gibson; he picked up a knife, and when she came towards him, the knife "must have just went [sic] in her." It was not until 26 January 1995, nearly ten months after the murder, that defendant confessed to stabbing Gibson. We conclude that the prosecutor's comment is not reasonably comparable to those arguments which we have held to be improper comments on a defendant's failure to testify. *See, e.g., State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975); *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975). This argument is without merit.

[2] Next, defendant contends that the State argued facts unsupported by the evidence. The first argument about which defendant complains occurred at the beginning of the State's first argument:

> [PROSECUTOR]: Thank you, if the Court please. This is the way he found her. (holds picture up) A beautiful, twenty-four year old vibrant mother. I submit to you this is the way she appeared to this Defendant when he forced his way into her apartment—

At this point, defense counsel objected, and the trial court overruled the objection. Defendant contends that there was no evidence to support the State's argument that defendant forced his way into Gibson's apartment. Defendant further argues that Officer Chris Bullard testified that he saw no sign of forced entry into the apartment. Defendant contends that the trial court erred in overruling defendant's objection to this argument. We disagree.

A review of the evidence supports a reasonable inference that defendant forced his way into Gibson's apartment. Steven Carter, the victim's boyfriend who lived with the victim and their daughter, testified that there were no knives in the apartment except for butter knives. This tends to establish that defendant entered the apartment armed with a sharp knife. Moreover, even if defendant did not forcibly break down the door to enter, he could still have been guilty of forcing his way into the apartment. Further, "a breaking may be actual or constructive." *State v. Young*, 312 N.C. 669, 681, 325 S.E.2d 181, 189 (1985). As we stated in *Young*, a constructive breaking occurs when entrance to the dwelling is accomplished through fraud, deception, or threatened violence. *Id.* Based on Carter's testimony, a reasonable juror could have inferred that the victim did not know defendant, that defendant had never been in her apartment before, and that defendant brought the knife into the apartment with him. Further, evidence tended to show that defendant had been hanging around the apartment and telling people he was in need of money. We conclude that there was sufficient evidence from which a reasonable juror could find that defendant either forced his way into the victim's apartment or used some pretext or threat of harm to gain entry. The prosecutor's argument that defendant forced his way into the apartment was a reasonable inference to be drawn from the evidence. The trial court did not err in overruling defendant's objection to this argument.

[3] Defendant further contends that the prosecutor engaged in improper argument regarding the victim's infant daughter, who witnessed her mother's murder. The prosecutor argued that "Yo Yo" Gibson would find out about the murder either from the public record or from a flashback. The prosecutor made the following argument:

> Or, the other way she's going to find out, is she's going to be driving along the highway and it's going to hit her like that, she will have a flashback to that day, and she'll remember every—

[Defense Counsel]: Objection.

[Prosecutor]:—every single stab wound—

THE COURT: Overruled.

[Prosecutor]: However she remembers it, she will find out about it. And when she does, she's going to have the right to come up to each and every one of you and ask you one simple question, do you think that justice was done in this case? What will you tell her?

Defendant first contends that there was no evidence to support the prosecutor's contention that the victim's child would remember what happened in a flashback. While we will not speculate about what the victim's daughter might remember regarding her mother's murder, a review of the State's evidence indicates that there was evidence to show that the victim's daughter witnessed her mother's killing. The State's evidence tended to show that when the toddler was found, a few feet away from her mother, her eyes were swollen and red, as though she had cried herself to sleep. Tammy May, a witness who had kept Yo Yo on weekends, testified that she had never seen the child's eyes look like that. Moreover, defendant told Detective Rowe that at some point while he was "rubbing the knife blade all over [the victim's] body," the baby somehow got defendant's attention. Detective Rowe testified that defendant told him he "reached for the baby but then pulled away from the baby and decided he needed to get out of there." We conclude that, based on this evidence, a juror reasonably could have inferred that the victim's daughter not only witnessed her mother's murder before her eyes, but was traumatized by that event. As to whether the child would later remember the murder, this Court addressed a similar argument in *State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 860 (1995). In *Reeves*, the defendant entered the home of a woman he did not know and ordered her to send her two-and-a-half-year-old daughter from the room. The defendant then brutally cut and sexually assaulted the victim. Speaking of the victim's child, who had witnessed the brutality, the prosecutor said, "she'll probably begin to remember more of [the events]. [S]ome people think a child's mind is like a piece of film. It records it and it develops it later." *Id.* at 732, 448 S.E.2d at 817. We stated in *Reeves* that "the prosecutor was arguing what he considered to be general knowledge, which he could do." *Id.* In view of our holding in *Reeves* and the evidence in the present case suggesting that the infant was painfully aware of what was hap-

pening to her mother, we conclude that the prosecution did not engage in improper argument with regard to what the victim's child might remember.

[4] Defendant further argues that the second portion of the prosecutor's argument improperly suggested that the jury would be accountable to the victim's family. As defendant did not object to this argument at trial, our review is limited to determining whether the argument was so grossly improper that the trial court erred by failing to intervene *ex mero motu*. We conclude that it did not. The prosecutor's argument was a plea for the jury to give serious consideration to the victim's death and the unique loss to her family. We have previously held that these types of arguments are not improper. *See, e.g., State v. Brown*, 320 N.C. 179, 202-03, 358 S.E.2d 1, 13 (prosecutor's argument that jury should find defendant guilty in order to grant justice to the victim's family not reversible error), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987); *State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983) (prosecutor's argument regarding victim's rights and reality of victim's death not improper). This argument is without merit.

The next instance of prosecutorial conduct about which defendant complains is the cross-examination of Dr. Charles Guyer, the defense mental health expert, and three prosecutorial arguments regarding Dr. Guyer's opinions about defendant's mental health. After carefully reviewing the transcript regarding this evidence, we conclude that neither the cross-examination of Dr. Guyer nor the arguments made by the prosecution were improper.

[5] Defendant first argues that the prosecutor improperly questioned Dr. Guyer regarding his fees. Defendant made no objection to the cross-examination and therefore must show plain error. Defendant has not done so. As we stated in *State v. Carver*, 286 N.C. 179, 209 S.E.2d 785 (1974), the scope of cross-examination rests largely within the trial court's discretion and is not ground for reversal unless the cross-examination is shown to have improperly influenced the verdict. We conclude that defendant has not made a showing that the cross-examination in the present case had an improper influence on the jury. This argument is without merit.

[6] The first argument about which defendant complains referred to the mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance. The prosecutor made the following argument:

[PROSECUTOR]: And here's what schizoid is, according to Dr. Guyer, you lack close friends, you're indifferent to praise or criticism, and you're emotionally cold, and that's a schizoid.

You know, I could go out there on the street and throw a rock and probably hit about three or four schizoid people this morning.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained to the extent not supported by the evidence.

[PROSECUTOR]: And Dr. Guyer, what a fine professional, here's Dr. Guyer's research into [defendant], the house and tree and person test.

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: He don't talk to his mother, his friends, he don't pick up the phone and call Dorothea Dix-

THE COURT: Overruled.

[PROSECUTOR]:—he makes him draw a house, a person, a tree, and a family, and another person. He lacks close friends, that's what he found. He lacks close friends from this drawing.

And you heard his parade of friends come in here. He never lacked for close friends. And Dr. Guyer says these tests are the same over time, if you test them when he's three years old, he lacks close friends, and same at twenty-six.

Defendant first contends that this argument distorted the evidence regarding Dr. Guyer's diagnosis of schizoid personality disorder and led the jury to infer that Dr. Guyer "did not know much about his business." Defendant's contention is misplaced. The prosecutor was attempting to show that the characteristics of schizoid personality disorder are not that unusual and are likely to be exhibited by any number of people. We conclude that the prosecutor's argument was supported by the evidence and was entirely appropriate to support the State's position that the jury should not find the mental or emotional disturbance mitigating circumstance.

[7] Defendant also contends that the prosecutor improperly suggested that "the house and tree and person test" was the sole basis for Dr. Guyer's opinion. Yet a review of the evidence demonstrates that

during cross-examination of Dr. Guyer the prosecutor also referred to the MMPI, the Incomplete Sentence Blank, and the Millon Clinical Multiaxial Inventory as tests given to defendant during his stay at Dorothea Dix Hospital. The prosecutor is free to underscore during closing argument those points of defendant's case that he perceives as weak. The prosecutor's argument was entirely proper and supported by the evidence.

[8] The third argument about which defendant complains is the prosecutor's argument against findings of mitigation based on cocaine abuse. Regarding whether defendant was a cocaine addict, the prosecutor argued:

> He was not a cocaine addict, or you would have heard it from somebody. You would have heard it from somebody.
>
> He even denied it to Dr. Guyer, who asked him. He denied it to Detective Rowe who asked him, do you use drugs, alcohol? No, I don't. He didn't use cocaine folks, until he got down there to Dorothea Dix and started planning his defense.
>
> And Dr. Guyer's explanation for that is well the first sign of being cocaine dependent is that you deny it. That's kind of a catch twenty-two, isn't it? You can go in there and you admit to Dr. Guyer you're a cocaine addict or you can deny it, either way he's going to write down you're a cocaine addict.
>
> I guess I'm a cocaine addict. I am one, because I deny I've ever done it.

As defendant failed to object to this argument at trial, we review it only to determine whether it was so grossly improper that the trial court erred by failing to intervene *ex mero motu* to correct it. We conclude that the trial court did not so err. After reviewing the context in which this argument was made, we conclude that the State's argument legitimately made the point that while defendant denied using cocaine and defense witnesses who knew defendant all denied any knowledge of drug use by defendant, Dr. Guyer found him to be a cocaine addict. The State was entitled to point out the absence of evidence to support the nonstatutory mitigating circumstance of drug dependence and to challenge the credibility of Dr. Guyer's opinion. This argument is without merit.

[9] Defendant next complains that the prosecutor improperly referred to defendant as a "thing" and that this encouraged the jury to

disregard his status as a human being in recommending its sentence. We disagree. It is not improper for counsel to make an argument urging the jurors to appreciate the circumstances of the crime. *State v. Artis*, 325 N.C. 278, 325, 384 S.E.2d 470, 497 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). In *Artis*, the victim died by manual strangulation. During sentencing in *Artis* the prosecutor asked the jurors to hold their breath for as long as they could during a four-minute stretch of time in an effort to help them understand the dynamics of manual strangulation. In that case, we concluded that the argument was neither an improper nor a prejudicial sentencing argument. *Id.*

As we stated in *Oliver*, 309 N.C. at 360, 307 S.E.2d at 326, the emphasis during sentencing "is on the circumstances of the crime and the character of the criminal." With that in mind, we note that the evidence tended to show that defendant bound, gagged, tortured, burned, and repeatedly stabbed the victim and left her to bleed to death in front of her infant daughter. While we do not condone the prosecutor's choice of language to describe defendant's character, the argument can reasonably be characterized as urging the jury to recognize the especially cruel nature of this murder. It is the duty of the prosecution in a capital sentencing proceeding to "strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty." *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). This argument is without merit.

[10] Defendant also contends that the prosecutor improperly called defendant a liar during cross-examination of Dr. Guyer. After considering this argument in context, and in conjunction with the rest of the evidence, we find the prosecutor's cross-examination to have been proper.

Dr. Guyer testified that defendant had denied using cocaine and that defendant had stated that he was not addicted to cocaine. Further, Dr. Guyer testified that his opinion concerning defendant's cocaine use was based on Dix Hospital's evaluation of defendant, Dr. Guyer's own testing of defendant, and his interviews with defendant. The prosecutor then proceeded as follows:

Q. So you didn't believe [defendant], did you?

A. No, I did not believe that he did not use drugs.

Q. Okay. You found him to be manipulative, didn't you?

A. Yes, I did.

Q. And basically that means he's a liar?

[DEFENSE COUNSEL]: OBJECTION.

THE COURT: OVERRULED.

A. If everyone who is manipulative is a liar then all of us in here are. Manipulation is something everyone does everyday. I think he's more manipulative than most.

The prosecutor did not call defendant a liar, but rather asked a meaningful question about the significance of test results that were the basis for an expert opinion. The trial court did not err by overruling defendant's objection. This argument is without merit.

[11] Finally, defendant contends that the prosecutor expressed his opinion that defendant's mother, his sisters, and Dexter Felder were liars. These individuals all testified to defendant's stepfather's absence during most of defendant's childhood and adolescence. With regard to the submitted nonstatutory mitigating circumstance that defendant had no father figure during his formative years, the prosecutor argued as follows:

> And you think about the irony in this case, he wants you to give him credit cause they didn't move with his dad to San Antonio. Give him credit for not having a father figure, when he's taken away—he's taken away a girl's mother. (holds up photograph) That's a fair trade. As far as I know his dad is still alive—
>
> [DEFENSE COUNSEL]: OBJECTION, Your Honor.
>
> THE COURT: SUSTAINED, to the extent not supported by the evidence.

We conclude that the prosecutor's argument cannot reasonably be construed to imply that defense witnesses had lied. The prosecutor was arguing to the jury that it should not find the submitted mitigating circumstance that defendant grew up without a father figure during his formative years. Defendant's mother testified that defendant never knew his natural father and that she married his stepfather when defendant was an infant. Thus, it is reasonable to infer that defendant's biological father might still be alive. Moreover, the trial court sustained the objection to the extent that the prosecutor's comment was not supported by the evidence. Where the trial court sus-

tains a defendant's objection, he has no grounds to except. *State v. Quick*, 329 N.C. 1, 29, 405 S.E.2d 179, 196 (1991).

[12] Defendant next contends that a portion of the prosecutor's closing argument was inflammatory and unsupported by the evidence. As defendant failed to object to this argument at trial, we are limited to determining whether the argument was so grossly improper that the trial court erred by failing to intervene *ex mero motu*. We conclude that it was not.

The prosecutor ended the State's closing argument as follows:

> If these defense lawyers try to say to you that you're committing murder yourselves, you remember where you were on April the 2nd, 1994, getting ready for Easter vacation, you weren't over on Brownsboro Road, all you are doing, Members of the Jury, is applying the law of the State of North Carolina to the facts of this case, which all of you said that you could do.
>
> And I ask you to impose the sentence of death in this case. And you remember the last words Trae Gibson said, Yo I love you.

Thus, the prosecutor cast the deceased's final words as having been spoken to her daughter, Yoshomira, who was also known as "Yo Yo."

We have found no impropriety on numerous occasions in which prosecutors argued from the victim's perspective where the argument was supported by the evidence. *See State v. King*, 299 N.C. 707, 711-13, 264 S.E.2d 40, 43-44 (1980) (prosecutor's closing argument as to what victim must have been thinking as he was dying not grossly improper); *State v. Hunt*, 339 N.C. 622, 651-52, 457 S.E.2d 276, 293 (1994) (prosecutor's closing argument concerning what the victim was thinking while kneeling, bleeding, and gasping for breath and that victim's life plans cut short not grossly improper); *State v. Frye*, 341 N.C. 470, 461 S.E.2d 664 (1995) (what victims must have thought as defendant committed crime not grossly improper), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 526 (1996).

The evidence presented at trial established that Yo Yo was Trae Gibson's only child and was fourteen months old at the time of her mother's murder. Tammy May testified that the victim was a good mother to her daughter and that May and the victim had planned an Easter egg hunt for the children for the day after the victim was

killed. The child was found on the bed, eyes swollen and red from crying, just a few feet from her mother's body.

From the evidence in this case, we conclude it was reasonable to infer that Trae Gibson's last words would have been to express her love for her child. Although the prosecutor's argument touched upon facts not specifically testified to, we conclude that it was a reasonable inference based on the evidence and was within the wide latitude properly given counsel in argument. *State v. Syriani*, 333 N.C. 350, 398-99, 428 S.E.2d 118, 145, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Assuming *arguendo* that this argument by the prosecutor was error, it was not so grossly improper as to require the trial court to intervene *ex mero motu*. This argument is without merit.

[13] Defendant next argues that the prosecutor made an improper argument based on the general public's fear of violent crime and on the jurors' own fears of violent crime. As defendant made no objection to this argument at trial, we review it for gross impropriety and find none.

The prosecutor held up a picture of the exterior of the victim's apartment building and argued that of all the pictures, that one was the most grotesque because "she was where we all think we can go and be safe." The prosecutor continued arguing the sanctity of the home, ending with "and that's why this is grotesque, cause it tells each and every one of you you are safe nowhere now. You're safe nowhere."

We have recognized as appropriate the sanctity of the home argument when it is supported by the evidence. *See Brown*, 320 N.C. at 202, 358 S.E.2d at 17 (argument regarding sanctity of the home not improper deterrence argument where founded upon evidence that the killing took place in the victim's home). This argument was based on evidence that Gibson was murdered while in her apartment, alone with her daughter, where she had a right to feel safe. The prosecutor's argument was within the wide latitude afforded counsel in hotly contested cases and was amply supported by the evidence. The trial court did not err by failing to intervene *ex mero motu*. This argument is without merit.

[14] Defendant next contends that the prosecutor made several improper arguments implying that the State was disadvantaged by the law governing capital sentencing. Arguing that the State is

restricted by statute in the aggravating circumstances that it can submit, the prosecutor argued that the defendant may submit many nonstatutory mitigating circumstances. The prosecutor's argument was as follows:

> If he helped an old lady across the street when he was thirteen years old, they can argue that to you.
>
> [DEFENSE COUNSEL]: OBJECTION.
>
> THE COURT: OVERRULED.
>
> [PROSECUTOR]: If he bought his grandmother a Happy Meal at McDonald's at some time in his life, they can argue that to you.
>
> So they are not limited in any respect. They can submit a thousand if they want to.

The prosecutor further stated that "we know that the rules are stacked against us," to which defendant did not object. Defendant argues that these arguments injected an arbitrary and irrational element into the case that influenced the sentencing decision and prejudiced him in this case. We disagree.

The prosecutor's argument regarding nonstatutory mitigating circumstances emphasized to the jury that it must hold the State to a higher burden than it holds defendant. This argument could not have prejudiced defendant. Moreover, the jury found two statutory mitigating circumstances, including the catchall, as well as two nonstatutory mitigating circumstances. As to the "rules are stacked against us" argument, we do not find this to be so grossly improper that the trial court erred by failing to intervene *ex mero motu*. This argument is without merit.

[15] Finally, defendant argues that the prosecutor made several arguments improperly referring to what a life sentence would be like and stated that it would not be adequate to deter other murders. Defendant did not object to these arguments. We have considered and rejected defendant's general deterrence argument previously. In *State v. Alston*, 341 N.C. 198, 252, 461 S.E.2d 687, 717 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 100 (1996), we held that argument about the conditions of life in prison "did not relate to general deterrence, but served to emphasize the State's position that defendant deserved the death penalty rather than a comfortable life in prison." We see no reason to depart from this decision. This argument is without merit.

[16] In the conclusion of his first assignment of error, defendant argues that the prosecution's conduct was overly zealous and that the cumulative effect of the instances he complains of denied him due process, requiring resentencing. We disagree.

In order for a defendant to receive a new sentencing proceeding, the prosecutor's comments must have so infected the trial with unfairness as to make the result a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986). We do not find this to be the case. Nor has defendant shown that the arguments "stray[ed] so far from the bounds of propriety as to impede the defendant's right to a fair trial." *State v. Davis*, 305 N.C. 400, 421-22, 290 S.E.2d 574, 587 (1982). For the foregoing reasons, we conclude that the cumulative effect of the arguments of the prosecutor during the capital sentencing proceeding in this case, which are the subject of this assignment of error, did not create prejudicial error. Accordingly, this assignment of error is overruled.

[17] By another assignment of error, defendant contends that the trial court erred by excusing prospective juror Scott Klein for his responses to death-qualification questions when his responses did not disqualify him for jury service. We disagree. After receiving ambivalent responses during the *voir dire* regarding Klein's ability to impose the death penalty, the trial court questioned Klein from the bench in the following exchange:

> THE COURT: Let me ask you this, would your views about the death penalty impair your ability to be fair and impartial to the State or to the Defendant in determining whether or not a sentence of death o[r] life imprisonment should be imposed?
>
> [MR. KLEIN]: To be fair to all involved, I would have to say in the absence of experience of having done so before, that it, I would have to say that it would be substantial, that there would be substantial ahh—that there would be a problem with my serving.
>
> THE COURT: There would be some impairment of your ability to view the evidence impartially and applying the law impartially under the law of North Carolina?
>
> MR. KLEIN: Ultimately because of my uncertainty I would have to say yes, simply because I'm not sure.

After further questioning by defense counsel and again by the prosecutor, the trial court took one last opportunity to clarify whether

Klein's views would substantially impair his ability to perform his duties as a juror:

> THE COURT: Mr. Klein do you believe your reluctance, expressed reluctance to impose the death penalty would impair your ability to be fair and impartial in determining the sentence in this case according to the law?
>
> MR. KLEIN: I would fear it might.
>
> THE COURT: Okay[.] Do you have some significant or substantial fear?
>
> MR. KLEIN: I would have to say so under the circumstances.

The trial court then excused Klein for cause.

Defendant contends that Klein was fit to serve on the jury because he stated at one point during the *voir dire* that he would apply the law as it was given to him. Viewed in its entirety, the *voir dire* of Klein shows that the trial court properly excused him for cause. *State v. Jones*, 336 N.C. 229, 247, 443 S.E.2d 48, 56, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 423 (1994). This assignment of error is overruled.

[18] By his next assignment of error, defendant contends that the trial court improperly denied his motion to allow the jury to consider life without parole as a sentencing option. Defendant argues that this violated his constitutional right to due process. We disagree.

Defendant argues that he was entitled to an instruction that a sentence of life imprisonment "means a sentence of life without parole." The General Assembly amended N.C.G.S. § 15A-2002 to require such an instruction in capital sentencing proceedings for offenses occurring on or after 1 October 1994. This Court has recognized that the legislature intended for N.C.G.S. § 15A-2002 to become effective 1 October 1994 and to be applied prospectively. *State v. Skipper*, 337 N.C. 1, 43, 446 S.E.2d 252, 275 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995); *State v. Fullwood*, 343 N.C. 725, 741, 472 S.E.2d 883, 891 (1996). In *Fullwood*, we rejected the same argument defendant raises in this assignment of error. We see no reason to depart from this sound holding. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant also raises for "preservation" the following five issues: (1) the trial court's instructions which permitted jurors to reject sub-

mitted mitigation on the basis that it had no mitigating value were erroneous; (2) the trial court's use of the term "may" in sentencing Issues Three and Four made consideration of proven mitigation discretionary with the sentencing jurors; (3) the court committed reversible constitutional error by submitting to the jury the "especially heinous, atrocious, or cruel" aggravating circumstance based upon instructions that failed adequately to limit the application of this inherently vague and overly broad circumstance; (4) the trial court violated defendant's right to due process of law and to be free of cruel and unusual punishment by refusing to give an accurate instruction on parole eligibility; and (5) the trial court violated defendant's rights to a fair and impartial jury, to due process of law, and to be free of cruel and unusual punishment by failing to prevent the prosecutor from asking each prospective juror if he or she believed capital punishment "necessary," which improperly raised the issue of general deterrence. We have previously rejected defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule each of these assignments of error.

PROPORTIONALITY REVIEW

[19] Having concluded that defendant's trial and separate capital sentencing proceeding were free of prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. It is our duty in this regard to ascertain (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (Supp. 1996). After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the evidence fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

In the case *sub judice*, defendant pled guilty to first-degree murder. The jury found the following two aggravating circumstances: that the murder was especially heinous, atrocious, or cruel, N.C.G.S.

§ 15A-2000(e)(9), and that defendant killed the victim while he was engaged in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5). In mitigation, one or more jurors found the statutory mitigating circumstances that defendant's capacity to appreciate the criminality of or to conform his conduct to the law was impaired, N.C.G.S. § 15A-2000(f)(6). The jury also found the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). The jury found as nonstatutory mitigating circumstances that defendant had acknowledged wrongdoing in connection with the offense within two days of its commission and that defendant was alcohol and cocaine dependent at the time of the murder.

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994). We have found the death penalty 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; *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). None of the seven cases in which this Court has found the death penalty disproportionate is factually similar to the present case.

This case has several features which distinguish it from the cases in which we have found the death penalty to be disproportionate. They are: (1) defendant inflicted incise wounds on the victim, consistent with torture, before leaving her to bleed to death; (2) defendant murdered the victim just a few feet away from where the victim's infant daughter sat; and (3) the victim was bound, gagged, cut, stabbed, and burned and would have suffered tremendously before dying. We find it significant that in none of the cases in which this Court has found the death penalty disproportionate did the defendant engage in torture of the victim, or do so in front of the victim's infant child.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. This case is factually

similar to *State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802. In that case, the defendant entered the home of a woman he did not know and ordered her to send her two-and-a-half-year-old child from the room before viciously assaulting the woman. After torturing her with sharp instruments, the defendant put a pillowcase over the victim's head and fired into the pillowcase.

In the present case, defendant entered the victim's home and repeatedly stabbed her, cut her skin in a manner consistent with torture, and burned her with a curling iron while she was bound and gagged, all in front of her infant daughter. We also note that defendant left the victim to bleed to death. As we stated in *Reeves*, we can imagine the helplessness and terror Trae Gibson must have felt as she endured this torture, knowing that she was going to die, leaving her fourteen-month-old child in the hands of her killer. We found the death sentence to be proportionate in *Reeves* and we find it to be proportionate in this case. Accordingly, we conclude that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

For the foregoing reasons, we hold that defendant received a fair capital sentencing proceeding, free of prejudicial error, and that the sentence of death entered in the present case must be and is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. JERRY WAYNE CONNER

No. 219A91-2

(Filed 10 February 1997)

1. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—statutory mitigating circumstances—instructions—value

The trial court did not err in a capital sentencing proceeding by denying defendant's requested instruction on the value of statutory mitigating circumstances. Defendant's request for an instruction that conveyed to the jury that it must give value to found statutory mitigators was fulfilled by the instruction given.

Am Jur 2d, Criminal Law §§ 527, 598.

2. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstances—instructions—mitigating value

There was no plain error in a capital sentencing proceeding in the instructions on mitigating value for nonstatutory mitigating circumstances. The North Carolina Supreme Court has considered and rejected the contention that the trial court must require each juror to use in determinations of Issues Three and Four all of those mitigating circumstances found by one or more jurors in Issue Two, even if the individual juror did not himself or herself find the circumstances to exist.

Am Jur 2d, Criminal Law §§ 598, 599.

3. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—instructions—mitigating circumstances

There was no constitutional error in the instructions in a capital sentencing proceeding in the use of the word "may" in the instruction that in deciding Issue Three "each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue Two."

Am Jur 2d, Criminal Law §§ 598, 599.

4. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—mitigating circumstances—jury not required to find

There was no error in a capital sentencing proceeding where the jury failed to find mitigating circumstances that defendant argues were supported by the evidence. The trial court has neither the duty nor the authority to require jurors to find mitigating circumstances that are supported by evidence, even when that evidence is uncontroverted. The defendant is entitled at most to a peremptory instruction but the jury may nonetheless reject the evidence and not find the fact at issue if it does not believe the evidence.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1447, 1760.

5. Criminal Law § 1375 (NCI4th Rev.)—capital sentencing—mitigating circumstances—failure of jury to find—not arbitrary

Failure to find mitigating circumstances does not render a jury's sentencing recommendation arbitrary; defendant's reliance

on N.C.G.S. § 15A-2000(d)(2) to argue that a sentencer cannot deny the existence of mitigation that all reasonable minds would agree to exist is inapposite.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1447, 1760.

6. Criminal Law § 1348 (NCI4th Rev.)— capital sentencing—instructions—parole eligibility—offense before 10/1/94—no authority to instruct on life without parole

The trial court had no authority in a capital sentencing proceeding (and did not err by refusing) to apply the amended N.C.G.S. § 15A-2002 to have the jury consider the possibility of life without parole where defendant was being sentenced for first-degree murders committed before 1 October 1994. Although defendant contended that fundamental fairness requires that an ameliorative law be applied to him, the amendment clearly increased the punishment for first-degree murder by making it a crime for which parole is no longer a possibility and was not ameliorative. The argument that a heavier minimum penalty makes application of the maximum penalty less likely is speculative and unsupported by any evidence in the record. Retroactive application would violate the constitutional prohibition on *ex post facto* application of punitive laws and defendant's offer to waive constitutional protection cannot change the effective date of the statute.

Am Jur 2d, Criminal Law § 590; Trial § 1443.

7. Jury § 141 (NCI4th)— capital sentencing—jury selection—questions concerning parole eligibility

The trial court did not err in a capital resentencing proceeding by denying defendant's motion to permit *voir dire* of prospective jurors regarding parole eligibility.

Am Jur 2d, Jury § 202; Trial § 575.

Prejudicial effect of statement or instruction of court as to possibility of parole or pardon. 12 ALR3d 832.

8. Criminal Law § 1348 (NCI4th Rev.)— capital sentencing—parole eligibility—instructions

The trial court did not err in a capital sentencing proceeding by refusing to instruct the jury that defendant, if sentenced to life imprisonment, would either spend the rest of his life incarcerated

or be paroled at a date no sooner than twenty years from his first confinement, that the trial judge had the discretion to sentence defendant consecutively, and that the penalty for first-degree rape was life imprisonment with no parole for twenty years.

Am Jur 2d, Criminal law § 918; Homicide§ 553.

Prejudicial effect of statement or instruction of court as to possibility of parole or pardon. 12 ALR3d 832.

9. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—instruction on sympathy—not given—no error

The trial court did not err in a capital sentencing proceeding by not instructing the jury that it could base its sentencing recommendation in part on sympathy for defendant's plight. To refer to sympathy would have been improper under *State v. Hill*, 331 N.C. 387, in which it was stated that the jury should instead be instructed on that statutory catch-all of "any other circumstance arising from the evidence." The trial court here properly instructed the jury regarding the statutory catchall mitigating circumstance which permits jurors to weigh sympathy in their determinations. Although defendant contends that the State urged the jury to base its recommendation on sympathy for the victims, these arguments were permissible victim-impact arguments.

Am Jur 2d, Criminal Law § 918; Trial §§ 649, 1457.

Sympathy to accused as appropriate factor in jury consideration. 72 ALR3d 842.

10. Criminal Law § 461 (NCI4th Rev.)— capital sentencing—prosecutor's argument—death as deterrent

There was no error in a capital sentencing proceeding where the prosecutor asked what the only guarantee would be that this defendant would not rape and kill again. It is not improper for the prosecutor to recommend death out of concern for the future dangerousness of the defendant.

Am Jur 2d, Homicide § 464; Trial § 572.

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

11. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—sympathy

There was no gross impropriety requiring intervention *ex mero motu* in a capital sentencing proceeding where defendant contended that the prosecutor directly linked important evidentiary facts offered by defendant with sympathy and advised jurors that they should decide these cases by following the law without sympathy. The State did not tell the jury to reject sympathy arising from the evidence; to the contrary, it told the jury to be merciful but to consider where mercy belongs in these cases.

Am Jur 2d, Criminal Law § 918; Trial §§ 649, 1457.

Sympathy to accused as appropriate factor in jury consideration. 72 ALR3d 842.

12. Criminal Law § 453 (NCI4th Rev.)— capital sentencing—prosecutor's arguments—victims' last moments

There was no error requiring intervention *ex mero motu* in a capital sentencing proceeding where defendant contended that the State improperly attempted to elicit sympathy for the victims by arguments that the victims would have no futures and vivid descriptions of what the victims might have done and felt in their last moments. Minor references to the rights of the victims are not so grossly improper as to require *ex mero motu* intervention, a trial court need not intervene *ex mero motu* to prevent the State from rebutting the existence or value of nonstatutory mitigating circumstances and, while the arguments concerning the victims' last moments contained some speculation, they were based largely on defendant's own confessions and the physical evidence that was before the jury and were victim-impact statements that fall within the wide latitude permitted the prosecutor.

Am Jur 2d, Criminal Law §§ 527, 598, 599; Homicide § 554; Trial § 664.

13. Appeal and Error § 421 (NCI4th)— capital sentencing—fact-specific issues—not preservation issues

Issues in an appeal from a capital sentencing proceeding were fact-specific and thus should not have been treated as preservation issues.

Am Jur 2d, Appellate Review § 547; Trial §§ 1475, 1999.

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

14. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not disproportionate

A death penalty was not disproportionate where the record supports the jury's findings on aggravating circumstances, the sentences were not entered under the influence of passion, prejudice, or other arbitrary consideration, and the sentences were not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. A death penalty has never been found disproportionate in a double murder case; the mere fact that other juries have made different recommendations as to different defendants involved in similar crimes does not render this sentence disproportionate. The two aggravating circumstances found here have been present in other cases in which the death sentence was found disproportionate. It is clear that the present cases are more similar to cases in which the North Carolina Supreme Court found the sentence of death proportionate than to cases in which it was found it disproportionate.

Am Jur 2d, Criminal Law § 628; Homicide § 556.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like—post-Gregg cases. 64 ALR4th 837.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed. 51 L. Ed. 2d 886.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of death entered by Parker, J., at the 17 January 1995 Criminal Session of Superior Court, Gates County. Heard in the Supreme Court 16 October 1996.

Michael F. Easley, Attorney General, by Joan Herre Erwin, Assistant Attorney General, for the State.

Jonathan D. Sasser and Martin H. Brinkley for defendant-appellant.

WHICHARD, Justice.

On 13 November 1990, defendant was indicted for two counts of first-degree murder, one count of first-degree rape, and one count of robbery with a dangerous weapon. He was tried capitally at the 15 April 1991 Criminal Session of Superior Court, Gates County. The jury found him guilty of all charges and recommended that he be sentenced to death for the two first-degree murder convictions. The trial court imposed death sentences for the murders, a sentence of life imprisonment for the first-degree rape, and a sentence of forty years' imprisonment for robbery with a firearm. On appeal, this Court found no error in the guilt-innocence phase of defendant's trial, but vacated defendant's death sentences and remanded for a new capital sentencing proceeding. *State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994). Defendant's new capital sentencing proceeding was held at the 17 January 1995 Criminal Session of Superior Court, Gates County. A jury again recommended sentences of death for the first-degree murders, and the trial court sentenced defendant accordingly. Defendant appeals from his sentences. We hold that defendant received a fair sentencing proceeding, free of prejudicial error, and that the sentences of death are not disproportionate.

The facts describing defendant's crimes were presented in our earlier opinion, *id.* at 623-27, 440 S.E.2d at 829-31, and need not be restated in detail here. During defendant's new sentencing proceeding, the State presented evidence that defendant robbed a convenience store; shot and killed the proprietor; and raped, shot, and killed the proprietor's daughter. The State's evidence tended to show that on 18 August 1990 at about 9:30 p.m., defendant spoke with Minh Linda Luong Rogers (Minh Rogers) in the parking lot of the convenience store. Defendant and Minh Rogers talked for a few moments, and then Minh Rogers entered the store. A few moments later, defendant, carrying a shotgun, approached three individuals who were sitting in a car in the store's parking lot. Defendant displayed something that looked like an identification card or badge and told the three people in the car that he was an agent with the Drug Enforcement Administration who was about to execute a drug bust. Defendant informed the individuals that they should leave the premises if they did not want to "get caught up in it." The individuals left the parking lot. Defendant then entered the store, robbed Minh Rogers, told her he was going to shoot her, and did so. Minh Rogers' sixteen-year-old daughter, Linda Minh Rogers (Linda Rogers), emerged from a back room of the store. Defendant raped Linda Rogers at gunpoint and then shot her in the head.

Defendant made two confessions in which he admitted killing both women. In the first confession, he stated that a man he met at a Fast Fare in Murfreesboro offered him $7,000 to kill a "Japanese"[1] woman who ran a store in Gates County. Defendant told the man that he was not interested. Later, however, defendant decided he needed the money and went back to Murfreesboro to find the man. When he was unable to find him, he decided to kill the woman and try to collect the money afterwards. In his second confession, defendant offered to tell "the truth." He stated that he stopped at Rogers' store on 18 August 1990 to get something to drink. An older white male and the woman who owned the store started to tease him, calling him "cowboy" or "cowgirl." Defendant became angry but left the store. Later, he drank two bottles of whiskey and brooded over the teasing he had received. He became angrier and decided to return to the store. Upon his return to the store, he encountered a white man who called him a "dickhead." Defendant invited the man to fight, but the man declined. Defendant stated that he then went into the store and killed the two women.

Defendant offered as mitigating evidence that he had been a reliable driver for a trucking business and that in prison he was a punctual and reliable worker in the Central Prison Hospital X-ray room. Defendant's expert forensic psychiatrist, Dr. Robert Brown, testified that although defendant was competent to stand trial and was not legally insane at the time he committed the crimes, his behavior was affected by mental illness. Dr. Brown testified that defendant suffers from a severe psychosexual disorder, an atypical personality disorder, and an antisocial personality disorder. According to Dr. Brown, defendant's psychosexual disorder causes defendant to desire to have sexual intercourse with women against their will and to fantasize about incestuous sexual relationships. Moreover, Dr. Brown testified, defendant suffers from hallucinations, bizarre ideation, and grandiose thoughts and beliefs. As a result, defendant fantasized about living a dangerous life filled with adventure and sex, and he told Dr. Brown implausible tales about being a "hit man" and being involved in drug shipments and deals involving large sums of money. Dr. Brown concluded that incarceration was the best treatment for defendant's conditions, and he opined that defendant had adjusted well to prison and was not a danger to anyone in that setting. He noted further that prison doctors have prescribed medication to treat defendant's mental disorders. Finally, Dr. Brown tes-

1. Minh Rogers was actually a Vietnamese immigrant.

tified that defendant has an IQ of eighty-two, which is significantly below average.

The jury found two aggravating circumstances with respect to defendant's conviction of the first-degree murder of Linda Rogers: that the murder was committed while defendant was engaged in the commission of first-degree rape and that the murder was part of a course of conduct including the commission of other crimes of violence against another person. The jury found two parallel circumstances aggravating defendant's conviction for the first-degree murder of Minh Rogers: that the murder was committed while defendant was engaged in the commission of robbery with a firearm and that the murder was part of a course of conduct including the commission of other crimes of violence against another person. With respect to both murders, the trial court submitted and the jury found the statutory mitigating circumstance that the crime was committed while defendant was under the influence of a mental or emotional disturbance. The jury also found the statutory catchall mitigating circumstance, as well as three of the ten nonstatutory mitigators submitted. The trial court submitted but the jury failed to find two statutory mitigating circumstances: that defendant's capacity to appreciate the criminality of his acts or to conform his conduct to the requirements of the law was impaired and that defendant's age at the time of the crimes was mitigating. The jury then determined that the mitigating circumstances found were insufficient to outweigh the aggravating circumstances found and that the aggravating circumstances when considered with the mitigating circumstances were sufficiently substantial to call for imposition of the death penalty.

[1] Defendant first assigns as error the trial court's denial of defendant's request that the following instruction be given regarding statutory mitigating circumstances:

> This mitigating factor is what is known as a "statutory mitigating factor" and thus has mitigating value as a matter of law. If one or more of you finds by a preponderance of the evidence that this statutory mitigating factor exists, then you must give this factor weight when deciding Issues Three and Four.

Defendant argues first that the requested instruction was a correct statement of the law and was supported by the evidence and that defendant was therefore entitled to the instruction. Defendant argues further that the trial court's failure to give the requested instruction

allowed the jury the discretionary power to disregard completely statutory mitigating circumstances proved by the evidence.

A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence. *State v. Moore*, 335 N.C. 567, 606, 440 S.E.2d 797, 819, *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 174 (1994). The trial court need not give the requested instruction verbatim, however; an instruction that gives the substance of the requested instructions is sufficient. *State v. Green*, 336 N.C. 142, 174, 443 S.E.2d 14, 33, *cert. denied*,— U.S. —-, 130 L. Ed. 2d 547 (1994). Defendant argues further that the instructions given did not adequately address the substance of his requested instruction because they provided no guidance as to the legal distinction between statutory and nonstatutory mitigating circumstances. The gravamen of defendant's contention is that the jury may have failed to recognize that statutory mitigating circumstances have mitigating value as a matter of law. *See State v. Jaynes*, 342 N.C. 249, 285, 464 S.E.2d 448, 470 (1995) ("The General Assembly has determined as a matter of law that statutory mitigating circumstances have mitigating value."), *cert. denied*,— U.S. —-, 135 L. Ed. 2d 1080 (1996). This Court considered and rejected this argument in *State v. Simpson*, 341 N.C. 316, 348-49, 462 S.E.2d 191, 209-10 (1995), *cert. denied*,— U.S. —-, 134 L. Ed. 2d 194 (1996).

Here, the trial court described each statutory mitigating circumstance submitted and instructed jurors: "If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreperson write 'yes' in the space provided after this mitigating circumstance on the Issues and Recommendation form." The trial court also instructed the jurors on the meaning of "mitigating circumstance," instructed that they must "weigh the aggravating circumstances against the mitigating circumstances" in Issue Three, and instructed that they must "consider [the aggravating circumstances] in connection with any mitigating circumstances found by one or more of you" in Issue Four. In *Simpson*, we held that virtually identical instructions sufficiently informed the jurors that any statutory mitigating circumstance found by one or more jurors in Issue Two must be given weight in the determination of Issues Three and Four. *Id.* at 348-49, 462 S.E.2d at 209-10. We therefore conclude that, as in *Simpson*, defendant's request for an instruction that conveyed to the jury that it must give value to found statutory mitigators was fulfilled by the instruction given. This assignment of error is overruled.

[2] Defendant's next assignment of error has several parts. First, defendant contends that the trial court committed plain error by failing to instruct the jury to consider in Issues Three and Four those nonstatutory mitigating circumstances that have mitigating value. The trial court instructed the jury that in deciding Issue Three, "each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue Two." The trial court gave a similar instruction regarding the use of mitigating circumstances in Issue Four. Defendant contends that these instructions were faulty for two reasons: first, because they allowed an individual juror to disregard mitigation found by any fellow juror; second, because they did not require an individual juror to consider any mitigation that he or she personally found to exist. This Court has considered and rejected the contention that the trial court must require each juror to use in the determinations of Issues Three and Four all of those mitigating circumstances found by one or more jurors in Issue Two, even if the individual juror did not himself or herself find the circumstance to exist. *See, e.g., State v. McCarver*, 341 N.C. 364, 402-03, 462 S.E.2d 25, 47 (1995), *cert. denied*,— U.S. —, 134 L. Ed. 2d 482 (1996). Defendant offers no compelling reasons for us to revisit this issue; therefore, our prior decisions control.

[3] Defendant's next contention apparently is based upon the trial court's use of the word "may," rather than "must," in the instruction given. The argument that this instruction unconstitutionally fails to require jurors to consider all the mitigating circumstances found has been rejected by this Court in several recent cases. *See, e.g., State v. Carter*, 338 N.C. 569, 604-05, 451 S.E.2d 157, 176 (1994), *cert. denied*,— U.S. —, 132 L. Ed. 2d 263 (1995).

[4] Next, defendant asserts that seven of the submitted mitigating circumstances that the jury failed to find were supported by the evidence. He argues that the jury's failure to find the circumstances resulted in an unreliable sentencing recommendation, in violation of defendant's Eighth Amendment right to freedom from cruel and unusual punishment. Defendant does not identify a specific erroneous action of the trial court that led to this outcome; nevertheless, he appears to believe that the trial court could and should have required the jury to find the circumstances. We know of no authority for this proposition. To the contrary, our death penalty statute places the responsibility of determining whether mitigating circumstances exist squarely on the jury. N.C.G.S. § 15A-2000(b) (Supp. 1996).

Defendant recites at length the evidence that he contends supports the mitigating circumstances at issue and argues that the evidence was not contradicted and the witnesses were not effectively impeached. Even assuming these assertions are true, defendant cannot prevail on this assignment of error. The trial court has neither the duty nor the authority to require jurors to find mitigating circumstances that are supported by evidence, even when that evidence is uncontroverted. "In those cases where the evidence is truly uncontradicted, the defendant is, at most, entitled to a peremptory instruction when he requests it." *State v. Alston*, 341 N.C. 198, 256, 461 S.E.2d 687, 719 (1995), *cert. denied*,--- U.S. —-, 134 L. Ed. 2d 100 (1996). Moreover, "even where all of the evidence supports a finding that the mitigating circumstance exists and a peremptory instruction is given, the jury may nonetheless reject the evidence and not find the fact at issue if it does not believe the evidence." *Id.* at 256, 461 S.E.2d at 719-20. Thus, the jurors were entitled to reject the evidence defendant offered in mitigation, and the trial court did not err by permitting them to do so.

[5] Finally, defendant argues that a sentencer cannot deny the existence of mitigation that all reasonable minds would agree to exist. The only North Carolina authority that defendant cites for this proposition is N.C.G.S. § 15A-2000(d)(2), which describes this Court's duty to scrutinize death sentences carefully and to vacate sentences "imposed under the influence of passion, prejudice, or any other arbitrary factor." Defendant's citation of this statute is inapposite. Failure to find mitigating circumstances does not render the jury's sentencing recommendation arbitrary. This Court's statutory duty to determine the propriety of a death sentence is described and performed later in this opinion. This assignment of error is overruled.

In his next assignment of error, defendant makes three arguments. First, he argues that the trial court denied him due process of law and equal protection of the law when it refused to allow jurors to consider the option of sentencing defendant to life without possibility of parole. Second, he contends that the trial court erred in denying his motion to permit *voir dire* of prospective jurors regarding their views about parole eligibility. Third, he argues that the trial court's refusal to give an instruction regarding parole eligibility was reversible error. We conclude that each of these arguments is without merit.

[6] Defendant argues first that he was entitled to have the jury consider the possibility of sentencing him to life imprisonment without

possibility of parole, even though the statute in effect at the time defendant committed the crimes did not permit such a sentence. At the time defendant committed the murders of Minh and Linda Rogers, persons sentenced to life imprisonment for first-degree murder were to become eligible for parole after twenty years. N.C.G.S. § 15A-1371(a1) (1988). In 1994, the legislature repealed this statute and amended N.C.G.S. § 15A-2002 to provide that a defendant sentenced to life imprisonment for a first-degree murder committed on or after 1 October 1994 shall not be eligible for parole. N.C.G.S. § 15A-2002 requires the judge to instruct the jury that a sentence of life imprisonment "means a sentence of life without parole." Defendants sentenced to life imprisonment for offenses committed before 1 October 1994 continue to be sentenced under the former statute and are therefore eligible for parole.

Defendant argues that the trial court's failure to apply to him the law providing for a sentence of life without parole violated his constitutional rights to due process, to equal protection of the laws, and to a fair and reliable sentencing hearing. Defendant contends that fundamental fairness requires that an ameliorative law be applied to him. He argues that the amendment to N.C.G.S. § 15A-2002 is ameliorative, even though it makes a sentence of life imprisonment more onerous, because it diminishes the chance that the jury will return a recommendation of death. Defendant's argument is without merit. The amendment was not an ameliorative act; it clearly increased the punishment for first-degree murder by making it a crime for which parole is no longer a possibility. Defendant's argument that a heavier minimum penalty makes application of the maximum penalty less likely is speculative and unsupported by any evidence in the record. By its plain terms, the amendment increases, rather than decreases, a penalty. Therefore, retroactive application of the amendment would violate the constitutional prohibition on *ex post facto* application of punitive laws. *See State v. Wright*, 302 N.C. 122, 128, 273 S.E.2d 699, 704 (1981) ("Any legislation which increases the punishment for a crime between the time the offense was committed and the time a defendant is punished therefor is considered an invalid *ex post facto* law as applied to that defendant.").

Defendant acknowledges the *ex post facto* problem and argues further that the trial court should have accepted his offer to waive this constitutional protection. His waiver of a constitutional right cannot change the effective date of a valid statute, however. The amended statute by its terms applies only to first-degree murders

committed on or after 1 October 1994. The trial court therefore had no authority to apply the statute to defendant's cases and did not err in refusing to do so.

[7] Defendant argues next that the trial court erred in denying his motion to permit *voir dire* of prospective jurors regarding their perceptions about the parole eligibility of defendants sentenced to life imprisonment. This Court has held repeatedly that a defendant is not entitled to explore on *voir dire* prospective jurors' perceptions of parole eligibility. *State v. Chandler*, 342 N.C. 742, 749-50, 467 S.E.2d 636, 640, *cert. denied*,— U.S. —, 136 L. Ed. 2d 133 (1996). We adhere to our prior decisions and hold that the trial court did not err in refusing defendant's request to question jurors about parole.

[8] Defendant concludes this assignment of error by contending that the trial court erred in refusing to instruct the jury that, if sentenced to life imprisonment, defendant would either spend the rest of his life incarcerated or be paroled at a date no sooner than twenty years from his first confinement. The proposed instruction also would have stated that the trial court had the discretion to sentence defendant consecutively for crimes of which he had been convicted and that the penalty for first-degree rape was life imprisonment with no parole for twenty years. Defendant contends that the trial court's failure to give these instructions violated his constitutional rights to due process of law and freedom from cruel and unusual punishment. This Court has considered and rejected similar arguments in numerous decisions. *See, e.g., Simpson*, 341 N.C. at 353-54, 462 S.E.2d at 215. This assignment of error is overruled.

[9] In his next assignment of error, defendant contends that the trial court erred by declining to instruct the jury that it could base its sentencing recommendations, in part, on sympathy for defendant's plight. In *State v. Hill*, 331 N.C. 387, 421, 417 S.E.2d 765, 782-83 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993), we stated:

> We believe that trial courts should not refer to "sympathy." Instead, when instructing the jury to consider the statutory catch-all circumstance of "*[a]ny other circumstance arising from the evidence* which the jury deems to have mitigating value," trial courts should emphasize that the jury must weigh all mitigating considerations whatsoever which it finds supported by evidence. N.C.G.S. § 15A-2000(f)(9) (1988) (emphasis added). We believe that this course will lead the jury to consider all of the mitigating evidence introduced as required by *Lockett v. Ohio*, 438 U.S. 586,

57 L. Ed. 2d 973 (1978), without the risk of encouraging the jury to exercise unbridled, and thus unconstitutional, discretion.

Therefore, the trial court did not err in refusing to give defendant's requested instruction; to the contrary, it would have been improper for the court to refer to sympathy.

Defendant attempts to distinguish *Hill* by contending that we did not decide in that case whether the sentiment of sympathy may nevertheless properly affect the weighing of aggravating and mitigating circumstances. Defendant contends that unless instructed as he requested, jurors would consider themselves to be restricted from applying human sentiment to the sentencing determination. We find no merit in this argument. The record shows that the trial court properly instructed the jury regarding the statutory catchall mitigating circumstance. Notwithstanding this Court's conclusion in *Hill* that the trial court should not specifically refer to sympathy, the catchall mitigating circumstance permits jurors to weigh sympathy in their determinations, if they in fact have sympathy for the defendant and consider that sympathy to be a circumstance having mitigating value. *See* N.C.G.S. § 15A-2000(f)(9).

Finally, defendant attempts to bolster his argument by contending that the State urged the jury to base its sentencing recommendations on the nonstatutory aggravating circumstance of sympathy for the victims. We have reviewed the arguments defendant recites, and we conclude that they were permissible victim-impact arguments that did not inappropriately deprive defendant of full consideration under the law of his mitigating evidence. This assignment of error is overruled.

[10] In his next assignment of error, defendant complains of several of the prosecution's arguments that he contends were improper. In the first argument defendant challenges, the prosecutor asked, "What is our only guarantee that this defendant will not rape again? What is our only guarantee that he will not kill again?" Defendant's objection was overruled. Defendant contends that this specific-deterrence argument was improper and should not have been permitted. This Court has overruled similar assignments of error in many cases, concluding that it is not improper for a prosecutor to urge the jury to recommend death out of concern for the future dangerousness of the defendant. *See, e.g., State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994). The trial court therefore did not err in allowing the argument.

[11] Defendant next argues that several arguments to which he did not object at trial were grossly improper, requiring *ex mero motu* intervention by the trial court. This Court has held repeatedly that remarks that pass without objection by defense counsel at trial "must be gross indeed for this Court to hold that the trial court abused its discretion in not recognizing and correcting *ex mero motu* the comments regarded by defendant as offensive only on appeal." *State v. Brown*, 327 N.C. 1, 19, 394 S.E.2d 434, 445 (1990). Further, in carrying out their duty to advocate zealously that the facts in evidence warrant imposition of the death penalty, prosecutors are permitted wide latitude in their arguments. *State v. Geddie*, 345 N.C. 73, 97, 478 S.E.2d 146, 158 (1996). Having examined the arguments in light of these principles, we conclude that they were not so grossly improper as to violate defendant's rights and that the trial court therefore did not err in failing to intervene *ex mero motu*. We now consider each argument in turn.

In his comments upon defendant's submitted mitigating circumstances, the prosecutor made the following statements:

> It may be suggested to you, well, be merciful, be merciful not because of any merit the defendant may present to you but because of the sort of people you are. Be merciful. Let mercy flow. Where does mercy belong? Where does mercy belong in these cases? The Ancient Greek Philosopher, Aristotle, once said, "Pity may be defined as a feeling of pain caused by the sight of some evil, destructive or painful event which benefits someone who does not deserve it." Who does not deserve it? Who did not deserve to die?
>
> Did Minh Linda Luong Rogers deserve to die? Did Linda Minh Rogers deserve to die?
>
> . . . .
>
> The defendant did what he wanted to do with the knowledge that these things were wrong, but now calls upon you not to do what I submit, you need to do, in the name of mercy.

Defendant contends that by this argument the State directly linked important evidentiary facts offered by defendant in mitigation with sympathy, and it advised jurors that they should decide these cases by following the law without sympathy. We disagree with this characterization of the State's argument. The State did not tell the jury to reject sympathy arising from the evidence; to the contrary, it told

the jury to be merciful but to consider where mercy belongs in these cases. Such an argument is within the scope of permissible arguments.

[12] Defendant next contends that the State improperly attempted to elicit sympathy for the victims. Defendant points to several arguments in which the State referred to the fact that the victims would have no futures and vividly described what the victims might have done and felt in the last moments of their lives.

In *Payne v. Tennessee*, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 736 (1991), the United States Supreme Court held that the Eighth Amendment does not prohibit a capital sentencing jury from considering, or a prosecutor from arguing, victim-impact evidence. Defendant acknowledges the authority of *Payne*, but contends that the State's arguments exceeded the bounds of *Payne*. Defendant complains particularly about the following statements:

> One of [defendant's] rights was the right to remain silent. The defendant, so far as we know, did not inform either this mother or her child of their rights to remain silent because the fact is, the immutable fact and no matter how we sift through it, the fact that will not go away is they are silent forever.
>
> . . . .
>
> The defendant has adjusted well to incarceration. Did Linda get a chance to adjust well to being raped? Did she get a chance to adjust well to being killed?

Defendant contends that these arguments ridiculed his mitigating evidence and rendered the sentencing proceeding fundamentally unfair. We disagree. With respect to the first statement quoted, this Court has held that minor references to the rights of the victims are not so grossly improper as to require the *ex mero motu* intervention of the trial court. *State v. Sexton*, 336 N.C. 321, 371-72, 444 S.E.2d 879, 908, *cert. denied*,— U.S. —, 130 L. Ed. 2d 429 (1994). With respect to the second statement quoted, this Court has held that a trial court need not intervene *ex mero motu* to prevent the State from rebutting the existence or value of nonstatutory mitigating circumstances; indeed, it has held that such arguments are not improper. *See, e.g., Green*, 336 N.C. at 189, 443 S.E.2d at 41.

Defendant argues further that this Court should not permit "purely speculative victim-impact evidence." We assume defendant is referring to those portions of the prosecutor's argument in which he

described the victims' last moments. The arguments complained of were based largely on defendant's own confessions and the physical evidence that was before the jury; however, they did include some speculation by the prosecutor as to what the victims thought and felt. We hold that these statements were victim-impact arguments that fall within the wide latitude permitted the prosecutor and that *ex mero motu* intervention by the trial court was not warranted. This assignment of error is overruled.

[13] Defendant next raises several assignments of error he labels "other issues." Defendant states that the issues "do not necessitate extensive briefing," as they are raised here "with the request that this Court grant relief on them and, if the Court declines to do so, in order to preserve them in the event of subsequent review." Defendant includes in this category the following issues: (1) the trial court's denial of defendant's motion to suppress statements attributed to defendant, (2) the trial court's denial of defendant's motion to suppress incriminating evidence uncovered by a search, and (3) the trial court's failure to impose a life sentence on the ground that the State's evidence was insufficient to support the N.C.G.S. § 15A-2000(e)(5) and (e)(11) aggravating circumstances. We disagree with defendant's conclusion that these issues "do not necessitate extensive briefing"; the issues are fact-specific and thus should not be treated as preservation issues. As we stated in *State v. Gregory*, 340 N.C. 365, 429, 459 S.E.2d 638, 675 (1995), *cert. denied*,— U.S. —, 134 L. Ed. 2d 478 (1996):

> [T]hese issues are not proper preservation issues because they are not determined solely by principles of law upon which this Court has previously ruled. Rather, these assignments of error are fact specific requiring review of the transcript and record to determine if the assignment has merit. Where counsel determines that an issue of this nature does not have merit, counsel should "omit it entirely from his or her argument on appeal." *State v. Barton*, 335 N.C. 696, 712, 441 S.E.2d 295, 303 (1994).

Defendant's arguments on these assignments of error are cursory and do not explain the relevant facts. Nevertheless, we have examined the record and transcript pertinent to these issues. We conclude that defendant has failed to carry his burden of showing error on the record. These assignments of error are therefore overruled.

Defendant raises ten additional issues which may properly be denominated preservation issues and which he concedes this Court

has decided against his position: (1) whether the trial court committed plain error by asking questions designed to death-qualify the jurors; (2) whether the trial court erred in denying defendant's pretrial motion for additional peremptory challenges; (3) whether the death penalty is unconstitutional; (4) whether the trial court erred in denying defendant's motion to prohibit death-qualification *voir dire* questions and to limit disqualification for jurors' particular views on punishment; (5) whether characterizing the jury's decision as a "recommendation" denies defendant's constitutional rights to due process of law and freedom from cruel and unusual punishment; (6) whether allowing jurors to determine whether a circumstance has mitigating value denies defendant his constitutional rights to due process of law and freedom from cruel and unusual punishment; (7) whether the submission of the N.C.G.S. § 15A-2000(e)(5) and (e)(11) aggravating circumstances is duplicative and constitutes "double counting" in violation of the Double Jeopardy Clause; (8) whether the trial court's use of the term "may" in instructing the jury with respect to Issues Three and Four makes consideration of proven mitigating circumstances discretionary, in violation of defendant's constitutional rights; (9) whether the trial court plainly erred by using instructions previously approved by this Court regarding defendant's burden of proof on mitigating circumstances; and (10) whether the trial court plainly erred by instructing the jury that it must unanimously agree on its answers to Issues Three and Four. Defendant has presented no compelling reason to reconsider our positions on these issues. Accordingly, these assignments of error are overruled.

[14] We turn now to our statutory duty to ascertain: (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentences of death were based; (2) whether the death sentences were entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. N.C.G.S. § 15A-2000(d)(2).

In each of these two murder cases, the jury found two aggravating circumstances. In the case of the murder of Minh Rogers, the jury found that the murder was committed while defendant was engaged in robbery, N.C.G.S. § 15A-2000(e)(5), and that the murder was part of a course of conduct involving other violent crimes, N.C.G.S. § 15A-2000(e)(11). In the case of Linda Rogers, the jury found that the murder was committed while defendant was en-

gaged in rape, N.C.G.S. § 15A-2000(e)(5), and that the murder was part of a course of conduct involving other violent crimes, N.C.G.S. § 15A-2000(e)(11). The record fully supports the finding of these aggravating circumstances. Further, we find no indication that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary consideration.

In conducting our final statutory duty of proportionality review, it is proper to compare the present cases to cases in which this Court has concluded that the death penalty was disproportionate. *State v. Heatwole*, 344 N.C. 1, 29, 473 S.E.2d 310, 325 (1996). We have found the death penalty 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).

These cases are distinguishable from those cases. First, defendant here was convicted of two murders. This Court has never found a death sentence disproportionate in a double-murder case. *Heatwole*, 344 N.C. at 30, 473 S.E.2d at 325. Defendant nevertheless contends that the death sentences are disproportionate here and cites a number of double-murder cases in which juries have recommended sentences of life imprisonment. The mere fact that other juries have made different recommendations as to different defendants involved in similar crimes does not render this defendant's death sentences disproportionate, however. As we stated in *State v. Keel*, 337 N.C. 469, 502, 447 S.E.2d 748, 767 (1994), *cert. denied*,— U.S. —, 131 L. Ed. 2d 147 (1995): "[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."

Second, the two aggravating circumstances found in these cases have been present in other cases in which this Court has found the sentence of death proportionate. *See, e.g., State v. Thomas*, 344 N.C. 639, 655, 477 S.E.2d 450, 460 (1996) (death sentence proportionate when murder committed while defendant engaged in the commission of a sexual offense); *Heatwole*, 344 N.C. at 30, 473 S.E.2d at 325

(death sentences proportionate in double murder in which course of conduct aggravator was found); *State v. Rowsey*, 343 N.C. 603, 630, 472 S.E.2d 903, 919 (1996) (death sentence proportionate when murder committed while defendant engaged in robbery with a firearm). Moreover, it is clear that the present cases are more similar to cases in which we have found the sentence of death proportionate than to cases in which we have found it disproportionate.

We conclude that the death sentences were not excessive or disproportionate. We hold that defendant received a fair capital sentencing proceeding, free of prejudicial error.

NO ERROR.

BARTLETT v. JACOBS

No. 551P96

Case below: 124 N.C.App. 521

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

CARLSON v. BRANCH BANKING AND TRUST CO.

No. 394P96

Case below: 123 N.C.App. 306

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

CENTRAL CAROLINA BANK v. WRIGHT

No. 540P96

Case below: 124 N.C.App. 477

Petition by respondents for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

COMMUNITY SERVICE OF THE CAROLINA'S v. FREEMAN

No. 445P96

Case below: 123 N.C.App. 789

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

COMPUTER DECISIONS, INC. v. ROUSE OFFICE MGMT. OF N.C.

No. 527P96

Case below: 124 N.C.App. 383

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

CROSS v. RESIDENTIAL SUPPORT SERVICES

No. 409P96

Case below: 123 N.C.App. 616

Upon petition by defendant for discretionary review pursuant to G.S. 7A-31, case is remanded 7 February 1997 to the North Carolina Court of Appeals for consideration in light of Lyles v. City of Charlotte, 344 N.C. 676 (1996).

DAUGHTRY v. CASTLEBERRY

No. 459PA96

Case below: 123 N.C.App. 671

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 7 February 1997.

EMERSON PHARES LUMBER CO. v. GOSHA

No. 525P96

Case below: 124 N.C.App. 457

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

FOSTER v. SUTER

No. 529P96

Case below: 124 N.C.App. 457

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

HEMMINGS v. GREEN

No. 456P96

Case below: 122 N.C.App. 191

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

HENDERSON v. U.S. FIDELITY & GUARANTY CO.

No. 490PA96

Case below: 124 N.C.App. 103

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1997.

HOUSTON v. DOUGLAS

No. 480P96

Case below: 124 N.C.App. 230

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

HUMPHRIES v. N.C. DEPT. OF CORRECTION

No. 549PA96

Case below: 124 N.C.App. 545

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1997.

IN RE APPEAL OF CAMEL CITY LAUNDRY CO.

No. 358P96

Case below: 123 N.C.App. 210

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

JOHNSTON v. WILLIAMS

No. 15P97

Case below: 124 N.C.App. 670

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

KING v. WEAVIL

No. 521P96

Case below: 124 N.C.App. 457

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

KING v. YEARGIN CONSTRUCTION CO.

No. 493P96

Case below: 124 N.C.App. 396

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

KISIAH v. W. R. KISIAH PLUMBING

No. 482P96

Case below: 124 N.C.App. 72

Petition by defendant (W. R. Kisiah Plumbing, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

LEE v. MILLS MFG. CORP.

No. 400P96

Case below: 123 N.C.App. 357

Petition by defendants (Graham Care Center and N.C. Farm Bureau) for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

MACLAGAN v. KLEIN

No. 412P96

Case below: 123 N.C.App. 557

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

McANINCH v. BUNCOMBE COUNTY SCHOOLS

No. 378PA96

Case below: 122 N.C.App. 679

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 7 February 1997.

MID-STATE OIL CO. v. WALTON

No. 502P96

Case below: 124 N.C.App. 457

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

MILLER v. BROOKS

No. 345P96

Case below: 123 N.C.App. 20

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

MORRIS v. DECATO BROTHERS, INC.

No. 550P96

Case below: 124 N.C.App. 458

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

MURRAY v. NATIONWIDE MUTUAL INS. CO.

No. 336P96

Case below: 123 N.C.App. 1

Petition by defendants (State Farm & U. S. Liability) for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997. Petition by defendant (Nationwide) for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

NICHOLSON v. AMERICAN SAFETY UTILITY CORP.

No. 486PA96

Case below: 124 N.C.App. 59

Petition by defendant (Siebe North) for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1997. Petition by defendant (American Safety) for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1997.

NOLAN v. FORSYTH MEMORIAL HOSPITAL

No. 13P97

Case below: 124 N.C.App. 670

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

ONSLOW COUNTY v. MOORE

No. 12P97

Case below: 124 N.C.App. 670

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

ONSLOW COUNTY v. PHILLIPS

No. 385A96

Case below: 123 N.C.App. 317

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 of the dissenting opinion in the Court of Appeals denied 7 February 1997.

PARKWOOD ASSN., INC. v. CITY OF DURHAM

No. 16P97

Case below: 124 N.C.App. 603

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

PLEASANT VALLEY PROMENADE v. LECHMERE, INC.

No. 531PA95

Case below: 120 N.C.App. 650

Joint motion by parties to withdraw petition for discretionary review allowed 10 December 1996.

PULLIAM v. SMITH

No. 499PA96

Case below: 345 N.C. 180

124 N.C.App. 144

Motion by defendant (Smith) for reconsideration and modification of the allowance of plaintiff's petition for discretionary review denied 6 January 1997. Motion by defendant (Smith) for entry of consent order denied 6 January 1997.

RETIREMENT VILLAGES, INC. v. N.C. DEPT OF HUMAN RESOURCES

No. 556P96

Case below: 124 N.C.App. 495

Motion by respondents (Brian Center) to withdraw petition for discretionary review allowed 28 January 1997.

ROBERTS v. FIRST-CITIZENS BANK & TRUST CO.

No. 3PA97

Case below: 124 N.C.App. 713

Motion by defendant (First Citizens) for temporary stay allowed 3 January 1997. Petition by defendant for writ of supersedeas allowed 7 February 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1997.

ROY BURT ENTERPRISES v. MARSH

No. 522P96

Case below: 124 N.C.App. 458

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

SANHUEZA v. LIBERTY STEEL ERECTORS

No. 295P96

Case below: 122 N.C.App. 603

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

SAUMS v. RALEIGH COMMUNITY HOSPITAL

No. 494PA96

Case below: 124 N.C.App. 219

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 7 February 1997.

SHEARIN v. STATE FARM FIRE AND CASUALTY CO.

No. 520P96

Case below: 124 N.C.App. 458

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

SMITH v. MOODY

No. 477P96

Case below: 124 N.C.App. 203

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 February 1997.

STATE v. ARTIS AND OWENS

No. 370P96

Case below: 123 N.C.App. 358

Petition by defendant (Owens) for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE v. ATKINS

No. 9A94-2

Case below: Buncomb County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Buncombe County denied 15 January 1997.

STATE v. BACON

No. 209A91-2

Case below: Onslow County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Onslow County denied 7 February 1997.

STATE v. BLEVINS

No. 325P96

Case below: 123 N.C.App. 161

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE v. CURRY

No. 515P96

Case below: 124 N.C.App. 459

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 February 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE v. DAUGHTRY

No. 412A93-3

Case below: Johnston County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Johnston County denied 7 February 1997.

STATE v. DAVIS

No. 487P96

Case below: 124 N.C.App. 93

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997. Motion by Attorney General to dismiss appeal allowed 7 February 1997.

STATE v. ELLISON

No. 469P96

Case below: 122 N.C.App. 638

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 February 1997.

STATE v. EVANS

No. 508P96

Case below: 123 N.C.App. 355

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 February 1997.

STATE v. FACON

No. 509P96

Case below: 124 N.C.App. 459

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE v. FARLEY

No. 507A96

Case below: 124 N.C.App. 459

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 February 1997.

STATE v. HARRIS

No. 7P97

Case below: Nash County Superior Court

Petition by defendant for writ of supersedeas and temporary stay denied 6 January 1997. Petition by defendant for writ of certiorari to review the order of the Superior Court, Nash County denied 6 January 1997.

STATE v. HASTY

No. 457P96

Case below: 124 N.C.App. 230

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE v. HENDRICKSON

No. 492PA96

Case below: 124 N.C.App. 150

Notice of appeal by defendant (substantial constitutional question) retained 7 February 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 February 1997.

STATE v. HOLLOWAY

No. 501P96

Case below: 124 N.C.App. 667

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 February 1997.

STATE v. JOHNSON

No. 473P96

Case below: 124 N.C.App. 460

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE v. LONG

No. 466P96

Case below: 123 N.C.App. 790

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 February 1997.

STATE v. MITCHELL

No. 479P96

Case below: 124 N.C.App. 231

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 February 1997.

STATE v. MOORES

No. 8P97

Case below: 124 N.C.App. 787

Petition by defendant (Moores) for writ of supersedeas and motion for temporary stay denied 24 January 1997. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 February 1997.

STATE v. MUNSEY

No. 417A95-2

Case below: Wilkes County Superior Court

Motion by defendant (Munsey) for appropriate relief denied 7 February 1997.

STATE v. PROVOST

No. 543P96

Case below: 124 N.C.App. 673

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE v. ROGERS

No. 513P96

Case below: 124 N.C.App. 364

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE v. SLOAN

No. 11A97

Case below: 124 N.C.App. 672

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 7 February 1997.

STATE v. SMITH

No. 553P96

Case below: 124 N.C.App. 668

Notice of appeal by defendant (substantial constitutional question) dismissed 7 February 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE v. STEWART

No. 410P96

Case below: 123 N.C.App. 789

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE v. TAYLOR

No. 31A93-2

Case below: Cumberland County Superior Court

Upon petition by defendant for writ of certiorari and writ of supersedeas, the following order is entered: Although this Court determined in State v. Conner, 335 N.C. at 644-45, that certain questions submitted by defense counsel to some prospective jurors in this case were proper questions under Morgan, we conclude that any

error in sustaining objections to those questions was not prejudicial under the peculiar facts of this case. Defendant's other issues are procedurally barred. Accordingly, defendant's petition is denied 7 February 1997.

STATE v. TRIBBLE

No. 306P96

Case below: 122 N.C.App. 577

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 February 1997.

STATE v. WILLIAMS

No. 2P97

Case below: 124 N.C.App. 788

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STATE FARM MUT. AUTO. INS. CO. v. YOUNG

No. 280P96

Case below: 122 N.C.App. 505

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

STOUT v. CITY OF DURHAM

No. 156PA96

Case below: 121 N.C.App. 716

Motion by plaintiffs to withdraw petition for discretionary review allowed 7 February 1997.

ST.PAUL FIRE AND MARINE INS CO. v.
N.C. MOTOR VEH. REINSURANCE FAC.

No. 526P96

Case below: 124 N.C.App. 450

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

TRI-CITIES DOOR CORP. v. PARNACHER

No. 546P96

Case below: 124 N.C.App. 673

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

VIEREGGE v. N.C. STATE UNIVERSITY

No. 491P96

Case below: 124 N.C.App. 461

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

WILMINGTON STAR-NEWS v. NEW HANOVER REGIONAL MEDICAL CENTER

No. 54P97

Case below: 125 N.C.App. 174

Motion by appellant (Craig) for temporary stay allowed 7 February 1997.

WILSON v. SUTTON

No. 488P96

Case below: 124 N.C.App. 170

Petition by defendants (Sutton & Sutton Motors) for discretionary review pursuant to G.S. 7A-31 denied 7 February 1997.

YOUNG v. MASTROM, INC.

No. 365PA96

Case below: 123 N.C.App. 162

344 N.C. 638

Motion by plaintiffs for order to show cause dismissed 7 February 1997.

PETITIONS TO REHEAR

LYLES v. CITY OF CHARLOTTE

No. 439PA95

Case below: 344 N.C. 676

Petition by plaintiff to rehear pursuant to Rule 31 denied 7 February 1997.

PROFESSIONAL LIABILITY CONSULTANTS v. TODD

No. 236A96

Case below: 345 N.C. 176

Petition by plaintiff to rehear pursuant to Rule 31 denied 7 February 1997.

STATE v. BOND

No. 143A95

Case below: 345 N.C. 1

Petition by defendant to rehear pursuant to Rule 31 denied 7 January 1997.

JAMES Y. MOORE, TRADING AND DOING BUSINESS AS MOORE'S DINETTE, AND GRACYE MOORE v. CITY OF CREEDMOOR, RALPH D. SEAGROVES, INDIVIDUALLY, AND AS CHIEF OF POLICE OF THE CITY OF CREEDMOOR, AND VANCE DOUGLAS HIGH, INDIVIDUALLY AND AS A COMMISSIONER OF THE CITY OF CREEDMOOR

No. 435A95

(Filed 10 February 1997)

1. Constitutional Law § 86 (NCI4th)— dinette—public nuisance—1983 action by dinette against town—summary judgment for town—improper

In an action arising from a dispute concerning a dinette patronized predominantly by the African-American community which functioned primarily as an eating establishment during the week and inside of which on weekends there would be dancing from 10:00 p.m. until 1:30 a.m., there was sufficient evidence to create a genuine issue of fact as to whether a constitutional violation occurred and, because the injunction against operation of the dinette was a direct result of the resolution officially adopted by the Board of Commissioners and, arguably, the moving force behind the constitutional violation, the City of Creedmoor as a municipality may be sued under 42 U.S.C. § 1983. Although a municipal government is a creation of the State, it does not have the immunity granted to the State and its agencies; local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief and summary judgment should not have been granted for defendant town on the federal constitutional claims.

Am Jur 2d, Civil Rights §§ 16, 17, 19.

2. Constitutional Law § 86 (NCI4th)— dinette—nuisance injunction obtained by city—1983 action by dinette against police chief and commissioner—official capacities—summary judgment for defendants improper

Summary judgment should not have been granted for a police chief and city commissioner in their official capacities on claims under 42 U.S.C. § 1983 arising from a dispute concerning a dinette patronized predominantly by the African-American community which functioned as an eating establishment during the week and allowed dancing on weekend nights. The only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses and the City here cannot

claim immunity. Furthermore, these claims are merely another way of bringing suit against the City.

Am Jur 2d, Civil Rights §§ 16, 17, 19.

3. Constitutional Law § 115 (NCI4th)— dinette as public nuisance—complaint by dinette owner about police chief and commissioner—retaliation—free speech—section 1983 action

Summary judgment was improperly granted for defendant police chief and defendant city commissioner in their individual capacities on claims under 42 U.S.C. § 1983 arising from a dispute concerning a dinette patronized predominantly by the African-American community which functioned as an eating establishment during the week and allowed dancing on weekend nights. The Court of Appeals erroneously applied a balancing test derived from public employer-employee cases; plaintiffs here are private citizens and there should be no balancing of competing interests with respect to their reports concerning the alleged negligence of city officials or the police department. They have a right to assert a public complaint concerning the negligence of public officials and to petition the government for redress of grievances. Where the First Amendment is implicated, any action which is taken in reckless disregard of a plaintiff's right will give rise to a section 1983 action. Based on the evidence presented, the issue of whether defendants retaliated against plaintiffs because Mr. Moore had exercised his freedom of speech is a factual issue which should be determined by a jury.

Am Jur 2d, Civil Rights §§ 19, 20.

4. Constitutional Law § 86 (NCI4th)— dinette—public nuisance—section 1983 action by dinette owner—no immunity for police chief and commissioner

Summary judgment was improperly granted for a police chief and city commissioner in an action under 42 U.S.C. § 1983 arising from a dispute concerning a dinette patronized predominantly by the African-American community which functioned as an eating establishment during the week and allowed dancing on weekend nights. Qualified immunity may protect government officials from personal liability for performing the discretionary functions of an office to the extent that such conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known. Applying this test requires a factual determination with respect to a defendant's motive, conduct, and the circumstances in which it occurred. Plaintiffs here made a showing that defendant's actions were improperly motivated and so may avoid summary judgment.

Am Jur 2d, Civil Rights § 17.

5. Malicious Prosecution § 20 (NCI4th)— dinette—public nuisance—malicious prosecution—punitive damages—summary judgment for police chief

Summary judgment was improperly granted for defendant chief of police on punitive damages arising from a malicious prosecution claim where the evidence tended to show that defendant Seagroves targeted the dinette as a trouble spot and felt that the dinette's persistent criticisms of the police department were unfounded; Seagroves led the effort to pass a parking ordinance targeted at the dinette; testimony showed that Seagroves hired and supervised an undercover agent to obtain evidence of illegal activity by plaintiffs; and Seagroves requested that the Board pass a resolution declaring the dinette a public nuisance and provided the district attorney with the incident report compiled by Seagroves. The evidence, viewed in the light most favorable to plaintiffs, presents a genuine issue of material fact as to whether actual malice existed on the part of Seagroves.

Am Jur 2d, Malicious Prosecution § 152.

6. Malicious Prosecution § 17 (NCI4th)—dinette—public nuisance action—initiation of action—Supreme Court evenly divided

Where one justice recused and the remaining justices were equally divided on the issue of whether the city or the police chief initiated the public nuisance action against plaintiffs which resulted in plaintiffs' malicious prosecution claim, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

Am Jur 2d, Appellate Review §§ 832, 859.

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

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 120 N.C. App. 27, 460 S.E.2d 899 (1995), reversing in part and affirming in part an order entered by Ellis, J., on 25 May 1993 in Superior Court, Granville County. On 8 February 1996, this Court allowed plaintiffs' petition for discretionary review of additional issues pursuant to N.C.G.S. § 7A-31. Heard in the Supreme Court 12 September 1996.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, for plaintiff-appellants and -appellees.

McDaniel & Anderson, L.L.P., by William E. Anderson and Marcia N. Southerland, for defendant-appellants and -appellees.

Smith, Follin & James, L.L.P., by Seth R. Cohen, on behalf of American Civil Liberties Union Legal Foundation; and Patterson, Harkavy & Lawrence, L.L.P., by Burton Craige, on behalf of North Carolina Academy of Trial Lawyers, amici curiae.

ORR, Justice.

This case involves a civil action which was filed seeking damages for malicious prosecution, intentional infliction of emotional distress, and violation of federal and state constitutional rights. Plaintiffs James Moore and Gracye Moore instituted this action in response to a nuisance abatement action which had been filed against them pertaining to the operation of their dinette. The nuisance abatement action was filed by the District Attorney for the Ninth Judicial District after the Board of Commissioners of the City of Creedmoor passed a resolution declaring that Moore's Dinette was a public nuisance.

For forty-five years, plaintiffs owned and operated Moore's Dinette in downtown Creedmoor. During the week, the dinette functioned primarily as an eating establishment patronized predominantly by the African-American community of Creedmoor. On the weekends, however, dancing would take place inside the dinette from 10:00 p.m. until 1:30 a.m. After closing, patrons of the dinette tended to congregate in the surrounding streets and parking lots. The dinette was licensed for the sale of beer, but no wine or hard liquor was sold on the premises. There were signs posted warning customers not to bring weapons or illegal drugs onto the property.

Over a period of several years, a series of events took place involving plaintiffs and the City of Creedmoor which eventually resulted in the filing of this action by the plaintiffs. The events can be traced back to 4 November 1982, when plaintiffs applied to the Board of Commissioners of the City of Creedmoor requesting that an area surrounding their building be rezoned. The Board of Commissioners approves city ordinances and resolutions, representing the official policy of the city. Plaintiffs requested the rezoning because patrons of their dinette were being forced to park along Lyon Street because of insufficient parking in the area. However, the Board tabled the resolution, in effect denying the rezoning request.

While the rezoning request was pending, an incident occurred at the dinette involving the Creedmoor Police Department. On 29 December 1982, plaintiff James Moore called the police and requested a response to a disturbance taking place outside the dinette. Two officers responded to the fight, but allegedly, instead of breaking up the fight, they stood and watched. Mr. Moore filed an official written grievance against the Creedmoor Police Department concerning its failure to take action. After a hearing was held before a local magistrate, both officers were reprimanded and one suspended without pay.

Vance Douglas High served as a member of the Board of Commissioners of the City of Creedmoor for twelve years from December 1977 until December 1989. High was a local businessman who ran a dental fixtures factory and invested in local real estate. During his tenure on the Board of Commissioners, High voted against the zoning request made by the Moores and introduced a no-parking ordinance that prohibited all parking along the street beside Moore's Dinette. High also discussed the possibility of closing Moore's Dinette at Board meetings. For most of High's tenure on the Board, he also served as Police Commissioner for the City of Creedmoor. In 1983, High was involved in the selection of a new chief of police for the City of Creedmoor and took part in interviewing Ralph Seagroves for the position.

On 17 May 1983, defendant Ralph Seagroves became the new police chief. As police chief, Seagroves attended Board meetings and reported directly to the Board. The relationship between plaintiffs and the Creedmoor Police Department deteriorated further during Seagroves' tenure as police chief. Within a year after his job commenced, Chief Seagroves targeted the dinette as a "problem area"

because of "the traffic . . . and the street problem . . . , the fights that you have down there."

During the winter of 1983-84, Chief Seagroves hired Vernadine Clark, an African-American woman, to conduct undercover surveillance activities at various alleged "liquor houses" in Creedmoor. Clark testified at trial that Seagroves specifically instructed her to focus on Moore's Dinette and to collect evidence of illegal alcohol and drug sales. Clark further testified that during her surveillance, she was unable to find any evidence of illegal activities at Moore's Dinette and that Mr. Moore ran a strict business and would not tolerate her attempts to buy illegal drugs on the premises.

Plaintiffs continued to run their business, apparently with no major incidents, until March 1986 when the dinette was broken into and a .38-caliber handgun stolen. After making an initial police report with respect to this incident, Mr. Moore repeatedly went to the Creedmoor Police Department to inquire about the status of his stolen gun. In September 1987, the gun was recovered by authorities in Fayetteville, North Carolina. Although the Fayetteville authorities informed the Creedmoor police that they had the gun, the Creedmoor police did not ask for the return of the weapon, nor were plaintiffs notified of its recovery, and it was subsequently destroyed.

The next event occurred on 15 June 1988 when Moore's Dinette was set on fire, and "KKK" was painted on a trash bin. Although Mr. Moore called the Creedmoor Police Department to report the fire, the Fire Department was not notified until sometime later. Mr. Moore complained to Chief Seagroves concerning the slow response to the fire. Chief Seagroves testified that he considered this to be "a very unfounded complaint." The arson case was never resolved.

Following the fire, Chief Seagroves instructed his officers to make detailed written reports any time they responded to calls at Moore's Dinette. Also, more and more patrons of the dinette began to be ticketed for parking violations. On 24 January 1989, Chief Seagroves recommended at a Board meeting that the city outlaw all parking on Lyon Street. This parking ordinance was passed without notice to plaintiffs. In their complaint, plaintiffs allege the ordinance was selectively enforced, as tickets were not given on weeknights or daytime hours, but patrons were ticketed when the dinette was open for dancing on the weekends.

On 28 March 1989, Mr. Moore made a formal written complaint and an oral presentation at a regular meeting of the Board of

Commissioners concerning the alleged negligence of the Creedmoor Police Department. Specifically, Mr. Moore complained about the following four matters: (1) negligence by the chief of police and the police department in failing to return his stolen gun, (2) slow action by the police department in failing to arrest an unruly customer, (3) selective enforcement of the parking ordinance against his customers on weekends, and (4) the enforcement of a public parking ordinance on private property located on the vacant lot beside his building. Chief Seagroves testified that plaintiffs' grievance against the Creedmoor Police Department did not bother him and that he believed all of plaintiffs' criticisms were "unfounded complaints."

In July 1990, two events occurred which, according to Chief Seagroves, "finalized" his decision to request that the district attorney commence procedures to close the dinette. In the first, a driver backed his automobile into a parking lot on Main Street and collided with Chief Seagroves' vehicle. In the second, labelled a "mob scene" or "riot" by defendants, two men began fighting in a parking lot behind a pharmacy on Main Street, a crowd gathered to watch, and shots were allegedly fired into the air. It is undisputed, however, that although these two incidents occurred in an area near the dinette, they were never directly linked to plaintiffs, the dinette, or any of the dinette's patrons.

On 24 July 1990, Chief Seagroves appeared at a regular meeting of the Board of Commissioners and requested that it pass a resolution supporting legal action to close Moore's Dinette as a public nuisance. The Board passed a resolution declaring that "Moore's Dinette has been for some time and remains a public nuisance which the Board feels should be abated through the use of the laws of the State of North Carolina." Chief Seagroves then went to the district attorney, who filed a nuisance abatement action pursuant to N.C.G.S. § 19-1(b) against plaintiffs on 1 August 1990. The complaint was verified by Chief Seagroves, and two exhibits were attached to it: the resolution regarding Moore's Dinette and a list of "incidents" compiled by Chief Seagroves. That same day, Superior Court Judge Henry Hight signed a temporary restraining order enjoining plaintiffs from operating the dinette in any capacity and ordering Chief Seagroves to padlock the premises. On 10 August 1990, following a hearing, Judge Hight signed a preliminary injunction prohibiting operation of the business between the hours of 9:00 p.m. and 7:00 a.m.

The nuisance abatement trial against plaintiffs commenced on 20 March 1991. At the trial, Chief Seagroves and Officers Hughes,

Belvin, Humphreys, Cash, and Eudy of the Creedmoor Police Department testified against plaintiffs. They were joined by Commissioners Jenkins, Kapher, Moos, and ex-Commissioner High, among others. Plaintiffs testified on their own behalf as did one of their employees, ten of their customers, and former undercover officer Vernadine Clark. The jury deliberated ten minutes and returned a verdict finding that the operation of Moore's Dinette did not constitute a nuisance.

On 11 April 1991, Judge Robert Hobgood heard further argument with respect to the case and entered a judgment dissolving the preliminary injunction against plaintiffs and awarding them attorney's fees in the amount of $14,000, plus additional costs totalling $578.40. On 24 January 1992, plaintiffs filed the complaint in this action against the City of Creedmoor; Ralph D. Seagroves, individually and as chief of police; and Vance Douglas High, individually and as a commissioner of the City of Creedmoor. The complaint alleged four separate claims for relief: malicious prosecution; intentional infliction of emotional distress; violation of federal constitutional rights secured by the First, Fifth, and Fourteenth Amendments; and violation of state constitutional rights secured by Article I of the North Carolina Constitution. On 24 March 1992, citing occurrences subsequent to the conclusion of the nuisance action, defendant Seagroves, individually, counterclaimed against plaintiffs, alleging a new public nuisance action.

On 25 May 1993, Judge B. Craig Ellis entered a summary judgment order dismissing the action filed by plaintiffs and also dismissing the counterclaim filed by defendant Seagroves. On 24 June 1993, plaintiffs gave notice of appeal to the North Carolina Court of Appeals. On 5 September 1995, the North Carolina Court of Appeals, in a divided decision, affirmed the trial court's entry of summary judgment against plaintiffs on their claims of intentional infliction of emotional distress and violation of federal constitutional rights. However, the Court of Appeals reversed the trial court on plaintiffs' state law tort claim of malicious prosecution and remanded it for trial. The Court of Appeals also held that plaintiffs had not shown "actual malice" and therefore could not assert a claim for punitive damages.

Defendants now appeal to this Court from Judge Greene's dissent in the Court of Appeals' opinion below. Judge Greene disagreed with the majority's holding that the trial court erred in granting summary judgment for defendants Seagroves and the City of Creedmoor on the

malicious prosecution claim. In Judge Greene's opinion, defendants Seagroves and the City of Creedmoor could not be found to have "initiated" the nuisance abatement action by supplying the information to the district attorney. Because initiation is an element of a malicious prosecution claim, Judge Greene felt summary judgment was properly granted.

Additionally, on 8 February 1996, we allowed plaintiffs' petition for discretionary review of the decision of the Court of Appeals as to the following issues: (1) whether the Court of Appeals erroneously dismissed plaintiffs' claim that their First Amendment rights were violated by the police chief and a city commissioner acting in their individual capacities; (2) whether the Court of Appeals erroneously ruled that a municipality in North Carolina, and a police chief and city commissioner acting in their official capacities cannot be sued for a violation of the United States Constitution because they are not "persons" within the meaning of 42 U.S.C. § 1983; and (3) whether the Court of Appeals erred in finding that plaintiffs presented insufficient evidence of actual malice by the city, its police chief, and a city commissioner and therefore erroneously dismissed plaintiffs' claim for punitive damages.

This Court must determine whether summary judgment was properly granted as to each of plaintiffs' claims brought forward on appeal. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990). It is "a drastic measure, and it should be used with caution." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979). "When ruling on a motion for summary judgment, 'the court must look at the record in the light most favorable to the party opposing the motion.' " *Wilkes County Vocational Workshop, Inc. v. United Sleep Prods.*, 321 N.C. 735, 737, 365 S.E.2d 292, 293 (1988) (quoting *W.S. Clark & Sons, Inc. v. Union Nat'l Bank*, 84 N.C. App. 686, 688, 353 S.E.2d 439, 440, *disc. rev. denied*, 320 N.C. 177, 358 S.E.2d 70 (1987)).

I.

[1] With respect to the issues allowed by plaintiffs' petition for discretionary review, plaintiffs first contend that the Court of Appeals erred in dismissing all of their federal constitutional claims against

the City of Creedmoor and defendants High and Seagroves in their official capacity. In the opinion below, the Court of Appeals held that a municipality and a police chief and city commissioner acting in their official capacities cannot be sued for a violation of the United States Constitution because they are not "persons" within the meaning of 42 U.S.C. § 1983. Accordingly, the court affirmed the summary judgment order entered in favor of defendants. We reverse the Court of Appeals.

In determining this issue, the Court of Appeals erroneously relied on *Corum v. University of N.C.*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). In *Corum*, this Court correctly relied on *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989), in holding that the State of North Carolina and its agencies are not "persons" within the meaning of section 1983 and therefore could not be sued for monetary damages under that statute. In the present case, the Court of Appeals erroneously applied the holding of *Corum* to dismiss plaintiffs' claims against a municipality and its officials. Although a municipal government is a creation of the State, it does not have the immunity granted to the State and its agencies. *See Owen v. City of Independence*, 445 U.S. 622, 63 L. Ed. 2d 673 (1990).

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1994). The United States Supreme Court, in *Monell v. Department of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611 (1978), overruled *Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492 (1961), and held that a municipality is a "person" within the meaning of section 1983. The United States Supreme Court stated: "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell*, 436 U.S. at 690, 56 L. Ed. 2d at 635. *Monell* did not, however, overrule *Monroe* insofar as *Monroe* held that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable

under section 1983 for constitutional torts of their employees. *Id.* at 663 n.7, 56 L. Ed. 2d at 619 n.7. Instead, "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690, 56 L. Ed. 2d at 635. This decision was recently reaffirmed in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 122 L. Ed. 2d 517 (1993).

For a governmental entity to be liable under section 1983, the "official policy must be 'the moving force of the constitutional violation.' " *Polk County v. Dodson*, 454 U.S. 312, 326, 70 L. Ed. 2d 509, 521 (1981) (quoting *Monell*, 436 U.S. at 694, 56 L. Ed. 2d at 638). Thus, the entity's "policy or custom" must have played a part in the violation of federal law. *Monell*, 436 U.S. at 694, 56 L. Ed. 2d at 638. Further, it is well settled that a municipal entity has no claim to immunity in a section 1983 suit. *See Owen v. City of Independence*, 445 U.S. at 657, 63 L. Ed. 2d at 697.

In the present case, the City of Creedmoor adopted an official resolution to prosecute plaintiffs for creating a public nuisance. This resolution directed the police chief to make available to the district attorney the police incident reports along with other information within the knowledge of the police department concerning alleged violations which had occurred in and adjacent to the dinette. In conclusion, the resolution directed the district attorney to "proceed pursuant to the laws of the State to obtain such orders as may be appropriate to abate immediately the continued operation of the business known as Moore's Dinette as a public nuisance jeopardizing the health, safety, and well-being of the citizens and residents of the City." Thus, the action alleged to be unconstitutional by plaintiffs was a resolution officially adopted by the City of Creedmoor's governing body which resulted in the filing of the nuisance abatement action against plaintiffs.

After the resolution was passed and the nuisance abatement suit filed, an injunction was entered against plaintiffs prohibiting the operation of their dinette. This action allegedly resulted in a deprivation of plaintiffs' freedom of speech. We believe there was sufficient evidence presented to create a genuine issue of material fact as to whether a constitutional violation did in fact occur. Further, because the injunction was a direct result of the resolution officially adopted

by the Board of Commissioners of the City of Creedmoor and, arguably, the moving force behind the constitutional violation, we find that the City of Creedmoor, as a municipality, may be sued under section 1983.

[2] We now must determine whether defendants Seagroves and High may also be sued under section 1983 in their official capacities. Defendants claim that they are protected from suit under section 1983 by either qualified, judicial, or legislative immunity. However, "the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses." *Hafer v. Melo*, 502 U.S. 21, 25, 116 L. Ed. 2d 301, 309 (1991). As we have already stated above, the City of Creedmoor cannot claim immunity under section 1983, and accordingly, neither defendant Seagroves nor defendant High can claim immunity in their official capacity.

Further, official-capacity suits " 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' " *Kentucky v. Graham*, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 121 (1985) (quoting *Monell*, 436 U.S. at 690 n.55, 56 L. Ed. 2d at 635 n.55). Thus, where the governmental entity may be held liable for damages resulting from its official policy, a suit naming public officers in their official capacity is redundant. *Id.* at 166, 87 L. Ed. 2d at 121 (official-capacity claim against public officer is claim against the office held by that person, rather than against the particular individual who occupies that office at the time the claim arose). Consequently, the claims against defendants Seagroves and High in their official capacities are merely another way of bringing suit against the City of Creedmoor. Accordingly, we reverse the Court of Appeals with respect to the City of Creedmoor as a municipality and as to defendants Seagroves and High in their official capacities.

II.

[3] Plaintiffs next contend that the Court of Appeals erred in affirming summary judgment as to their constitutional claims against defendants Seagroves and High in their individual capacities. Specifically, plaintiffs' primary constitutional claim is that defendants violated their First Amendment right to free speech and to petition the government for redress of grievances. Plaintiffs argue that defendants decided to close Moore's Dinette in retaliation for Mr. Moore's criticism of the police department and city officials.

"Personal-capacity suits . . . seek to impose individual liability upon a government official for actions taken under color of state

law." Hafer, 502 U.S. at 25, 116 L. Ed. 2d at 309. Thus, "to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Graham*, 473 U.S. at 166, 87 L. Ed. 2d at 122. Where the First Amendment is implicated, any action which is taken in reckless disregard of a plaintiff's right will give rise to a section 1983 action. "While the plaintiff in a personal-capacity suit need not establish a connection to governmental 'policy or custom,' officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law." *Hafer*, 502 U.S. at 25, 116 L. Ed. 2d at 309-10 (quoting *Graham* 473 U.S. at 166, 87 L. Ed. 2d at 122).

In the opinion below, the Court of Appeals erroneously applied a balancing test derived from public employer-employee cases that was enunciated in *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276, *disc. rev. denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). Applying this balancing test, the Court of Appeals determined that plaintiffs' First Amendment rights to criticize city officials could be overridden by the city's statutory duty to keep the streets free for travel and to abate nuisances. This balancing test is not applicable to the case at bar. In *Lenzer*, a physician's assistant at the state Alcohol Rehabilitation Center sued the officials who employed her, contending that she had been discharged in violation of her free speech right to report patient abuse. The *Lenzer* court properly found that a public employer may have certain institutional interests that must be weighed against an employee's right to speak out on a matter of public concern. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 20 L. Ed. 2d 811 (1968) (discussing the balancing of competing employee and employer interests).

In the present case, plaintiffs are private citizens, not public employees, and there should be no balancing of competing interests with respect to their reports concerning the alleged negligence of city officials or the police department. To the contrary, they have a right to assert a public complaint concerning the negligence of public officials and to petition the government for redress of grievances. *Mills v. Alabama*, 384 U.S. 214, 16 L. Ed. 2d 484 (1966). The United States Supreme Court has repeatedly held that the First Amendment guarantees the right to criticize police officers. See *Norwell v. City of Cincinnati*, 414 U.S. 14, 38 L. Ed. 2d 170 (1973) (protecting the right to non-provocative voicing of objections to police action); *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964) (pro-

tecting the right to criticize police chief in context of libel lawsuit). It should also be noted that once the government has opened a forum—such as a public meeting—to allow direct citizen involvement, it may not discriminate between speakers based upon the content of their speech. *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176, 50 L. Ed. 2d 376, 385 (1976).

Here, Mr. Moore filed written complaints against the police department, appeared at disciplinary hearings against officers, and made speeches at Board meetings criticizing the police department and the unfairness of the City's parking ordinance. In each of these situations, Mr. Moore was petitioning the government for a redress of grievances. When he spoke at disciplinary hearings and Board meetings, he was using a public forum. The majority of Mr. Moore's complaints concerning the police department and city officials centered around the operation of his business.

The evidence presented with respect to defendant Seagroves tended to show that Seagroves himself recruited and trained an undercover officer to gather evidence of illegal activity taking place at Moore's Dinette. Further, defendant High testified that Seagroves was annoyed at having to answer calls at the dinette and ordered his officers to make written reports any time they responded to calls at the dinette. Seagroves himself collected these reports and presented them to the Board and to the district attorney in order to persuade them to bring a nuisance abatement action against plaintiffs. Seagroves testified concerning the two "major incidents" which "finalized" his decision to seek the nuisance resolution. Admittedly, neither incident directly involved Moore's Dinette.

Additionally, evidence was presented which tended to show High aided Seagroves in carrying out his actions. Testimony showed that High and Seagroves collaborated on the passage of the parking ordinance, with Seagroves recommending that the City outlaw all parking on Lyon Street and High making the motion. High was still the Police Commissioner in 1989 when he purchased property surrounding the dinette. Two weeks after High initially invested in the property surrounding the dinette, he laid claim to the vacant lots adjacent to the dinette. These areas had previously been used by patrons of the dinette for parking. Subsequent to High's purchase of this land, the police department towed vehicles from this area. Further, although High was a private citizen when the nuisance abatement

action was commenced, he may still be held liable because private parties who conspire with public officials are subject to suit under section 1983. *See Dennis v. Sparks*, 449 U.S. 24, 66 L. Ed. 2d 185, *cert. denied*, 449 U.S. 1021, 66 L. Ed. 2d 483 (1980).

As we have previously stated, summary judgment is appropriate only if "there is no genuine issue as to any material fact." N.C.G.S. § 1A-1, Rule 56(c). Based on the evidence presented, the issue of whether defendants retaliated against plaintiffs by shutting down their business because Mr. Moore had exercised his freedom of speech is a factual issue which should be determined by a jury.

[4] Further, we hold that neither defendant is entitled to "qualified immunity." As we stated above, qualified immunity may protect government officials from personal liability for performing the discretionary functions of an office to the extent that such conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Corum, 330 N.C. at 772, 413 S.E.2d at 283 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982)). Applying this test requires a factual determination with respect to a defendant's motive, conduct, and the circumstances in which it occurred. When a defendant's subjective intent is an element of the plaintiff's claim and that defendant has moved for summary judgment, the plaintiff may avoid summary judgment by pointing to specific evidence that the defendant's actions were improperly motivated. *Id.* at 774, 413 S.E.2d at 283. After reviewing the events described above, along with a review of the transcript, we find plaintiffs have made this showing. Accordingly, we reverse the Court of Appeals and hold that summary judgment was improperly granted with respect to this issue.

III.

[5] Finally, plaintiffs contend that the Court of Appeals erred in affirming the trial court's dismissal of the state law claim for punitive damages against defendant Seagroves individually in plaintiffs' malicious prosecution claim. Plaintiffs argue that they presented sufficient evidence to create an issue of fact as to Seagroves' motivation for initiating the public nuisance action. In the opinion below, the Court of Appeals stated that plaintiffs failed to produce sufficient evidence to show actual malice by Seagroves. We disagree.

We note that plaintiffs do not seek punitive damages against the City or against defendants High and Seagroves in their official capac-

ities. Plaintiffs recognize that the United States Supreme Court has ruled that punitive damages under section 1983 are not available against a municipal government. *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 69 L. Ed. 2d 616 (1981).

In the opinion below, the Court of Appeals properly noted that plaintiffs produced "both direct and circumstantial evidence" tending to show a "lack of probable cause for the institution of the public nuisance proceedings." *Moore v. City of Creedmoor*, 120 N.C. App. 27, 42, 460 S.E.2d 899, 908 (1995). Accordingly, the Court of Appeals found that plaintiffs satisfied their burden of showing that defendants acted with "legal malice," also known as implied or constructive malice. *Id.* at 44, 460 S.E.2d at 909. "Implied malice may be inferred from want of probable cause in reckless disregard of plaintiff[s'] rights." *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 86-87, 249 S.E.2d 375, 379 (1978). The Court of Appeals then concluded that plaintiffs had failed to show actual malice.

" '[A] plaintiff may recover punitive damages only where the wrong is done willfully or under circumstances of rudeness, oppression, or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights.' " *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 191, 437 S.E.2d 374, 379 (1993) (quoting *Hardy v. Toler*, 288 N.C. 303, 306-07, 218 S.E.2d 342, 345 (1975)). Plaintiffs may prove actual malice by showing that Seagroves was motivated by personal spite and a desire for revenge or that his actions towards plaintiffs were conducted "in a manner which showed reckless and wanton disregard of the plaintiff[s'] right[s]." *Jones v. Gwynne*, 312 N.C. 393, 405, 323 S.E.2d 9, 16 (1984).

In the present case, the evidence tended to show that Seagroves targeted Moore's Dinette as a trouble spot and felt Mr. Moore's persistent criticisms of the police department were unfounded. Testimony also revealed that Seagroves led the effort to pass a parking ordinance targeted at Moore's Dinette. Further testimony showed that Seagroves hired and supervised an undercover agent to obtain evidence of illegal activity by plaintiffs. Finally, as discussed above, Seagroves requested that the Board pass a resolution declaring the dinette a public nuisance and provided the district attorney with the incident report compiled by Seagroves.

A review of the record, along with the incidents discussed above, reveals that the evidence, when viewed in the light most favorable to plaintiffs, presents a genuine issue of material fact as to whether

actual malice existed on the part of Seagroves. Accordingly, we reverse the Court of Appeals' ruling on this issue.

IV.

[6] With regard to the issue presented by virtue of the dissent, defendants argue that the Court of Appeals erred in concluding that defendants could be found to have "initiated" the malicious prosecution suit. Judge Greene, in his dissent, stated that plaintiffs' malicious prosecution claim was properly dismissed because, in his view, neither the City of Creedmoor nor defendant Seagroves "initiated" the public nuisance action against plaintiffs.

Justice Whichard recused and took no part in the consideration or decision of this case. The remaining members of the Court are equally divided on this issue, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Therefore, as to this issue, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Nesbit v. Howard*, 333 N.C. 782, 429 S.E.2d 730 (1993).

As to the issues presented on discretionary review, this case is remanded to the Court of Appeals for further remand to the Superior Court, Granville County, for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

STATE OF NORTH CAROLINA v. LARRY PATRICK BURGESS, JR.

No. 294A96

(Filed 10 February 1997)

1. Criminal Law § 914 (NCI4th Rev.)— first-degree murder—instructions—premeditation and deliberation and felony murder—no denial of unanimous verdict

The trial court did not violate defendant's constitutional right to a unanimous jury verdict in its instructions informing the jury that it could convict defendant of first-degree murder under

either or both theories of premeditated and deliberate murder and felony murder, and the instructions did not constitute plain error, where the instructions made it clear to the jury that it had to be unanimous on both the verdict and the basis for that verdict; the instructions could not have been interpreted by the jury to permit different jurors to convict defendant on the basis of different theories; and the verdict sheet and the jury poll show that the jury did not construe the instructions to allow it to convict defendant of first-degree murder on a basis that was not unanimously found beyond a reasonable doubt in that the jury found defendant guilty of both premeditated and deliberate murder and felony murder and each juror indicated that he or she found defendant guilty of first-degree murder based on both theories.

Am Jur 2d, Criminal Law § 1014.

2. Homicide § 727 (NCI4th)— first-degree murders—premeditation and deliberation and felony murder—sentence for underlying felony

Where defendant was convicted of two first-degree murders based upon theories of premeditation and deliberation and felony murder, the underlying felony of arson did not merge with the murders, and the trial court did not err by sentencing defendant separately for each of the murders and for the underlying felony of arson.

Am Jur 2d, Homicide §§ 44-48, 52, 184, 439, 501.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

3. Homicide § 727 (NCI4th)— two first-degree murders—premeditation and deliberation and felony murder—each murder as underlying felony—sentences for both murders

Where defendant was convicted of two first-degree murders based upon theories of premeditation and deliberation and felony murder, there was no merger of either murder conviction by its use as an underlying felony for the other murder, and the trial court did not err by sentencing defendant separately for each murder.

Am Jur 2d, Homicide §§ 44-48, 52, 184, 439, 501.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

4. Criminal Law § 1156 (NCI4th Rev.)— arson—nonstatutory aggravating factor—course of conduct endangering others—contemporaneous murder convictions not used

The trial court did not improperly use defendant's contemporaneous murder convictions as a nonstatutory aggravating factor for an arson conviction when it found that "the arson was committed during a course of conduct in which other crimes endangered the lives of others" where the "other crimes" involved assaults on one murder victim's children rather than the murders. Furthermore, this "course of conduct" clearly related to the purposes of sentencing and was properly found as a nonstatutory aggravating factor.

Am Jur 2d, Arson § 31.

5. Criminal Law § 1218 (NCI4th Rev.)— arson—aggravating factor—armed with deadly weapon—not basis for joinable crimes

The trial court could properly find as an aggravating factor for an arson conviction that "defendant was armed with a deadly weapon at the time of the crime" where defendant was convicted of two counts of first-degree murder and one count of first-degree arson, and the act of carrying the deadly weapon could have been, but was not, the basis for other joinable criminal convictions.

Am Jur 2d, Criminal Law §§ 598, 599.

6. Criminal Law § 697 (NCI4th Rev.)— requested instruction given in substance—no error

The trial court did not err by refusing to give the jury in a first-degree murder prosecution defendant's requested instruction on lack of mental capacity where the court instructed the jury in substantial conformity with the specific instruction requested by defendant.

Am Jur 2d, Trial §§ 1259, 1260.

7. Homicide § 33 (NCI4th)— first-degree murder—premeditation and deliberation—cool state of blood—sufficiency of evidence

The State's evidence was sufficient to support a finding by the jury that defendant killed the victims in a cool state of blood so as to support his conviction of two first-degree murders based upon the theory of premeditation and deliberation, notwithstanding defendant may have been angry or in an emotional state at the time he shot the victims, where the evidence tended to show that defendant entered one victim's apartment without a pistol, argued with this victim, left the apartment, and then returned to the apartment with a pistol; after again arguing with such victim, defendant shot his way into a bathroom where the two victims and three small children had locked themselves away from defendant's reach; once inside the bathroom, defendant, a Marine experienced with firearms, took aim and fired a bullet into the first victim's neck; and defendant then placed the muzzle of the gun next to the hand the second victim had raised to defend herself and shot her in the head.

Am Jur 2d, Homicide §§ 60, 115, 292.

8. Evidence and Witnesses § 2302 (NCI4th)— first-degree murders—expert testimony that defendant "snapped"—exclusion as harmless error

The trial court erred in excluding testimony by a forensic psychologist that defendant had "snapped" at the time of two murders because this testimony tended to show that defendant was not in a cool state of blood when he shot the victims and was thus relevant to show that defendant did not premeditate and deliberate the killings. However, this error was not prejudicial where the witness was allowed to give testimony about defendant's mental state at the time of the murders which indicated that defendant did not form the specific intent to kill, and the jury's verdicts would not have been different if the witness had given his opinion that defendant "snapped."

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.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of life imprisonment entered by Ragan, J., at the 23 October 1995 Criminal Session of Superior Court, Pitt County, upon jury verdicts of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for first-degree arson was allowed 9 July 1996. Heard in the Supreme Court 12 November 1996.

Michael F. Easley, Attorney General, by R. Kendrick Cleveland, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Charlesena Walker, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Upon proper indictments, defendant was tried and convicted of murder in the first degree of Juanita Michelle Jones (Jones), murder in the first degree of Christie Nicole Smith (Smith), and first-degree arson of the home of Juanita Michelle Jones and her three small children. As to each murder victim, the jury found defendant guilty of murder in the first degree on the basis of malice, premeditation, and deliberation as well as under the felony murder rule. At the capital sentencing proceeding, the jury recommended a sentence of life imprisonment for each murder. On 17 November 1995, Judge Ragan entered judgments imposing sentences of life imprisonment for each of the first-degree murder convictions and life imprisonment for the first-degree arson conviction.

On appeal to this Court, defendant makes eight arguments. After reviewing the record, transcript, and briefs in this case, we conclude that defendant received a fair trial, free of prejudicial error.

The State's evidence presented at trial tended to show the following facts and circumstances: On 20 May 1994, defendant borrowed a friend's automobile and drove to the apartment of Juanita Michelle Jones, whom he had dated in the past. Brittany Jones, Jones' four-year-old daughter, let defendant into the house. After arguing with Jones, defendant returned to the automobile, obtained a .38-caliber pistol from under the seat of the automobile, and reentered the apartment. Defendant displayed the pistol and told Brittany to go upstairs. Brittany went upstairs and told Jones, who was ironing at the time, that defendant had a gun. Defendant refused to allow Jones to leave the room. Brittany ran to the bathroom where her younger

brothers and Christie Nicole Smith, Jones' cousin, were. Jones ran into the bathroom and locked the door. Defendant burst through the door and killed Jones and Smith. He choked Brittany and her two brothers and threw them to the floor. Defendant set a fire in Jones' closet and then left the apartment.

Mary Cox, Jones' aunt, telephoned Jones' apartment on 20 May 1994. Brittany answered the telephone and said, "Aunt Helen, come. [Defendant] killed my momma and Chris. Come. We are going to burn up." Cox immediately left work and went to Jones' apartment. When Cox arrived, she noticed black smoke coming out the back door. Cox opened the door and was met by Jones' children. As the children grabbed her and ran from the apartment, Cox noticed blood "everywhere" on their clothes.

Defendant testified at trial that he was twenty-one years old in May 1994 and that he had been in the United States Marine Corps for about one year. Defendant further testified that he met Jones in January 1992 in a Jacksonville shopping mall and that Jones had lied to him about not having children, about being in school, about having a job, and about not having dated a serviceman before. They continued to date for a while, even after he discovered these untruths. In the summer of 1992, Jones told defendant that she was marrying a corporal and that she would be moving with him to California. Defendant testified that he was happy for her.

Defendant further testified that in January 1993, Jones tried twice to reach defendant at his office, but defendant was meeting with a superior officer each time she called and could not come to the telephone. During one call, someone grabbed the telephone from Jones and told the sergeant who answered the telephone that if defendant was too busy to talk to Jones, he could talk to her in court. Jones did not leave her name either time she called, and defendant was dumbfounded by the message. In February 1993, defendant learned that a civil summons had been issued to him for nonsupport. It was defendant's first knowledge of the lawsuit. At court, Jones admitted that she was not sure whether her third child was defendant's but that she had to bring the suit because her mother was "on her case about having kids and having deadbeat dads for them." Shortly thereafter, Jones told the district attorney that she wanted to drop the suit.

Defendant further testified that Jones stopped by his barracks at Camp Lejeune in Jacksonville between 5:30 and 6:00 one morning in June 1993 and stated that she was at the camp visiting a friend and

just wanted to see how he was doing. He told her that he had a busy morning ahead of him and needed to get some rest. Shortly thereafter, there was another knock at the door of defendant's barracks, and defendant found a baby at the door and saw Jones driving away. Defendant drove around, found Jones at her friend's house in Greenville, and returned the baby. Jones had told defendant that if he did not have time for her, he would have to make time. Defendant returned to the barracks too late for a class required to maintain his security clearance. As a result of being late for class, defendant was dismissed from the class, and his top-secret security clearance was nullified.

Defendant testified that in August 1993, he was deployed overseas to Bosnia and Somalia. While he was away, Jones called Camp Lejeune looking for him and "fussed out" several high-ranking officers. Upon returning to Camp Lejeune, defendant was informed of these calls and was advised to get blood tests performed to determine paternity. Pursuant to this advice, defendant and Jones scheduled blood testing at the Department of Social Services (DSS) in Greenville. Defendant missed the first appointment and his rescheduled appointment because he was performing field operations. Defendant called DSS to report that he would not be able to make the appointments. The DSS worker who answered the telephone told defendant that if he could not make his appointment, they would see him in court. The court date was set for 13 May 1994. At court, the judge declined making a decision on the nonsupport action and ordered defendant to appear for blood testing on 20 May 1994.

Defendant also testified that on 20 May 1994, he borrowed a friend's automobile and went to Jones' apartment to drive her to the health department for the blood testing. Jones, however, just wanted him to sign papers acknowledging that he was the father. He asked her why she had not told him during her pregnancy that she was pregnant and suspected that he was the father. Defendant also asked Jones about the sergeant she was purportedly dating during her pregnancy. An argument ensued, and Jones grabbed a knife from the kitchen and asked defendant to leave. Defendant went out to the automobile to leave but changed his mind because he did not want to be degraded at the health department without first getting some answers from Jones. At that point, defendant reached under the seat and grabbed a .38-caliber pistol that he knew the owner of the automobile kept under the seat.

Defendant testified that he then reentered Jones' apartment and proceeded upstairs where Jones and Smith were talking. When Jones saw that defendant had a gun, she asked if that was supposed to mean anything. After defendant told her that he just wanted to talk, Jones stated that she did not need him for anything and that defendant had better pray that the child was not his because she was going to make the rest of his life miserable. Jones threatened to "put a curse" on defendant. The argument escalated, and defendant fired the pistol. Defendant testified that he did not remember how many times he fired the weapon but that he did remember shooting the victims. Defendant then testified that he was "really nervous" and that he set fire to his clothes in Jones' closet because he thought that Jones had used them to put a curse on him. Defendant denied that he tried to harm the children.

Defendant's motions to dismiss made at the close of the State's evidence and again at the close of all the evidence were denied.

[1] In his first argument, defendant contends that the trial court committed plain error in instructing the jury about premeditated and deliberate murder and felony murder and by informing the jury that it could convict defendant of first-degree murder under either or both theories. Defendant argues that the trial court should have specifically informed the jury that it had to be unanimous on the theory of first-degree murder upon which its verdict was rendered. Defendant contends that the jury could have interpreted the instructions to allow a conviction on a theory of first-degree murder not found by all the jurors beyond a reasonable doubt, in violation of his constitutional right to a unanimous jury. Defendant contends that it is impossible to determine whether the jury unanimously found that he actually committed either premeditated and deliberate murder or felony murder or if different jurors convicted him on the basis of different theories. Notwithstanding the failure to object to the instructions at trial, defendant argues that this Court should grant a new trial under the plain error rule because of a perceived lack of evidence that defendant formed the intent to kill while in a cool state of blood. In light of the actual instructions given to the jury, the verdict sheet returned by the jury, and the jury poll, we are satisfied that the jury was not misled by the instructions.

We rejected a similar challenge in *State v. Alford*, 339 N.C. 562, 453 S.E.2d 512 (1995). In *Alford*, we noted:

> The actual instructions given by the trial court made it clear to the jury that it had to be unanimous on both the verdict and the basis for that verdict. After informing the jury that it could "find the defendant guilty of first degree murder on either or both of two theories[,] [t]hat is, on the basis of malice, premeditation and deliberation, or under the felony—first-degree felony murder rule," the trial court charged the jury on first-degree murder by premeditation and deliberation and then instructed on the elements of felony murder.

Id. at 575, 453 S.E.2d at 519.

As in *Alford*, the actual instructions given by the trial court in the instant case made it clear to the jury that it had to be unanimous on both the verdict and the basis for that verdict. After informing the jury that it could find "defendant guilty of first degree murder on either or both of two theories, that is, on the basis of malice, premeditation and deliberation, or under the first-degree felony murder rule," the trial court charged the jury on first-degree murder on the basis of malice, premeditation, and deliberation and then instructed on the elements of first-degree murder under the felony murder rule. The court in the instant case then charged the jury as follows:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally killed the victim with a deadly weapon and that this proximately caused the victim's death, and that the defendant intended to kill the victim, and that he acted with malice after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation.
>
> However, if you do not so find or have a reasonable doubt as to one or more of these things, you would not run [sic] a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation.
>
> Whether or not you find the defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, you will also consider whether he is guilty of first-degree murder under the first-degree felony murder rule.

We note that this instruction is essentially identical to the instruction given in *Alford*.

In *Alford*, we noted that "[t]he court then gave the final mandate on felony murder and finally instructed the jurors, 'You and each of you, that is, all 12 of you, must unanimously agree upon any verdict which you return.' " *Id.* at 576, 453 S.E.2d at 519. In the instant case, after instructing the jurors on felony murder, the court continued to instruct the jury on other crimes for which defendant could be found guilty. The court then told the jury: "Now, I instruct you that a verdict is not a verdict until all twelve jurors agree unanimously as to what your decision shall be. You may not render a verdict by majority vote." After admonishing the jurors as to their "duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment," the court instructed the jurors, "Now, when you have reached a unanimous verdict you will have your foreperson mark your—mark the ballot (sic) appropriately and knock on the door to announce your verdict."

We further note that in *Alford*, we said:

> [T]he verdict sheet actually returned by the jury and the jury poll conducted after the verdict was returned indicate that the jurors did not construe the disjunctive instructions to allow the jury to convict defendant of first-degree murder on a basis that was not unanimously found beyond a reasonable doubt. The verdict sheet clearly indicates that the jury found defendant guilty of both premeditated and deliberate murder and felony murder. When polled, each juror reiterated that he or she found defendant guilty of first-degree murder based on both theories.

Id. at 575, 453 S.E.2d at 519. In the instant case, the verdict sheet actually returned by the jury and the jury poll conducted after the verdict was returned indicate that the jurors did not construe the court's instructions in a manner allowing the jury to convict defendant of first-degree murder on a basis that was not unanimously found beyond a reasonable doubt. The verdict sheet indicates that the jury found defendant guilty of both premeditated and deliberate murder and felony murder. Further, the record shows that when polled, no juror expressed that he or she had not found defendant guilty of first-degree murder based on both theories. Accordingly, as in *Alford*, we conclude that defendant's contentions are without merit, and we reject defendant's first argument.

[2] In his second argument, defendant contends that the trial court committed reversible error when it imposed judgment upon defendant for the arson conviction when defendant had already been con-

victed and sentenced for his convictions of first-degree murder based upon the felony murder rule with arson as one of the underlying felonies. Defendant argues that because arson was used as one of the underlying felonies to support his first-degree murder convictions under the felony murder rule, defendant could not be sentenced for both arson and murder.

In *State v. Lewis*, 321 N.C. 42, 361 S.E.2d 728 (1987), we said:

> When the evidence so warrants, a trial judge may submit a special verdict form to the jury that allows the jurors to indicate whether they find the defendant guilty of first degree murder based upon premeditation and deliberation or first degree murder based on a felony murder theory. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981). However, if both theories are submitted to the jury and the jury finds the defendant guilty under both theories the underlying felony need not merge with the murder. *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)].

Lewis, 321 N.C. at 50, 361 S.E.2d at 733. In the instant case, defendant was convicted of the first-degree murders based upon theories of premeditation and deliberation and felony murder. Thus, the underlying felony of arson need not merge with the murder convictions, and it was not error to sentence defendant separately for each of the murders and for the underlying felony.

[3] In his third argument, defendant contends that the trial court erred when it imposed separate judgments for each of the two first-degree murder convictions since the convictions were based upon the felony murder rule and each homicide was used as the underlying felony for the other. Again we note that defendant was convicted of the first-degree murders based on theories of premeditation and deliberation and felony murder. Defendant was sentenced only once for the murder of Jones and once for the murder of Smith. Since there was no merger of either murder conviction by its use as an underlying felony for the other murder, *see id.*, the trial court did not err by sentencing defendant separately for each murder.

[4] In his fourth argument, defendant contends that the trial court improperly used his contemporaneous murder convictions as a nonstatutory aggravating factor for the arson conviction when it found that "the arson was committed during a course of conduct in which other crimes endangered the lives of others." We disagree.

In *State v. Taylor*, 322 N.C. 280, 367 S.E.2d 664 (1988), we said:

> Pursuant to the Fair Sentencing Act, the trial court is not confined to consideration of statutory factors only, but may consider nonstatutory factors to the extent they are (1) related to the purposes of sentencing and (2) supported by the evidence in the case. N.C.G.S. § 15A-1340.4(a) (1983). Amongst the purposes of sentencing explicitly identified in N.C.G.S. § 15A-1340.3 are "to protect the public by restraining offenders" and "to provide a general deterrent to criminal behavior."

Taylor, 322 N.C. at 287, 367 S.E.2d at 668. Additionally, the Fair Sentencing Act[1] and our cases interpreting it establish that a conviction may not be aggravated by (1) prior convictions of other crimes which could have been joined for trial, (2) contemporaneous convictions of crimes actually joined, or (3) acts which form the gravamen of these prior or contemporaneous convictions. N.C.G.S. § 15A-1340.4(a)(1)o (1983); *State v. Hayes*, 323 N.C. 306, 372 S.E.2d 704 (1988); *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985); *State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984).

In the case before us, the trial court aggravated defendant's sentence on the basis of defendant's committing the arson "during a course of conduct in which other crimes endangered the lives of others." Contrary to defendant's contention that the "other crimes" referred to in this nonstatutory aggravating factor include the murders of Jones and Smith for which defendant was contemporaneously convicted, we conclude that the other crimes involved the assaults on Jones' three small children. It is certainly reasonable to conclude that this is the type of behavior from which the public should be protected and from which possible future offenders should be deterred. Thus, the trial court's finding of the nonstatutory aggravating factor in question was clearly related to the purposes of sentencing.

Moreover, the trial court's finding was amply supported by the evidence. The State's evidence in the proceeding below indicated that when defendant pulled his gun, he saw Brittany run into the bathroom where Smith and the other two children were. The shell casings found in the bedroom show that defendant fired two bullets into the locked bathroom while he was standing on the outside of the door in the master bedroom. Further, the State's evidence shows that defend-

1. The Fair Sentencing Act, N.C.G.S. § 15A-1340.1 to -1340.7 (1988), was repealed effective 1 October 1994, when the Structured Sentencing Act became effective for offenses occurring on or after that date.

ant choked the three children and threw them to the floor. This evidence is sufficient for the trial judge to find the aggravating factor that the arson was committed during a course of conduct, that is, the assaults on the children, that endangered the lives of others. These crimes are separate and distinct from the murders for which defendant was convicted. Thus, the aggravating factor did not run afoul of the statute.

[5] In his fifth argument, defendant contends that the trial court improperly used evidence of the offenses joined for trial when it found as an aggravating factor for the arson conviction that "defendant was armed with a deadly weapon at the time of the crime." In the instant case, defendant was convicted of two counts of first-degree murder and one count of first-degree arson. The trial court found as an aggravating factor that defendant was armed with a deadly weapon at the time he started the fire that constituted the criminal act supporting the arson conviction. We have held that acts which could have been, but were not, the basis for other joinable criminal convictions may be used to aggravate the conviction for which a defendant is being sentenced. *State v. Abee*, 308 N.C. 379, 302 S.E.2d 230 (1983). Because the act of carrying the deadly weapon could have been, but was not, the basis for other joinable criminal convictions, it may be used to aggravate the conviction for which defendant is being sentenced. Accordingly, we find no error in the trial court's use of this aggravating factor.

[6] In his sixth argument, defendant contends that the trial court committed reversible error when it refused to instruct the jury on the lack of mental capacity according to defendant's requested written instruction. Defendant requested the following instruction:

> You may find that there is evidence which tends to show that the defendant lacked mental capacity at the time of the alleged events in this case. However, if you find that the defendant lacked mental capacity, you should consider whether this condition affected whether or not he deliberated prior to his killing which is required for the conviction of first-degree murder. In order for you to find the defendant guilty of first-degree murder, you must find beyond a reasonable doubt that he killed the deceased with malice, and in the execution of an actual specific intent to kill formed after premeditation and deliberation.
>
> If as a result of lack of mental capacity, the defendant did not deliberate prior to killing the deceased, he is not guilty of first-

degree murder. Therefore, I charge that if upon considering the evidence with respect to the defendant's lack of mental capacity you have a reasonable doubt as to whether the defendant formulated the specific intent required for the conviction of first-degree murder, you will not return a verdict of guilty of first-degree murder.

The State offered North Carolina criminal pattern jury instruction 305.11. After considering both parties' proposed jury instructions, the trial court consolidated the two instructions and instructed the jury as follows:

Now, you may find that there is evidence which tends to show that the defendant lacked mental capacity at the time of the acts alleged in this case. If you find that the defendant lacked mental capacity, you could—you should consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first-degree murder on the basis of malice, premeditation, and deliberation, or whether this condition affected his ability to premeditate or deliberate.

In order for you to find the defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, you must find beyond a reasonable doubt that he killed the deceased with malice and [in] the execution of an actual specific intent to kill formed after premeditation [] and deliberation.

If as a result of a lack of mental capacity, the defendant did not have the specific intent to kill the deceased formed after premeditation [] and deliberation, he is not guilty of first-degree murder on the basis of malice, premeditation, and deliberation.

If as a result of a lack of mental capacity, the defendant did not have the ability to premeditate or deliberate, he is not guilty of first-degree murder on the basis of malice, premeditation, and deliberation.

Therefore, I charge that if—upon considering the evidence with respect to the defendant's lack of mental capacity you have a reasonable doubt as to whether the defendant formulated the specific intent required for the conviction of first-degree murder or lacked the mental capacity to premeditate or deliberate, you will not return a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation.

In *State v. Brown*, 335 N.C. 477, 439 S.E.2d 589 (1994), we said:

> With regard to a defendant's request for jury instructions, this Court has consistently held that a trial court is not required to repeat verbatim a requested, specific instruction that is correct and supported by the evidence, but that it is sufficient if the court gives the instruction in substantial conformity with the request.

Id. at 490, 439 S.E.2d at 597. In the instant case, the trial court instructed the jury in substantial conformity with the specific instruction requested by defendant. Therefore, we reject defendant's sixth argument.

[7] In his seventh argument, defendant contends that the trial court committed reversible error in denying his motion to dismiss the charges of first-degree murder based upon the theory of premeditation and deliberation. Defendant argues that the State's evidence failed to prove beyond a reasonable doubt that defendant formed the intent to kill the victims while in a cool state of blood.

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 that can be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). The determination of the witnesses' credibility is for the jury. *See State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

In *State v. Saunders*, 317 N.C. 308, 345 S.E.2d 212 (1986), we said:

> "Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Calloway*, 305 N.C. 747, 751, 291 S.E.2d 622, 625 (1982). Premeditation is defined as "thought beforehand for some length of time no matter how short." *Id.* Deliberation means an "intention to kill executed by the defendant in a 'cool state of blood' in furtherance of a 'fixed design to gratify a feeling of revenge, or, to accomplish some unlawful purpose.' " *Id.* " 'Cool state of blood' as used in connection with premeditation and deliberation does not mean absence of passion and emotion but means that an unlawful killing is deliberate and premeditated if executed with a

fixed design to kill notwithstanding defendant was angry or in an emotional state at the time." *State v. Ruof*, 296 N.C. 623, 636, 252 S.E.2d 720, 728 (1979).

Saunders, 317 N.C. at 312, 345 S.E.2d at 215.

In the instant case, there was substantial evidence to support a finding that defendant killed the victims in a cool state of blood. Viewing the evidence in the light most favorable to the State, as we must, the evidence shows that defendant entered Jones' apartment without a pistol and, after leaving the apartment after an argument with Jones, returned with a pistol, argued with Jones again, and then shot his way into the bathroom where Jones, Smith, and the three small children had locked themselves away from defendant's reach. Once inside the bathroom, defendant, a Marine experienced with firearms, took aim and fired a bullet into Jones' neck and placed the muzzle of the gun next to the hand Smith had raised to defend herself and shot her in the head. Notwithstanding that defendant may have been angry or in an emotional state at the time he shot the victims, the evidence was sufficient for a jury to find that defendant executed his specific intent to kill in a cool state of blood. Therefore, the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence.

[8] In his eighth and final argument, defendant contends that the trial court committed reversible error by sustaining the prosecutor's objections to a portion of the direct testimony of Dr. John Warren, a forensic psychologist, relating to defendant's state of mind at the time of the killings.

On direct examination, defense counsel asked Dr. Warren whether he had an opinion concerning whether the killings of the victims in this case were "committed in a cool state of blood." After he stated that he had an opinion, defense counsel asked Dr. Warren to state his opinion, at which time the State objected. Outside the presence of the jury, the trial court sustained the State's objection as to the use of a precise legal term. Defense counsel then offered to rephrase the question. On *voir dire*, defense counsel rephrased the question concerning defendant's mental state to ask whether "around the time of the killings of [the victims,] . . . [defendant] had snapped." The trial court sustained the State's objection to the use of the term "snapped." On *voir dire*, Dr. Warren stated that he had an opinion as to whether defendant had "snapped" and testified as follows:

> Recognizing the imprecise nature of the term—slang term snapped, as I said in my report, I believe that the defendant had an inability to think things through calmly and clearly, to weigh options or consider alternatives at the moment of the shootings. And this combined with his report of snapping, would indicate that yes, he snapped.

Defendant argues that the testimony of Dr. Warren that defendant "snapped" tended to show that defendant was not in a cool state of blood when he shot the victims and, thus, was relevant since it tended to show that defendant did not premeditate and deliberate the killings. We agree. *See State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988) (expert witness may testify concerning defendant's ability to make and carry out plans, and jury may consider such evidence when determining if defendant had the ability to form a specific intent).

Nevertheless, a determination of relevancy under Rule 401 does not necessarily end the inquiry as to whether a trial court erred in sustaining an objection to proffered expert witness testimony. As we said in *State v. Jackson*, 340 N.C. 301, 457 S.E.2d 862 (1995):

> The admissibility of evidence is first governed by Rule 401 of the Rules of Evidence, which defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Rule 702 sets the standard for the admissibility of expert opinion testimony, specifying that a witness qualified as an expert may testify as to scientific, technical or other specialized knowledge *if* such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702 (1992).

Jackson, 340 N.C. at 310, 457 S.E.2d at 868.

As an expert witness in the field of psychology, Dr. Warren was, by education and training, in a better position than the jury to evaluate whether defendant could formulate a specific plan or intent to kill. *See State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). An expert witness' opinion to the effect that the defendant's capacity to calmly function and plan was severely impaired is evidence which arguably would tend to show that the defendant acted without premeditation and deliberation and could not form the specific intent to kill.

Assuming *arguendo* that Dr. Warren's opinion that defendant "snapped" could have "assist[ed] the trier of fact to understand the evidence or to determine a fact in issue," N.C.G.S. § 8C-1, Rule 702, and that the trial court erred by not admitting it, we nevertheless conclude that the error in this instance was not prejudicial. Dr. Warren was allowed to testify about defendant's mental state at the time of the murders, testimony which indicated that defendant did not form the specific intent to kill. We are convinced that even if Dr. Warren had given his opinion that defendant "snapped," the jury verdicts in this case would not have been different. *See* N.C.G.S. § 15A-1443(a) (1988). Accordingly, we reject defendant's final argument. Defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. KENNETH EUGENE COFFEY

No. 137A96

(Filed 10 February 1997)

1. Criminal Law § 761 (NCI4th Rev.)— noncapital first-degree murder—instructions—finding evidence true beyond reasonable doubt—no prejudice

There was no plain error in a noncapital first-degree murder prosecution where defendant contended that the trial court erred by instructing jurors that they must unanimously find beyond a reasonable doubt that the evidence was true before they could consider it in determining defendant's guilt or innocence. It would appear that the trial judge was merely referencing the weighing process which must occur during jury deliberations; assuming that the trial court inaccurately described the weighing process, the instructions when read as a whole and in context reflect that the judge fairly advised the jury of every element of the offense charged and provided a correct statement of the law, and there was substantial evidence to support the verdict.

Am Jur 2d, Trial §§ 1203, 1370, 1376.

2. Evidence and Witnesses §§ 1222, 1235 (NCI4th)— defendant's statements during and after polygraph—not an interrogation—right to counsel not denied

The trial court did not err in a noncapital first-degree murder prosecution by not suppressing statements made during and after a polygraph exam where defendant contended that the statements were obtained in violation of his Fifth and Sixth Amendment rights to counsel. Although there is no question that defendant was in custody at the time the statements were made, he was not being interrogated at that time. Since there was no interrogation, his rights to counsel were not violated. Even assuming that defendant was being interrogated, there is competent evidence in the record to support the trial court's finding of fact that defendant initiated the conversation with the SBI agent and the detective, and that finding is binding on appeal.

Am Jur 2d, Criminal Law §§ 793-795, 797; Evidence § 749.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination. 89 ALR3d 230.

3. Evidence and Witnesses § 1339 (NCI4th)— noncapital first-degree murder—defendant's statements to officers—conclusion of voluntariness—supported by findings and evidence

A noncapital first-degree murder defendant's statements to officers were voluntarily and knowingly made, under the totality of the circumstances, where the trial court's conclusion was fully supported by findings based on competent testimony, including defendant's testimony that his statement was made knowingly and willingly and was true.

Am Jur 2d, Evidence §§ 723, 728, 742.

4. Evidence and Witnesses § 162 (NCI4th)— noncapital first-degree murder—unrelated threats by defendant—admissible

The trial court did not err in a noncapital first-degree murder prosecution by admitting as corroborative evidence a witness's statement to an investigating officer that she had initially been too afraid to give information to an investigating officer because of a prior threat of violence from defendant arising from an eviction. Although defendant contends that the testimony concerning the statement was not necessary to prove any material fact and was unfairly prejudicial, it would have been reasonable for the jury to have raised questions about the failure of the witness to give information about the case to the SBI agent and the statement corroborates her in-court testimony that she did not want to get involved because she was scared. There was no abuse of discretion in the trial judge's determination that the danger of unfair prejudice did not outweigh its probative value.

Am Jur 2d, Evidence §§ 340-342.

5. Evidence and Witnesses § 3126 (NCI4th)— noncapital first-degree murder—witness afraid of defendant—hearsay statement—admitted as corroboration

The statement of a witness to an officer was not inadmissible hearsay in a capital murder prosecution where the statement was not offered to prove the truth of the matter asserted, but merely to strengthen the credibility of the witness's testimony that she had not talked with an SBI agent because she was afraid of defendant due to an unrelated incident. N.C.G.S. § 8C-1, Rule 801(c).

Am Jur 2d, Evidence §§ 661, 667; Witnesses § 1001.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Downs, J., at the 27 November 1995 Criminal Session of Superior Court, Watauga County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 14 October 1996.

Michael F. Easley, Attorney General, by James P. Erwin, Jr., Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

ORR, Justice.

This case arises out of the murder of Marvin "Coy" Hartley, who was found beaten to death in his home on 8 December 1994. Defendant was indicted for this crime on 20 February 1995 and was tried noncapitally before a jury. The jury returned a verdict finding defendant guilty of first-degree murder. The trial court imposed a mandatory sentence of life imprisonment for this conviction.

After consideration of the assignments of error brought forward on appeal by defendant and a thorough review of the transcript of the proceedings, the record on appeal, the briefs, and oral arguments, we conclude that defendant received a fair trial, free from prejudicial error. For the reasons set forth below, we affirm his conviction and sentence.

At trial, the State's evidence tended to show the following: Larry Grimes testified that he lived with his wife in Greenway Trailer Park in Boone, North Carolina, and that the victim, Coy Hartley, lived alone in a trailer two doors down from them. Grimes testified that he delivered leftover food to Hartley nearly every day. Around 6:30 p.m. on 8 December 1994, Grimes went to Hartley's trailer to bring him some food, and after Hartley failed to answer the door, Grimes entered through the unlocked door. Upon entering the trailer, Grimes discovered Hartley lying face down on the floor in the living room. When Hartley did not respond, Grimes returned to his own trailer and called 911.

Gary Taylor, one of the EMTs who responded to the call, testified that there was "a large, massive amount of blood" underneath Hartley's face. He further testified that he could find no vital signs and that "[Hartley] had already expired." Taylor returned later to assist in removing the body, and when the body was rolled over, severe wounds to the face and head were discovered.

Dr. Brent Hall, a medical expert in the field of pathology, testified that during his autopsy on the body of Coy Hartley, he observed multiple bruises and lacerations on the head and upper chest. Dr. Hall determined that, in his opinion, the cause of death was blunt traumatic injury to the head.

Officer Randall Rasnak, a patrolman with the Boone Police Department, testified that during December 1994, while working a night shift, he and Officer Hayes responded to a call at the Longview

Motel concerning a fight. When Officer Rasnak and Officer Hayes arrived at the scene, they observed defendant and Bobby Bragg, both of whom were intoxicated. The officers proceeded to search both men and recovered a knife and a white athletic sock containing a chrome trailer-hitch ball from Bragg's coat pocket. When Officer Rasnak asked whether the trailer ball had been used as a weapon, Bragg indicated that he had just found it and placed it in the sock. A bottle of alcohol was recovered from defendant, but no weapon was found on him. Both Bragg and defendant were transported to the Watauga County Sheriff's Department for a twenty-four-hour hold and were subsequently released.

Detective Shook testified that he and several other officers interviewed residents of the trailer park concerning what they had observed there on the day of Hartley's murder. Several witnesses gave descriptions matching that of defendant and Bragg, stating that they had been seen in the area on the day of the murder. On the day after the body was found, Detectives Shook and Harrison spoke with defendant's father, who directed them to defendant's residence, where they found defendant. Defendant accompanied the officers to the police department, where he was interviewed for five hours. Defendant told police that he and Bragg had been at the victim's trailer the day of the murder. Defendant further stated that Bragg had hit Hartley with a trailer-hitch ball in a sock and had taken Hartley's billfold. After witnessing this, defendant testified that he ran from the trailer.

On the basis of the statements made by defendant, Bragg was arrested on 10 December 1994 in Mountain City, Tennessee. Subsequently, on 6 January 1995, defendant was arrested for a probation violation. After being questioned for several hours concerning Hartley's death, defendant was then also charged with the murder.

SBI polygraph examiner Jonathan Jones testified that on 21 March 1995, defendant was brought into his office in Hickory, North Carolina, for a polygraph examination. Prior to the administration of the polygraph, defendant made a statement to Agent Jones concerning the murder.

After the polygraph was administered, defendant then made another statement to Detective Shook describing the events which unfolded on 8 December 1994. He told Detective Shook that upon returning home from the liquor store that afternoon, he met Bobby

Bragg. Bragg planned to take Hartley's money after getting him drunk, and defendant reluctantly agreed to go along with this plan. Upon entering the trailer, Hartley ordered Bragg out, and defendant proceeded to hit Hartley in the face twice. Bragg then also began hitting Hartley with the trailer ball. Hartley eventually fell to the floor, and the wallet fell out of his back pocket. Bragg took the wallet and attempted to give defendant some money from the wallet. He told defendant that he better not say anything or he would regret it. Defendant took the money and left.

Defendant also presented evidence at trial. John Combs testified that he worked at an ABC store in Boone and that he knew both defendant and Hartley. He testified that it was common for Hartley to visit the store once or twice daily, buying a pint of "Popov" vodka on each visit. On the day of the murder, defendant entered the store sometime in the evening and said that Coy Hartley had sent him. He then inquired as to what brand of liquor Hartley bought. Defendant purchased a pint of "Popov" vodka and then left the store.

Defendant's father, Jack Coffey, testified that he worked in a plant in Lenoir for a year and a half and occasionally did some landscaping. He stated that defendant's mother had been committed to Broughton Hospital three or four times. He further testified that defendant began drinking when he was very young and had been committed a number of times to institutions.

William Eller testified that he was director of guidance at Watauga High School. He stated that defendant was in special education classes in 1979 when he was in the ninth grade. Defendant had attended school for a year and a half, but his enrollment after that was erratic. Eller further testified that defendant had a tested IQ of 75 in 1979 and was classified as "educable mentally handicapped."

Jim Thornton testified that he was director of the Substance Abuse Unit at New River Mental Health. He stated that he first met defendant in 1990 when defendant was an outpatient and that he had worked with defendant on and off since then.

I.

[1] Defendant's first assignment of error involves the trial court's instructions to the jury. Defendant contends that the trial court erred by instructing the jurors that they must unanimously find beyond a reasonable doubt that the evidence was true before they could consider it in determining defendant's guilt or innocence. Defendant

argues that the instructions distorted the reasonable doubt standard and the proper allocation of the burden of proof.

The trial court instructed the jury as follows:

> This being a criminal case, alleged to be, and the defendant having entered a plea of not guilty, he, the defendant, is presumed to be innocent. He's not required to prove his innocence. The burden is upon the State, the charging party, to satisfy you, the jury, of the defendant's guilt to the charge he's facing from the evidence to the extent of beyond a reasonable doubt.
>
> A reasonable doubt is a doubt that's based upon reason and common sense arising out of some or all of the evidence that's been presented or lack of that evidence, whichever the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt to the charge he is facing.

After properly instructing the jury on the State's burden of proof and the definition of reasonable doubt, the trial judge continued as follows:

> In order to resolve whatever conflicts exist in the testimony and then after making that resolution, determining the importance of evidence, the jury is empowered with two particular aspects of discretion, absolute discretion, in regard to the evidence.
>
> First, the jury can believe or disbelieve some, none or all of the various testimonies you've heard. Even though each and every witness has been under oath, you can disregard that. *Believe some, none or all and then based upon what you believe, the jury also then has the discretion to decide how important that evidence is when you decide that it is believable because once you unanimously decide that certain evidence is believable to the extent of beyond a reasonable doubt, then you['ve] got to weigh it, one aspect of it against the other to decide it's [sic] importance.* That's weighing the evidence.
>
> . . . .
>
> . . . So, you use your common sense rules. You use the criteria that I've given you and then based upon that process, determine how much, if any or all the testimonies you're going to believe or disbelieve. *Then based upon what you believe to the*

extent of beyond a reasonable doubt, from that you find the facts.

(Emphasis added.)

In the present case, defendant contends that these instructions prevented the jurors from considering the evidence unless they unanimously found it to be true beyond a reasonable doubt. Arguably, the trial judge, in instructing that "once you unanimously decide that certain evidence is believable to the extent of beyond a reasonable doubt," is referring to the jury's duty to determine whether or not defendant is guilty of the charge based on the evidence beyond a reasonable doubt. Obviously, at some point during the trial, the jury must decide that the evidence is believable beyond a reasonable doubt in order to make its determination that defendant is guilty of the charge. Here, it would appear that the trial judge was merely referencing the weighing process which must occur during jury deliberations.

Defendant did not object at trial to the instructions to which he now assigns error. As a result, we hold that he has waived his right to appellate review of the question except under the "plain error" standard set forth in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). To find plain error, "the error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or [such that] probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). Further, "[o]nly in a 'rare case' will an improper instruction 'justify reversal of a criminal conviction when no objection has been made in the trial court.' " *State v. Weathers*, 339 N.C. 441, 454, 451 S.E.2d 266, 273 (1994) (quoting *State v. Odom*, 307 N.C. at 661, 300 S.E.2d at 378).

Assuming *arguendo* that the trial court inaccurately described the weighing process of the evidence, we do not find that the trial court's instructions rise to the level of plain error. As this Court has previously held, no reversal will occur when the trial court's instructions, read as a whole and considered in context, reflect that the judge fairly advised the jury of every element of the offense charged and provided a correct statement of the law. *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984). In its opening remarks, the trial court made it clear that defendant is entitled to a presumption of

innocence and is not required to prove his innocence. The trial court further stated that the State bears the burden of satisfying the jury "of the defendant's guilt . . . from the evidence to the extent of beyond a reasonable doubt." The trial court also correctly instructed the jury on every element of the offense charged. Thus, any error in the trial court's instructions is "not so fundamental as to amount to a miscarriage of justice." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

Moreover, there was substantial evidence to support the verdict in this case. Defendant's confession, which was admitted into evidence, contained statements in which defendant admitted to striking the victim in the face twice and taking money from the victim. The jury subsequently found defendant guilty of felony murder. Felony murder is defined 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 . . . .

N.C.G.S. § 14-17 (Supp. 1994). Here, the jury found that defendant had committed the underlying felony of robbery with a dangerous weapon. In light of the substantial evidence in this case supporting the verdict, that the jury would have reached a different result had the trial court not given this instruction is improbable. Therefore, we overrule this assignment of error.

II.

[2] Defendant next assigns as error the trial court's failure to suppress statements defendant made during and after a polygraph examination administered by an SBI agent. Defendant contends that the trial court committed reversible error by denying his motion to suppress the statements because they were obtained in violation of his Fifth and Sixth Amendment rights to counsel. We find this contention to be without merit.

A hearing was held on defendant's motion to suppress, outside the presence of the jury. Both the State and defendant presented evidence and exhibits relevant to the evidence. The trial court's pertinent findings of fact, which defendant concedes were based on the evidence before it, are as follows:

The defendant through his then attorneys requested the District Attorney to set up a polygraph examination of the defendant by the, by a member of the State Bureau of Investigation qualified to administer such polygraph.

That both attorneys signed the request by the District Attorney to the State Bureau of Investigation.

Neither attorney expressed any desire to accompany the defendant to the site of the polygraph and after the polygraph was administered and completed and both attorneys [were] informed that the defendant had made some statement that could have been construed to be inculpatory during that examination. Neither attorney expressed any surprise that they weren't asked to attend with the defendant for that test.

The only concern that was raised was that there was an interrogation type process versus general questions to ascertain the defendant's truthfulness by way of a polygraph examination.

. . . .

That upon being removed from his cell and taken to the vehicle for transportation to Hickory, the defendant told the deputy accompanying him that he wanted to call his attorney and that the deputy declined because it was policy of the Sheriff's office not to allow any telephone calls when a prisoner was being transported from the Watauga Jail facility to any other facility.

. . . .

That upon arriving at the State Bureau of Investigation office where the polygraph was to be administered, the defendant was advised of his Miranda rights . . . , and he did not invoke any of those rights. Further, that he acknowledged that he understood them and further, that he waived all of them.

That during the course of the examination with the polygraph operator, the defendant informed the polygraph operator that he had not told an officer the truth in some previous statement. This was made in response to the question as to whether or not he had any questions about the administration of the test. He was then asked as to what it was that he had not said that was the truth[,] to which he made a response that he would make a statement, but he would talk to Detective Shook only.

That he completed the polygraph examination and after that, Detective Shook then made inquiry of the defendant on a one on one basis and wrote down what the defendant said and read it back to him as he wrote it down.

At the end of that session, the defendant decided that he would not sign the statement rather than contact his attorneys.

His statement was not taped. The defendant was not coerced. His response to all questions throughout the day, including the time that he made the statement to Officer Shook, were responsive to the questions asked except for the responses to the questions that Agent Jones asked him wherein the defendant continued to reinitiate the topic that he had been untruthful in some prior statement he had made to officers.

During the process of the questions and/or answers, the defendant acknowledged that he had two attorneys and the defendant testified at this voir dire hearing and further stated that what he said to Detective Shook was knowingly and willingly made and, further, that what he said was true.

The trial court then made several conclusions of law based on the findings of fact. Based on those conclusions and considering the totality of the circumstances, the trial court concluded that "any statement that the defendant made to Officer Shook was knowingly and voluntarily made and understandably made." The trial court further concluded that no provision of the United States Constitution or the North Carolina Constitution had been violated.

Defendant argues that his invocation of the right to counsel in the face of impending interrogation was not honored and that the trial court erred in concluding that none of defendant's constitutional rights had been violated. Defendant relies on the rules enunciated in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981), in support of this contention.

In *Miranda v. Arizona*, the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination gives rise to a right to the presence of counsel during custodial interrogation. 384 U.S. 436, 16 L. Ed. 2d 694. If during the course of a custodial interrogation a suspect requests an attorney, all questioning must cease until an attorney is present, *Minnick v. Mississippi*, 498 U.S.

146, 152, 112 L. Ed. 2d 489, 498 (1990), or "the accused himself initiates further communication, exchanges, or conversations with the police," *Edwards v. Arizona*, 451 U.S. at 485, 68 L. Ed. 2d at 386. In *Michigan v. Jackson*, 475 U.S. 625, 89 L. Ed. 2d 631 (1986), the United States Supreme Court held that the rule in *Edwards*, although decided under the Fifth Amendment, applies with at least equal force to situations involving the Sixth Amendment. Thus, defendant claims both his Fifth and Sixth Amendment rights were violated.

In this case, there is no question that defendant was in custody at the time the statements were made. The key inquiry therefore becomes whether defendant was being "interrogated" at the time he made his statements. The United States Supreme Court defined "interrogation" in *Rhode Island v. Innis*, 446 U.S. 291, 302, 64 L. Ed. 2d 297, 308 (1980), stating that interrogation is not only express questioning by the police, but also includes any "words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response from the suspect."

In the present case, based upon the evidence presented at trial as well as the trial court's findings of fact and conclusions of law, we conclude defendant was not being interrogated at the time he made the incriminating statements. Agent Jones testified at the suppression hearing that during the pretest phase of a polygraph examination he explains to the person who is going to take the test each and every step that will occur during the polygraph examination. Upon explaining the polygraph procedures to defendant, Agent Jones testified that defendant stated that he did not tell the officers the truth about the money. Agent Jones then inquired as to what defendant did not tell the truth about. At that time, defendant made a statement that he was handed the money by Bragg and that Bragg just "went off." Agent Jones testified that he did not follow up with any questions, but proceeded with the polygraph.

Once the polygraph was completed, Agent Jones reminded defendant he was still under arrest and who his attorneys were. Agent Jones then informed defendant that he had not passed the polygraph in reference to planning to rob Hartley and beating him. At that time, defendant made an incriminating statement to Agent Jones. After making the statement, Agent Jones then asked defendant if he would be willing to talk to one of the detectives. Defendant said he was willing to talk to Detective Shook and repeated the statement he had made to Agent Jones. This statement was reduced to writing and

signed by Agent Jones and Detective Shook. Defendant, however, refused to sign it.

The above evidence supports the conclusion that defendant was not being interrogated at the time he made either statement. Defendant's attorneys had requested that a polygraph examination be given, and defendant was given the proper *Miranda* warnings before the test was administered. Defendant's statements were not made in response to questioning initiated by law enforcement officers, but were volunteered by defendant himself. As the United States Supreme Court stated in *Edwards*:

> Had Edwards initiated the meeting . . . nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. *Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver.*

Edwards v. Arizona, 451 U.S. at 485-86, 68 L. Ed. 2d at 386 (emphasis added). Since defendant was not subjected to custodial interrogation, his Fifth Amendment right to have counsel present was not violated. Similarly, since there was no interrogation, defendant's Sixth Amendment right to counsel was not violated. *See Michigan v. Jackson*, 475 U.S. 625, 89 L. Ed. 2d 631.

Further, even assuming *arguendo* that defendant was being interrogated at the time he made the incriminating statements, the trial court correctly concluded that defendant initiated the communication with the law enforcement officers. An accused in custody who requests counsel is not subject to further questioning until counsel has been made available to him, unless the accused himself initiates further communications with the police. *Edwards v. Arizona*, 451 U.S. at 485-86, 68 L. Ed. 2d at 386. Here, the trial court concluded that "defendant reinitiated and continued to reinitiate the conversation regarding whatever his participation was in the crime that he is charged with in this case." Because there is competent evidence in the record to support the trial court's finding of fact that defendant initiated the conversation with Agent Jones and Detective Shook, we are bound by this finding. *State v. Ross*, 329 N.C. 108, 123, 405 S.E.2d 158, 166 (1991).

[3] Having found no violation of defendant's Fifth or Sixth Amendment rights, we must next determine whether, under the totality of the circumstances, defendant's statements were voluntarily and knowingly made. *See State v. Schneider*, 306 N.C. 351, 293 S.E.2d 157 (1982). The trial court concluded that "any statement that the defendant made to Officer Shook was knowingly and voluntarily made and understandably made." This conclusion is fully supported by the findings of fact, which are based on competent testimony. Defendant himself testified to the following:

> Q Did you knowingly and willingly give this statement to, to the officers?
>
> A The one I gave to Mr. Shook, yes, I did.
>
> Q Are the things that you told him true?
>
> A Yes, sir.

Thus, we hold that the trial court properly concluded that defendant's statements were knowingly and willingly given. For all the foregoing reasons, we hold that the trial court correctly concluded that defendant's rights under the Fifth and Sixth Amendments were not violated and, therefore, correctly denied the motion to suppress defendant's statements.

III.

[4] Defendant's final assignment of error concerns the admission of a witness's statement given to an investigating officer as corroborative evidence. Defendant argues that Detective Shook's testimony concerning Linda Nelson's out-of-court statement about her fear of defendant was not necessary to prove any fact material to the State's case and was unfairly prejudicial. Defendant further asserts that the testimony of Detective Shook concerning Nelson's statement constituted impermissible hearsay. We disagree.

Linda Renee Nelson, a material witness in this trial, testified concerning the activities of the victim, defendant, and Bragg up until moments before the murder occurred. In the course of her testimony, it was revealed that the first officer to question her was Agent Steve Wilson with the SBI. Nelson gave the following testimony concerning her response to questioning by Agent Wilson:

> Q Okay, someone named Wilson from the S.B.I. Did you tell him—what did you—did you tell him what you've told us here today?

A Some of it. I was kind of afraid to talk to him.

Q Why were you afraid, ma'am?

A Because I really didn't want to get involved. I was scared.

Subsequently, during the direct examination of Detective Shook, the prosecutor asked him to read a statement he took from Nelson during the investigation into Hartley's death. Defense counsel objected, and the trial court instructed that the statement would be received only to corroborate Nelson's testimony. The following is a portion of her statement which was admitted and to which defendant objects:

> On Friday morning, SBI Agent Wilson came by her trailer and Linda states that she told Mr. Wilson that she saw Kenneth Coffey, but when Mr. Wilson told her that there had been a murder, she was too scared to say anything else. Linda said that she has known Kenneth Coffey about two years and Kenneth and his girlfriend named Rhoda got evicted by Mike Garlock and Kenneth thought that she had said something to Mike and the time was around [July of 1994] and Kenneth came over to her trailer, banging on it and he said that he knew that she had called Mike and he would beat her God damn brains and if she didn't stop . . . .

A witness's prior out-of-court statement may be admitted to corroborate the witness's courtroom testimony. *State v. Holden*, 321 N.C. 125, 143, 362 S.E.2d 513, 526 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Corroborating statements are admissible only when they are in fact consistent with and substantially similar to the trial testimony. *State v. Harrison*, 328 N.C. 678, 681-82, 403 S.E.2d 301, 304 (1991). "In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986).

In the present case, it would have been reasonable for the jury to have raised questions about the failure of Nelson to give information about this case to SBI Agent Wilson. The statement corroborates Nelson's in-court testimony that she really did not want to get involved because she "was scared." Further, the explanation contained at the end of the statement given to Detective Shook clarifies Nelson's reasons for initially refusing to discuss the matter and, thus, strengthens or adds credibility to the testimony of the witness.

Even if the testimony is admissible as corroborative, the trial court still must determine whether its probative value outweighs the danger of unfair prejudice to defendant. N.C.G.S. § 8C-1, Rule 403 (1986). Defendant argues that the evidence of the specific act of threatened violence by defendant was unfairly prejudicial. This Court has adopted the test currently applied to Federal Rule of Evidence 403 that "[w]hether or not to exclude evidence under [Rule 403] is a matter within the sound discretion of the trial judge." *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). In the present case, we find no abuse of discretion.

[5] Defendant also contends that the statement was inadmissible hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1986). Detective Shook's testimony was not offered to prove the truth of the matter asserted, but was offered merely to strengthen the credibility of Nelson's testimony. For the reasons stated above, we hold that the trial court did not err in permitting the State to introduce Detective Shook's testimony regarding Nelson's statement. Accordingly, this assignment of error is overruled.

Having reviewed each of defendant's assignments of error brought forward on appeal, we conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

IN RE: JERRY L. SPIVEY, DISTRICT ATTORNEY

No. 36PA96

(Filed 10 February 1997)

1. District Attorneys § 5 (NCI4th)— removal by impeachment—no constitutional or statutory authority

District attorneys are not subject to removal by impeachment because impeachment of district attorneys is not within the intent of either the North Carolina Constitution or N.C.G.S. § 123-5 (1986).

Am Jur 2d, Prosecuting Attorneys §§ 16, 17.

Disciplinary action against attorney for misconduct related to performance of official duties as prosecuting attorney. 10 ALR4th 605.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR4th 112.

2. District Attorneys § 5 (NCI4th)— constitutionality of removal statute

Neither Article IV, § 18 nor any other provision of the North Carolina Constitution prohibits the General Assembly from enacting a statutory method for the removal of district attorneys from office so long as district attorneys whose removal is sought are accorded due process of law. Therefore, the statute creating a procedure for removal of district attorneys from office by the superior court, N.C.G.S. § 7A-66, does not violate the North Carolina Constitution, and the superior court had subject matter jurisdiction of a proceeding to remove a district attorney from office.

Am Jur 2d, Prosecuting Attorneys §§ 16, 17.

Disciplinary action against attorney for misconduct related to performance of official duties as prosecuting attorney. 10 ALR4th 605.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR4th 112.

3. District Attorneys § 5 (NCI4th)— removal for racial epithets—not protected speech

The removal of a district attorney from office for his behavior in a bar, including his repeated references to an African-American bar patron by a racial epithet, did not violate the district attorney's constitutionally protected right to express his viewpoint. Instead, when taken in context, the racial epithets used by the district attorney constituted "fighting words" tending to incite an immediate breach of the peace which are not protected by the First Amendment to the United States Constitution or by Article I, § 14 of the North Carolina Constitution.

Am Jur 2d, Prosecuting Attorneys §§ 16, 17.

Disciplinary action against attorney for misconduct related to performance of official duties as prosecuting attorney. 10 ALR4th 605.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR4th 112.

4. District Attorneys § 5 (NCI4th)— removal from office—enumerated grounds

N.C.G.S. § 7A-66 requires removal of a district attorney from office if the superior court judge finds that one of the grounds enumerated in the statute exists.

Am Jur 2d, Prosecuting Attorneys §§ 16, 17.

Disciplinary action against attorney for misconduct related to performance of official duties as prosecuting attorney. 10 ALR4th 605.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR4th 112.

5. District Attorneys § 5 (NCI4th)— racial epithets against member of public—conduct prejudicial to administration of justice

The trial court properly found that a district attorney's use of racial epithets against a member of the public in an apparent attempt to provoke an affray in public was conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and this ultimate finding required removal of the district attorney from office.

Am Jur 2d, Prosecuting Attorneys §§ 16, 17.

Disciplinary action against attorney for misconduct related to performance of official duties as prosecuting attorney. 10 ALR4th 605.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR4th 112.

6. District Attorneys § 5 (NCI4th)— removal proceeding—appointment of independent counsel

In order to comply with the due process requirement of a neutral decision-maker, it was within the inherent power of the superior court to appoint an independent counsel to gather and present evidence in a judicial inquiry into whether a district attorney should be removed from office for misconduct.

Am Jur 2d, Prosecuting Attorneys §§ 16, 17.

Validity, under state law, of appointment of special prosecutor where regular prosecutor is charged with, or being investigated for, criminal or impeachable offense. 84 ALR3d 115.

Disciplinary action against attorney for misconduct related to performance of official duties as prosecuting attorney. 10 ALR4th 605.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR4th 112.

7. District Attorneys § 5 (NCI4th)— removal proceeding—SBI investigation—absence of prejudice

Assuming *arguendo* that the superior court erred in seeking the assistance of the SBI in investigating a district attorney's alleged misconduct and that the investigation went beyond that agency's authority, the district attorney was not prejudiced where the SBI simply located witnesses who were present during the alleged misconduct and took their statements, which were turned over to the independent counsel.

Am Jur 2d, Prosecuting Attorneys §§ 16, 17.

Disciplinary action against attorney for misconduct related to performance of official duties as prosecuting attorney. 10 ALR4th 605.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR4th 112.

8. District Attorneys § 5 (NCI4th)— removal proceeding—procedural irregularities—absence of prejudice

A district attorney was not prejudiced by procedural irregularities in a removal proceeding under N.C.G.S. § 7A-66 where the record shows that the superior court judge, conducting the proceeding without a jury, understood the issues before him and the proper focus for the inquiry in this case and that he properly conducted the proceeding.

Am Jur 2d, Prosecuting Attorneys §§ 16, 17.

Disciplinary action against attorney for misconduct related to performance of official duties as prosecuting attorney. 10 ALR4th 605.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR4th 112.

On discretionary review, prior to determination by the Court of Appeals, pursuant to N.C.G.S. § 7A-31, of an order entered by Allsbrook, J., on 29 August 1995 in Superior Court, New Hanover County, removing respondent Jerry L. Spivey from the Office of District Attorney for the Fifth Judicial District. Heard in the Supreme Court 13 September 1996.

Fuller, Becton, Slifkin, Zaytoun & Bell, by James C. Fuller, Maria J. Mangano, and Asa L. Bell, Jr., for petitioner-appellees Robert F. Kendrick, Peter Grear, and Terry B. Richardson.

Tharrington & Smith, by Roger W. Smith, E. Hardy Lewis, and Debra Smith Sasser, for respondent-appellant Spivey.

MITCHELL, Chief Justice.

This appeal arises from the removal of a district attorney from office pursuant to N.C.G.S. § 7A-66. Uncontested evidence tends to show that during the early morning hours of 30 June 1995, respondent Jerry L. Spivey, District Attorney for the Fifth Prosecutorial District, was at a bar in Wrightsville Beach. While there, Spivey loudly and repeatedly addressed a black patron, Mr. Ray Jacobs, using the derogatory and abusive racial epithet "nigger." Because of this and other improper conduct, Spivey was forcefully removed from the premises despite his unruly objections. As a result of his conduct, several affidavits were filed seeking removal of respondent Spivey from the office of district attorney pursuant to N.C.G.S. § 7A-66. Following notice to Spivey and a hearing on the matter, Judge Allsbrook made findings in accord with the uncontested evidence and further found that District Attorney Spivey had engaged in conduct prejudicial to the administration of justice and had brought his office into disrepute. Based on these findings, Judge Allsbrook ordered that Spivey be permanently removed from his position as district attorney.

By his first assignment of error, respondent Spivey contends that the General Assembly was without constitutional authority to pass N.C.G.S. § 7A-66 providing for the removal of district attorneys from office. Based on the doctrine of separation of powers set forth in the Constitution of North Carolina, he argues that absent an express constitutional grant of power, the General Assembly has no power to

remove a constitutional officer or provide for the removal of a constitutional officer for misconduct or for any other reason. He contends that the Constitution confers no such grant of power for the removal of district attorneys upon the legislature and, thus, that N.C.G.S. § 7A-66 is unconstitutional. Therefore, he contends, the superior court was without subject matter jurisdiction, and as a result, this Court must hold the superior court order removing him from office to be null and void. We do not agree.

At the time of the hearing in superior court, respondent made no motion to dismiss for want of subject matter jurisdiction. It is well established, however, that a challenge to the trial court's subject matter jurisdiction may be made at any time, even on appeal to this Court. *Askew v. Leonard Tire Co.*, 264 N.C. 168, 171, 141 S.E.2d 280, 282 (1965). Therefore, this issue is properly before us.

N.C.G.S. § 7A-66, enacted in 1973, aims to create a procedure for the removal of district attorneys by the superior court. The statute purports to confer upon the superior court judge the power to "hear evidence and make findings of fact and conclusions of law and if he finds that grounds for removal exist, he shall enter an order permanently removing the district attorney from office, and terminating his salary." N.C.G.S. § 7A-66 (1995).

We begin with the basic premise that jurisdiction is essential to a valid proceeding or judgment. *Baker v. Varser*, 239 N.C. 180, 185, 79 S.E.2d 757, 761 (1954). In determining whether N.C.G.S. § 7A-66 is an effective grant of subject matter jurisdiction to the superior court, this Court must consider whether the General Assembly has the power to create a means, not expressly provided for in the Constitution of North Carolina, by which the superior court may remove a district attorney from office. We conclude that the General Assembly has such authority.

Article IV, Section 18 creates the office of district attorney, providing that the holder of that office is to be "chosen for a term of four years by the qualified voters" of the district. N.C. Const. art. IV, § 18. District attorneys are "independent constitutional officers." *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 870 (1991). They are the constitutional officers expressly vested by our Constitution with the sole and exclusive responsibility for the prosecution on behalf of the State of *all* criminal actions in the superior courts. *Id.* at 593, 406 S.E.2d at 871. They are vested by statute with responsibility for the

prosecution of all criminal actions and infractions in the district courts. N.C.G.S. § 7A-61 (1995).

[1] Respondent-appellant Spivey contends that as he is an independent constitutional officer, the only possible method—if any method exists—for his removal from office is impeachment as contemplated in Article IV, Sections 1 and 4 of the Constitution. He notes that Article IV, Section 1 vests the judicial power of the State in a "Court for the Trial of Impeachments" and in a "General Court of Justice." N.C. Const. art. IV, § 1. Further, Article IV, Section 4 provides that "the House of Representatives solely shall have the power of impeaching. The Court for the Trial of Impeachments shall be the Senate." N.C. Const. art. IV, § 4. He reminds us that under our Constitution's requirement of separation of judicial, legislative, and executive powers of government, "[i]t is a well established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution." *Smith v. State*, 289 N.C. 303, 328, 222 S.E.2d 412, 428 (1976); *see also Marbury v. Madison*, 5 U.S. 137, 173-80, 2 L. Ed. 60, 72-74 (1803) (same under United States Constitution). He contends that Article IV, Sections 1 and 4 withhold from the judiciary the power to impeach and try constitutional officers by placing that power solely in the Court for the Trial of Impeachments. He argues that since the superior court could not be given jurisdiction over an impeachment proceeding and the Constitution does not provide for the removal of constitutional officers by any other method, N.C.G.S. § 7A-66 purporting to give the superior court the authority to remove district attorneys from office by a method other than impeachment is unconstitutional. Therefore, he contends that the order of the superior court requiring his removal from office was null and void *ab initio*. We reject these arguments for reasons which follow.

The 1868 Constitution of North Carolina was "unusual among the states because it [did] not list either the officers subject to impeachment or the proper grounds of impeachment." David M. Lawrence, *Removing Local Elected Officials from Office in North Carolina*, 16 Wake Forest L. Rev. 547, 549-50 (1980) [hereinafter *Removing Local Elected Officials*]. Prior to our Constitution of 1868, however, no such omissions were found in our state constitutions.

> The omissions date from the 1868 constitution. The 1835 constitution, which in this respect simply elaborated the original

> 1776 language, listed both the officers subject to impeachment—governor, supreme court justices and superior court judges, and "all other officers of this State"—and the grounds—willful violation of the constitution, maladministration, and corruption. N.C. Const. of 1776, art. III, § 1(1) (1835).

Removing Local Elected Officials, 16 Wake Forest L. Rev. at 550 n.12. No such listing of impeachable officers or offenses was included in the Constitution of 1868.

In 1877, this Court was faced with a question concerning whether a judge of probate was liable to impeachment under the Constitution of 1868. We noted that the Constitution "nowhere declares what persons are liable to impeachment." *People ex rel. Attorney General v. Heaton*, 77 N.C. 18, 20-21 (1877). As a result, this Court concluded that it must "look not to the Constitution, but to the statute law, to ascertain what persons are liable to impeachment." *Id.* at 21. We then noted: "The first act under the new Constitution [of 1868] was passed by the Legislature of 1868-69, Bat. Rev., ch. 58 sec. 16 of which enacts that '[e]very officer in this State shall be liable for impeachment for (1) corruption or other misconduct in his official capacity,' etc., enumerating many other causes of impeachment." *Id.* "Of the seven impeachments considered since 1868, one was of a governor, two were of supreme court justices, three were of superior court judges, and one was of a solicitor [or district attorney]. The journals record no attempt to impeach a local official." *Removing Local Elected Officials*, 16 Wake Forest L. Rev. at 551-52.

Assuming *arguendo* that our decision in *Heaton* is still controlling precedent and we still must look to the statutes rather than the Constitution to ascertain what persons are liable to impeachment, district attorneys are no longer subject to impeachment. The pertinent statute now provides:

> Each member of the Council of State, each justice of the General Court of Justice, and each judge of the General Court of Justice shall be liable to impeachment for the commission of any felony, or the commission of any misdemeanor involving moral turpitude, or for malfeasance in office, or for willful neglect of duty.

N.C.G.S. § 123-5 (1986). The statutory listing is exclusive and does not allow for impeachment of district attorneys.

Since our decision in *Heaton*, however, our Constitution has been amended many times and now specifically provides for the removal of numerous state officials by impeachment. *E.g.*, N.C. Const. art. III, § 3(4) (expressly providing that the Governor is subject to removal by impeachment and may be otherwise removed because of mental incapacity); art. III, § 7 (expressly providing that the Lieutenant Governor, the Secretary of State, the Auditor, the Treasurer, the Superintendent of Public Instruction, the Attorney General, the Commissioner of Agriculture, the Commissioner of Labor, and the Commissioner of Insurance are subject to impeachment and otherwise removable); art. IV, § 17(1), (2) (expressly providing for removal of justices and judges by impeachment and other methods). Thus, a strong argument can be made that our reliance in *Heaton* upon statutory provisions relating to impeachment should no longer be deemed authoritative on the issue of which officers may be impeached, as the people have now expressly provided for removal of constitutional officers by impeachment in every instance where that was their intent. We need not resolve that issue here, however, as both the statute and our Constitution now expressly provide that most constitutional officers are removable by impeachment, specifically setting forth the offices involved by their titles. Neither the Constitution nor the statute provides that district attorneys are subject to removal by impeachment. Therefore, applying the maxim *inclusio unius est exclusio alterius* (inclusion of one is exclusion of another), we conclude that impeachment of district attorneys is not within the intent of either the Constitution or the statute and that district attorneys are not subject to removal by impeachment.

[2] Having determined that district attorneys are not subject to removal by impeachment, we still must resolve the greater issue of whether the General Assembly has the authority under our Constitution to provide by statute for a method of removal of an individual holding the constitutional office of district attorney, where the Constitution does not itself specify any method whatsoever for removal of an individual from that office.

Our Constitution provides with regard to district attorneys that:

> The General Assembly shall, from time to time, divide the State into a convenient number of prosecutorial districts, for each of which a District Attorney shall be chosen for a term of four years by the qualified voters thereof, at the same time and places as

> members of the General Assembly are elected. The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe.

N.C. Const. art. IV, § 18(1). As we have often noted, it is "firmly established that our State Constitution is not a grant of power. 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." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). Therefore, this Court gives acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute. *Brannon v. N.C. State Bd. of Elections*, 331 N.C. 335, 339, 416 S.E.2d 390, 392 (1992).

Our Constitution is silent as to the matter of removing district attorneys from office. Applying the presumption of constitutionality of actions of the General Assembly inherent in our Constitution, we find persuasive the reasoning set forth over 121 years ago by the Supreme Court of Alabama in a case construing constitutional and statutory provisions quite similar to those before us in the present case. There, as here,

> [t]he [State] Constitution simply creates the office of [district attorney], defines the manner of election, and fixes the duration of the official term. Thus far, the office is beyond legislative control. The office may not be abolished . . . nor can the official term be enlarged or diminished. The whole matter of removal or suspension from office, the causes for which, and the mode in which it may be effected, not being expressed in the Constitution, is a proper subject of legislation. It is part of the sovereignty of the State, part of the law-making power, and is not either expressly or impliedly withheld from the general assembly.

Ex parte Wiley, 54 Ala. 226, 228 (1875). For similar reasons, we conclude that neither Article IV, Section 18 nor any other provision of the Constitution of North Carolina prohibits the General Assembly from enacting a statutory method for the removal of district attorneys from office, so long as district attorneys whose removal from office is

sought are accorded due process of law. Accordingly, we conclude that N.C.G.S. § 7A-66 does not violate the Constitution of North Carolina and that the superior court had jurisdiction of this case. Therefore, we overrule this assignment of error.

[3] By another assignment of error, respondent Spivey contends that his removal from office for his behavior, including the use of the word "nigger" and other tasteless language, violates the First Amendment to the Constitution of the United States and Article I, Section 14 of the Constitution of North Carolina. Spivey argues that he has been wrongly removed from office because of the content of his speech. He claims that this violated his constitutionally protected right to express his viewpoint. We disagree.

Taken in context, the use of the word "nigger" by Spivey squarely falls within the category of unprotected speech defined by the Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031 (1942). In *Chaplinsky*, the United States Supreme Court wrote

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72, 86 L. Ed. at 1035. At the hearing on this matter, there was testimony concerning the hurt and anger caused African-Americans when they are subjected to racial slurs by white people. We question, however, whether such testimony was necessary to the findings of the superior court in this case. Rule 201(b) of the North Carolina Rules of Evidence provides that a trial court may take judicial notice of a fact if it is not subject to reasonable dispute in that it is generally known within the territorial jurisdiction of the trial court. N.C.G.S. § 8C-1, Rule 201(b) (1992). No fact is more generally known than that a white man who calls a black man a "nigger" within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate. The trial court was free to judicially note this fact. Additionally, evidence concerning the circumstances surrounding Spivey's verbal outbursts in the bar tends to show that his use of this racial epithet in the present case was

intended by him to hurt and anger Mr. Jacobs and to provoke a confrontation with him. " 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.' " *Chaplinsky*, 315 U.S. at 572, 86 L. Ed. at 1035 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10, 84 L. Ed. 1213, 1221 (1940)).

Respondent Spivey cites *Bond v. Floyd*, 385 U.S. 116, 17 L. Ed. 2d 235 (1966), for the proposition that governmental restriction on the ability of elected officials to express their views, however objectionable, stifles public debate and violates the First Amendment. We conclude that nothing in that opinion protects the use of racial invective by a public official against a member of the public in a bar. Spivey's use of the word "nigger" and his abusive conduct on the night in question did not in any way involve an expression of his viewpoint on any local or national policy. In fact, Spivey himself has repeatedly asserted since the incident in question that the use of the racial epithet "nigger" does not in any way reflect his views about race.

Mr. Spivey's abusive verbal attack on Mr. Jacobs which gave rise to the inquiry removing him from office is not protected speech under the First Amendment. Instead, when taken in context, his repeated references to Mr. Jacobs as a "nigger" presents a classic case of the use of "fighting words" tending to incite an immediate breach of the peace which are not protected by either the Constitution of the United States or the Constitution of North Carolina. We overrule this assignment of error.

By another assignment of error, Spivey contends that his conduct on the night in question was not so improper as to support his removal from office. Relying on several cases involving this Court's censure or removal of judges under N.C.G.S. § 7A-376, Spivey argues that a district attorney cannot be removed from office for directing racially abusive epithets against a member of the public while not acting in his official capacity. We do not agree.

[4] The statutory procedures for removal of district attorneys are entirely different from those providing for censure or removal of judges. Under N.C.G.S. § 7A-66, if the superior court judge finds that one of the enumerated grounds for removal of a district attorney exists, "he *shall* enter an order permanently removing the district attorney from office, and terminating his salary." N.C.G.S. § 7A-66 (emphasis added). Removal is the only sanction available and is mandatory. This Court's decisions as to whether to remove the judges

involved in those cases or to impose the lesser punishment of censure were based upon a statute entirely unrelated to district attorneys which authorized this Court, upon receipt of a recommendation by the Judicial Standards Commission, to exercise discretion in determining which, if either, punishment to impose. N.C.G.S. § 7A-376 (1995). Those cases are of little assistance in resolving the issue raised by this assignment of error.

[5] Having determined that N.C.G.S. § 7A-66 requires removal of a district attorney if one of the enumerated grounds exists, we focus our attention on whether Spivey's conduct could properly be found to be conduct prejudicial to the administration of justice which brings the office of district attorney into disrepute. We conclude that the evidence supports such a finding by the trial court. In his order removing Spivey from office, Judge Allsbrook found that "this incident has resulted in the loss of confidence, trust, and respect for this high office by a significant number of residents of the Fifth Prosecutorial District." It could hardly be argued otherwise. When considering the often unrestrained powers that the people have given our district attorneys in our Constitution and statutes, it is paramount that the office of district attorney be held in a manner that exemplifies fairness and equal justice under the law. There can be no question that the use of racial epithets against a member of the public by a district attorney in an apparent attempt to provoke an affray in public is conduct prejudicial to the administration of justice which brings the office into disrepute.

Spivey further complains that the hearing consisted of a stream of witnesses who, through personal anecdotes and opinions, described in detail the history of the mistreatment of African-Americans. We agree that the trial court allowed the testimony to range far beyond the matters directly at issue. However, it is crucial to note that this matter was heard without a jury. In this context, we cannot say the trial court erred in allowing the African-American citizens who testified to give anecdotal testimony relating to the pain and frustration they had felt as a result of long-past acts of racism. Where, as here, the trial judge acted as the finder of fact, it is presumed that he disregarded any inadmissible evidence that was admitted and based his judgment solely on the admissible evidence that was before him. *Bizzell v. Bizzell*, 247 N.C. 590, 604-06, 101 S.E.2d 668, 678-79, *cert. denied*, 358 U.S. 888, 3 L. Ed. 2d 115 (1958). The ultimate finding of the superior court, that Spivey's conduct giving rise to this inquiry was conduct prejudicial to the administration of justice

which brings the office into disrepute, is supported by the evidence and the other findings. The statute itself compels removal upon a finding of one of the enumerated grounds and leaves no discretion in this regard with the superior court. N.C.G.S. § 7A-66. Therefore, this assignment of error must be overruled.

By another assignment of error, respondent Spivey contends that under N.C.G.S. § 7A-66, the superior court had no authority to appoint a member of the Bar to act as counsel for purposes of the inquiry and to present the evidence concerning Spivey's conduct. He also contends in support of this assignment of error that the superior court had no authority to cause the State Bureau of Investigation (SBI) to investigate Spivey's conduct and that the SBI exceeded the investigative authority granted it by law in conducting its investigation in connection with this case.

[6] Spivey's argument against the superior court's appointment of independent counsel is based in part on his contention that this resulted in his being removed by a court which had itself directed and controlled the discovery and presentation of evidence against him. We conclude, however, that it is precisely because the trial judge should not both present the case against a district attorney and pass judgment on the case that the judge necessarily had the power to appoint independent counsel. A trial court has inherent power "to do all things that are reasonably necessary for the proper administration of justice." *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). This Court has always recognized that a proceeding resulting in the removal of an individual from public office must accord that individual due process of law. *E.g., State ex rel. Caldwell v. Wilson*, 121 N.C. 425, 28 S.E. 554 (1897) (action in the nature of *quo warranto* to try title to the office of Railroad Commissioner arising during the political turmoil in North Carolina during the late nineteenth century). Due process requires a neutral decision-maker. In order to comply with this due process requirement, it was necessary that the superior court appoint independent counsel to gather and present the evidence relating to Spivey's conduct. Therefore, it was within the proper inherent power of the superior court to appoint Mr. Fuller to present the evidence relating to the allegations against Spivey giving rise to the judicial inquiry concerning Spivey's conduct.

[7] Respondent Spivey also contends under this assignment of error that the superior court deprived him of a fair judicial inquiry by requesting and receiving the assistance of the SBI in investigating the

allegations concerning Spivey's conduct. Assuming *arguendo* that the superior court erred in seeking the assistance of the SBI and that the investigation here went beyond that agency's statutory authority, we fail to see how any such error could have unfairly prejudiced Spivey. It appears that the SBI simply located witnesses who were present at the bar on the night in question and took their statements, which were then turned over to Mr. Fuller. Any private citizen could have done the same. We see no reason to believe that the mere fact that the SBI performed this function was unfairly prejudicial to Spivey. Spivey has not contested the essential facts of the incident at issue. We conclude that the use of the SBI in this case was not prejudicial error. This assignment of error is overruled.

[8] By another assignment of error, respondent Spivey contends that the superior court committed prejudicial error by treating the proceeding before it as a civil action; by designating the affiants who commenced the inquiry as "petitioners"; and by allowing such "petitioners" to participate as parties, counsel, and witnesses. He further argues that the superior court committed prejudicial error by treating each of the affidavits complaining of his conduct, some of which were erroneously captioned as "petitions," as initiating a separate proceeding with the affiant as the "petitioner." We do not agree with these contentions.

It is true that a district attorney removal proceeding under N.C.G.S. § 7A-66 is an inquiry; it is neither a civil suit nor a criminal prosecution. It is commenced by the filing of one or more sworn affidavits with the clerk of superior court of the county where the district attorney resides. N.C.G.S. § 7A-66. The matter is then brought to the attention of the senior regular resident superior court judge who within thirty days shall act on the charges or refer them to another superior court judge to be acted upon. *Id.* If probable cause exists to believe that the charges are true and, if true, create grounds for removal, then a hearing will be ordered. *Id.* The hearing shall be held in not less than ten days nor more than thirty days after the district attorney has received written notice of the proceedings and a true copy of the charges. *Id.* At the hearing, the superior court judge shall hear evidence and make findings of fact and conclusions of law. *Id.* If he finds that grounds for removal exist, then he shall enter an order permanently removing the district attorney from office. *Id.*

Even though the procedural irregularities Spivey complains of occurred here, we see no reason to believe that he was thereby prej-

udiced. The hearing resolving the matters raised in this inquiry was conducted by one of our most able and experienced superior court judges. Fortunately, this was the first inquiry resulting in the removal of a district attorney ever to occur. Unfortunately, this left the judge to apply the procedures set forth in N.C.G.S. § 7A-66 for the first time and in the context of an emotionally charged setting. The record before us makes us confident that Judge Allsbrook, conducting this proceeding *without a jury*, understood the issues before him and the proper focus for the inquiry in this case and that he properly conducted this proceeding, which was the first of its kind to be held. Accordingly, we conclude that respondent Spivey was not prejudiced by any procedural irregularity, and we overrule this assignment of error.

Having considered each of respondent's assignments of error, we conclude that the order permanently removing District Attorney Spivey from office was free from prejudicial error. Therefore, we affirm that order.

AFFIRMED.

FULTON CORPORATION v. JANICE H. FAULKNER, SECRETARY OF REVENUE

No. 305A93-2

(Filed 10 February 1997)

1. Taxation § 92 (NCI4th)— intangibles tax—unconstitutional taxable percentage deduction—severance from statute

Where the United States Supreme Court held in *Fulton v. Faulkner*, — U.S. — (1996) that the intangibles tax imposed on corporate stock by former N.C.G.S. § 105-203 violated the Commerce Clause of the United States Constitution because of the taxable percentage deduction provided in that statute, the General Assembly provided a severability clause for the intangibles tax statute in N.C.G.S. § 105-215, and the offending portion of the intangibles tax statute and other parts of the statute were not so interrelated or mutually dependent that the tax could not

be imposed without reference to the offending part, the unconstitutional taxable percentage deduction will be severed from the statute and the remainder of the statute will be enforced.

Am Jur 2d, State and Local Taxation §§ 197, 265.

2. Taxation § 92 (NCI4th)— intangibles tax—severance of unconstitutional provision—retroactive application

The rule of this case that the taxable percentage deduction for corporate stock in the intangibles tax statute violates the Commerce Clause of the United States Constitution and that this unconstitutional portion of the statute will be severed and the remainder of the statute enforced is to be applied retroactively.

Am Jur 2d, State and Local Taxation §§ 197, 265.

Justice ORR dissenting.

Justices FRYE and LAKE join in this dissenting opinion.

On remand from the Supreme Court of the United States. Heard in the Supreme Court 9 September 1996.

In this action, the plaintiff has challenged the intangibles tax formerly imposed by N.C.G.S. § 105-203 on the ground it violates the Commerce Clause of the Constitution of the United States. N.C.G.S. § 105-203 provided for an annual tax of $0.25 on each $100.00 of the fair market value of all shares of stock on 31 December of each year. The section provided for a reduction of this tax in proportion to the issuing company's income taxed in North Carolina. It is this reduction which the plaintiff says violates the Commerce Clause.

The superior court allowed a motion for summary judgment by the defendant, upholding the tax. The Court of Appeals reversed. *Fulton Corp. v. Justus*, 110 N.C. App. 493, 430 S.E.2d 494 (1993). It did not order a refund, however, but severed the offending part of N.C.G.S. § 105-203 and ordered that the intangibles tax be paid without any reduction for income taxes paid to the State.

This Court reversed the Court of Appeals. *Fulton Corp. v. Justus*, 338 N.C. 472, 450 S.E.2d 728 (1994). We held that the reduction in the intangibles tax did not offend the Commerce Clause. On 18 April 1995, the General Assembly repealed the intangibles tax in its entirety effective 1 January 1995. Act of April 18, 1995, ch. 41, sec. 1(b), 1995 N.C. Sess. Laws 84. The legislation also provided that the repeal

> does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal.

Id. sec. 11, 1995 N.C. Sess. Laws at 88.

The Supreme Court of the United States reversed this Court. *Fulton Corp. v. Faulkner*, —— U.S. ——, 133 L. Ed. 2d 796 (1996). It held that the reduction violated the Commerce Clause and remanded the case to this Court to fashion a remedy.

We ordered that the parties "brief the question of why, in light of the decision of the Supreme Court of the United States in this case, this Court should not affirm the decision of the North Carolina Court of Appeals."

Womble Carlyle Sandridge & Rice, PLLC, by Jasper L. Cummings, Jr., for plaintiff-appellee.

Michael F. Easley, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General, Edwin M. Speas, Jr., Senior Deputy Attorney General, Thomas F. Moffitt, Special Deputy Attorney General, and Marilyn R. Mudge, Assistant Attorney General, for defendant-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by G. Eugene Boyce, of counsel, amicus curiae.

WEBB, Justice.

[1] This case brings to the Court the question of the remedy to be applied after a portion of the intangibles tax statute has been declared unconstitutional. The Court of Appeals held that the part of the statute which was unconstitutional should be severed and that the balance of the statute should be enforced. This would leave the intangibles tax to be enforced without any reduction for income taxes paid to this State. We believe the Court of Appeals was correct in this holding.

In determining whether an unconstitutional part of a statute should be severed and the rest of the statute enforced, we look first at the intention of the General Assembly. If the legislature intended that the constitutional part of the statute be enforced after the other

part has been declared unconstitutional, and if the separate parts of the statute are not so interrelated and mutually dependent that one part cannot be enforced without reference to another, the offending part must be severed and the rest of the statute enforced. *Flippin v. Jarrell*, 301 N.C. 108, 117, 270 S.E.2d 482, 488 (1980); *Constantian v. Anson County*, 244 N.C. 221, 228, 93 S.E.2d 163, 168 (1956).

The General Assembly has stated its intention. N.C.G.S. § 105-215 provided in part:

> If any clause, sentence, paragraph, or part of this Article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Article or schedule, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

N.C.G.S. § 105-215 (1992) (repealed 1995). We believe this section shows clearly that the General Assembly intended that if any part of the statute providing for an intangibles tax was declared unconstitutional, that part should be severed from the statute, and the balance of the statute should be enforced.

In this case, the offending portion of the intangibles tax statute and the other parts of the statute were not so interrelated or mutually dependent that the imposition of the tax could not be done without reference to the offending part. The valid part is complete in itself and capable of enforcement.

The plaintiff argues that the United States Supreme Court in this case declared the entire intangibles tax unconstitutional. We do not agree with this interpretation. The Supreme Court noted that the Court of Appeals had addressed the issue of severability and decided that the clause required severance of the taxable percentage deduction. *Fulton v. Faulkner*, —— U.S. at —— n.12, 133 L. Ed. 2d at 815 n.12. The Court gave no indication that applying the severability clause in that manner would contravene its holding or that a tax on corporate stock is per se unconstitutional. To the contrary, the Court's language and reasoning revealed the intangibles tax violated the Commerce Clause because of the discriminatory portion—the taxable percentage deduction. It gave no reason to believe that absent the discriminatory deduction, the tax would violate the Commerce Clause.

The defendant asserts and the plaintiff agrees that it was the intention of the General Assembly that if the taxable percentage reduction were to be held unconstitutional, it should not be severed from N.C.G.S. § 105-203, and the whole section must fail. They concede that N.C.G.S. § 105-215 provides for the severance of any part of the statute which is declared unconstitutional. They say, relying on *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 259-60, 250 S.E.2d 603, 609 (1979), *judgment vacated on other grounds*, 445 U.S. 947, 63 L. Ed. 2d 782 (1980), and *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 421-22, 276 S.E.2d 422, 434-35 (1981), that the "presence of a severability clause is not conclusive but provides some guidance to the courts as to legislative intent." They say we must look at all relevant parts of the statute to discern legislative intent.

The plaintiff and defendant contend that the General Assembly, since the inception of the intangibles tax, has never intended to tax all stocks and that by severing the unconstitutional part of N.C.G.S. § 105-203, the Court of Appeals has broadened the tax contrary to the legislative will. They argue that the taxable percentage deduction has always been an essential element of the tax and an expression of the legislative intent not to tax all shares of corporate stock. They argue that we should hold all of N.C.G.S. § 105-203 unconstitutional.

We do not agree with the parties' interpretation of *Andrews* and *Sheffield*. *Andrews* involved an action to abate a nuisance. We held that assuming one of the remedies provided in the statute was unconstitutional, it could be severed from the statute and the other remedies enforced. We said that severability depended on the will of the General Assembly. *Andrews*, 296 N.C. at 259-60, 250 S.E.2d at 608-09. We did not say how that will was to be discovered, but simply referred to the portion of the statute which provided for severability. *Sheffield* dealt with disclosures required by the North Carolina Tender Offer Disclosure Act, N.C.G.S. ch. 78B (1977). In that case we held that the Act did not apply to purchases of stock in the open market. The plaintiff argued that because of a severability clause in the statute, the disclosure requirement nevertheless applied. It contended that partial application of the statute was mandated by the severability clause. We held that this was not the intention of the General Assembly. We do not believe *Sheffield* or *Andrews* is authority for the proposition that a severability clause is not conclusive as to the intention of the General Assembly.

Even assuming *arguendo* that the parties are correct, looking beyond the severability clause and at the entire act to determine the

will of the General Assembly does not help the plaintiff. The General Assembly has said by the severability clause that the unconstitutional part of the statute should be severed. The parties have made good arguments as to why it should not be severed, but they do not overcome the plain meaning of the statute. We affirm that part of the opinion of the Court of Appeals which holds that the unconstitutional part of N.C.G.S. § 105-203 be severed. *Fulton Corp. v. Justus*, 110 N.C. App. at 504, 430 S.E.2d at 501.

[2] We reverse that part of the opinion of the Court of Appeals which holds that the rule of this case should not be applied retroactively. *Id.* at 504-05, 430 S.E.2d at 501-02. In reaching this result, the Court of Appeals relied on our opinion in *Swanson v. North Carolina*, 329 N.C. 576, 407 S.E.2d 791, *on reh'g*, 330 N.C. 390, 410 S.E.2d 490 (1991). On 18 June 1993, three days after the Court of Appeals decided this case, the United States Supreme Court handed down *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 125 L. Ed. 2d 74 (1993). Ten days later, the Supreme Court issued an order vacating our opinion in *Swanson* in light of *Harper*. *Swanson v. North Carolina*, 509 U.S. 916, 125 L. Ed. 2d 713 (1993). The United States Supreme Court held in *Harper* that its application of a rule of federal law requires every court to give retroactive effect to that decision. We are thus required by *Harper* to apply the law retroactively in this case. Whether to enforce the tax as to all shareholders is within the province of the General Assembly.

The General Assembly may forgive this tax if it so chooses. We do not have the authority to do so.

We affirm that part of the decision of the Court of Appeals which holds that the unconstitutional part of N.C.G.S. § 105-203 must be severed and the balance of the section enforced. We reverse that part of the decision which holds that the rule of this case should not be enforced retroactively.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Justice ORR dissenting.

The majority applies a plain-meaning analysis to the statute in question and concludes that the taxable percentage deduction contained in N.C.G.S. § 105-203 should be severed and the remainder of the statute upheld as applied. The opinion states that "[t]he General Assembly has said by the severability clause that the unconstitutional

part of the statute should be severed." However, this Court has rejected such a plain-meaning analysis in determining whether an unconstitutional provision may be severed and the remainder of the statute upheld. In *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 250 S.E.2d 603 (1979), *judgment vacated on other grounds*, 445 U.S. 947, 63 L. Ed. 2d 782 (1980), this Court prescribed the utilization of a two-part test for deciding the issue of severability:

> To determine whether the portions are in fact divisible, the courts first see if the portions remaining are capable of being enforced on their own. They also look to legislative intent, particularly to determine whether that body would have enacted the valid provisions if the invalid ones were omitted.

Id. at 259, 250 S.E.2d at 608. Because I believe that the majority's holding in this case is contrary to the intent of the North Carolina legislature, I respectfully dissent.

In *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973), this Court also addressed the issue of severability and enunciated the following principle:

> "If the objectionable parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional. If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid."

Id. at 442, 194 S.E.2d at 27 (quoting 16 Am. Jur. 2d *Constitutional Law* § 186 (1964)). In support of our position in the present case, the Court in *Waddell* went on to note that " '[w]hen exceptions, exemptions, or provisos in a statute are found to be invalid, the entire act may be void on the theory that by striking out the invalid exception the act has been widened in its scope and therefore cannot properly represent the legislative intent.' " *Id.* at 443, 194 S.E.2d at 27 (quoting J.G. Sutherland, *Statutes and Statutory Construction* § 2412 (Frank E. Horack, Jr., ed., 3d ed. 1943)).

In this case, as the remaining intangibles tax on stock is clearly capable of standing on its own, it is an examination of the legislative intent which compels the conclusion that the taxable percentage deduction is not severable. Although the presence of a severability clause provides some guidance as to legislative intent, *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. at 260, 250 S.E.2d at 609, it is not conclusive. In *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981), this Court discussed the presence of a severability clause and commented that

> [p]laintiffs' reliance on the severability clause is misplaced. While the severability clause obviously protects other provisions of the Act from invalidity due to a finding that one or more provisions are invalid, a severability [clause] is relevant to a decision only when the validity of a *particular* provision of the Act is at issue. Here, the inapplicable provisions of G.S. 78B-3 remain relevant to our consideration *in determining legislative intent* with respect to the application of the Act as a whole to open market purchases. Clearly in interpreting the legislative intent, we cannot ignore all the provisions of the Act simply because it contains a severability clause common to most statutes enacted by our Legislature.

Id. at 421, 276 S.E.2d at 434.

In determining that the severability clause could not be applied in *Sheffield*, the Court applied the following well-established canon of statutory construction:

> "In order to discover and give effect to the legislative intent we must consider the act as a whole, having due regard to each of its expressed provisions; for there is no presumption that any provision is useless or redundant. That the act consists of several sections is altogether immaterial on the question of its unity. 'The construction of a statute can ordinarily be in no wise affected by the fact that it is subdivided into sections or titles. A statute [is] passed as a whole and not in parts or sections and is animated by one general purpose or intent. Consequently the several parts or sections of an act are to be construed in connection with every other part or section and all are to be considered as parts of a connected whole and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers.' "

Id. at 421-22, 276 S.E.2d at 434 (quoting *Jones v. Board of Educ.*, 185 N.C. 303, 307, 117 S.E. 37, 39 (1923) (citation omitted)). The Court

concluded that "[w]e will not apply the severability clause to vary and to contradict the express terms of a statute, for we cannot believe the Legislature intended such a result." *Id.* at 422, 276 S.E.2d at 434.

In the present case, the taxable percentage deduction is contained in the provision of the intangibles tax which applies to stocks. N.C.G.S. § 105-203 provides in pertinent part:

> All shares of stock . . . owned by residents of this State or having a business, commercial, or taxable situs in this State on December 31 of each year, with the exception herein provided, 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 . . . .
>
> (2) In the case of a taxpayer that is not a corporation, the proportion of the dividends upon the stock that would be deductible by the taxpayer, if the taxpayer were a corporation, in computing its income tax liability under the provisions of G.S. 105-130.7(1), (2), (3), (3a), and (5) . . . .

N.C.G.S. § 105-203 (1992) (repealed 1995). In *Fulton Corp. v. Justus*, 338 N.C. 472, 450 S.E.2d 728 (1994), this Court explained the procedure involved in calculating the intangibles tax on stock as follows:

> 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%.

Id. at 475, 450 S.E.2d at 730. For a more detailed discussion of the application of the intangibles tax on stock, see *Fulton v. Justus*, 338 N.C. 472, 450 S.E.2d 728. Because of the process involved in calculating the intangibles tax on stock, the elimination of the taxable percentage deduction would subject all stock in North Carolina companies to a full tax burden under N.C.G.S. § 105-203.

Further, because plaintiff in this case is a corporate taxpayer, the majority addresses only N.C.G.S. § 105-203(1), the taxable percentage deduction for stock owned by corporations. However, as the Secretary of Revenue's brief notes, the constitutional infirmity in N.C.G.S. § 105-203(1) is also present in N.C.G.S. § 105-203(2), the taxable percentage deduction for stock owned by individuals. Thus, if the taxable percentage deduction which applies to corporations must be severed, it follows that the taxable percentage deduction which applies to stock owned by individuals must also be severed. Under the logic of the majority's decision, excising the discriminatory deduction would eliminate the only unconstitutional feature of N.C.G.S. § 105-203. This would result in the remainder of N.C.G.S. § 105-203 becoming a constitutional tax on all shares of stock owned by corporations and individual taxpayers of North Carolina. Thus, the tax would apply not only to stock in publicly traded companies from around the world, but also to every small, incorporated business in our state. The full tax would also apply to corporate shareholders and individual stockholders. To contend that the legislature would have "passed the residue independently" is to defy the practical and political reality of the impact of such a tax.

When the General Assembly enacted the intangibles tax on stock in 1937, the shares of all corporations that paid taxes in North Carolina were excluded. Act of Jan. 6, 1937, ch. 127, sec. 706, 1937 N.C. Public Laws 170, 331 (an act to raise revenue). It was in 1939 that the General Assembly narrowed the exclusion to the proportion of tax the corporation paid in North Carolina. Act of Mar. 24, 1939, ch. 158, sec. 705, 1939 N.C. Public Laws 176, 359 (an act to raise revenue). In the portion of N.C.G.S. § 105-203 that levies the tax, the 1939 General Assembly stated that "[a]ll shares of stock . . . owned by residents of this State . . . , *with the exceptions herein provided*, shall be subject to an annual tax." *Id.* (emphasis added). The remainder of the statute then listed the exceptions, including the taxable percentage

deduction on all shares of stock owned by corporations and individual taxpayers in North Carolina. Thus, the General Assembly has always manifested its intent that the scope of the intangibles tax on shares of stock be narrowed by these exceptions.

Severing the taxable percentage deduction as the majority opinion has done contravenes the intent of the legislature because it expands the scope of N.C.G.S. § 105-203. By severing the deduction, not only publicly traded shares of stock but also shares of stock in closely held corporations which have never before been subject to the intangibles tax on stock are now subject to such taxation.

Further evidence that the majority's decision contravenes the intent of the legislature can be found in the repeal of the intangibles tax in its entirety—including N.C.G.S. § 105-203—which became effective on 1 January 1995. Act of Jan. 25, 1995, ch. 41, sec. 1(b), 1995 N.C. Sess. Laws 59, 60 (an act to repeal the intangibles tax and to reimburse local governments for their resulting revenue loss). In the Legislative Research Commission's Report to the General Assembly, the Commission expressed three reasons for repealing the intangibles tax:

> First, many consider it an unfair tax because, unlike tangible property, intangible property does not require local government services and thus should not be subject to tax. Second, many also believe the tax has a negative effect on economic development, causing corporate executives, retirees, and wealthy individuals to leave the State or to decide against moving into the State. *Third, if the United States Supreme Court overturns the North Carolina Supreme Court's decision and agrees with the court of appeals that the taxable percentage deduction is invalid, the result would be a tax increase for many taxpayers, particularly individuals who own small, in-State businesses.*

Legislative Research Comm'n, Revenue Laws, Report to the 1995 Gen. Assembly of N.C., at 97 (1995) (emphasis added). Because of the repeal of North Carolina's intangibles tax, N.C.G.S. § 105-203, the legislature also amended N.C.G.S. § 105-275, which classifies property that is excluded from the tax base and includes, *inter alia*, "[s]hares of stock, including shares and units of ownership of mutual funds, investment trusts, and investment funds." N.C.G.S. § 105-275(31c) (1995). The explicit exemption of stock from taxation in the General Statutes clearly illustrates the intent of the legislature.

Thus, although a severability clause is contained in the statute, that alone does not determine that the constitutional portion should remain. Clearly, the legislature did not intend that the scope of N.C.G.S. § 105-203 be broadened. As this Court has recognized, invalidation of some exceptions or exemptions may require an entire statute to fail if severing the invalid provisions would widen the scope of the statute beyond the legislature's intended coverage. *State v. Waddell*, 282 N.C. at 443, 194 S.E.2d at 27. This is exactly what severing the taxable percentage deduction and upholding the residue of the tax would do in the present case. Therefore, I conclude that the majority is in error and would agree with both the Secretary of Revenue and the corporate plaintiff that the entire tax must fail and that plaintiff is therefore entitled to a refund.

Justices FRYE and LAKE join in this dissenting opinion.

BRUCE T. CUNNINGHAM, JR. v. JANET F. CUNNINGHAM

No. 147A96

(Filed 10 February 1997)

1. Divorce and Separation § 291 (NCI4th)— motion to modify alimony—status as dependent spouse not reconsidered

The defendant's status as a dependent spouse is not properly reconsidered upon a motion by plaintiff to modify or terminate an alimony order based upon a separation agreement incorporated into the parties' divorce decree. However, it is appropriate for the trial court to consider whether the dependent spouse's financial need, that is, dependency, as it relates to the factors listed in N.C.G.S. § 50-16.5 has changed. Although the trial court in this case concluded that "[d]efendant is a dependent spouse," the court's findings of fact indicate that the court properly considered factors listed in N.C.G.S. § 50-16.5 as they related to the financial needs of defendant and the ability of plaintiff to pay and that the court did not reconsider defendant's status as the dependent spouse and plaintiff's status as the supporting spouse.

Am Jur 2d, Divorce and Separation §§ 710-712, 715.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance. 18 ALR2d 10.

2. Divorce and Separation § 292 (NCI4th)— alimony order—automatic adjustment for income fluctuations—income change not change of circumstances

Where an alimony order based upon a separation agreement incorporated into a divorce decree included a provision that automatically adjusted the amount of the alimony payments to account for the supporting spouse's income fluctuations by requiring plaintiff husband to pay defendant wife "one half of his monthly salary after first deducting social security," the fact that plaintiff's income has changed since the time of the original agreement is not a sufficient basis for determining that a substantial change of circumstances exists to warrant a modification of the alimony order absent a showing that the change in income hinders plaintiff's ability to meet his obligation to pay alimony.

Am Jur 2d, Divorce and Separation §§ 710-713.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance. 18 ALR2d 10.

Validity and enforceability of escalation clause in divorce decree relating to alimony and child support. 19 ALR4th 830.

Consideration of obligated spouse's earnings from overtime or "second job" held in addition to regular full-time employment in fixing alimony or child support awards. 17 ALR5th 143.

3. Divorce and Separation § 298 (NCI4th)— increase in part-time employment earnings—alimony modification not warranted

An increase in defendant wife's income from part-time work from $2,400 per year at the time of the parties' separation to $7,000 per year at the time of an alimony modification hearing was not alone sufficient to warrant a modification of the alimony order.

Am Jur 2d, Divorce and Separation §§ 710-712, 715.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance. 18 ALR2d 10.

4. Divorce and Separation § 297 (NCI4th)— alimony modification—effect of increase in wife's investments—remand of change of circumstances issue

The change of circumstances issue in an alimony modification proceeding is remanded for consideration by the trial court where the trial court's order contained findings of fact regarding the increase in the value of defendant wife's investment portfolio since the entry of the original alimony order and the amount of taxable income produced by these investments but it is unclear from the findings whether the increase in taxable income generated by defendant's investments is less than, equal to, or more than necessary to support herself, while maintaining her accustomed standard of living, without depleting her estate.

Am Jur 2d, Divorce and Separation §§ 710-712, 716.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance. 18 ALR2d 10.

Justice ORR concurring.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 121 N.C. App. 771, 468 S.E.2d 466 (1996), reversing an order entered by Grant, J., on 25 August 1994 in District Court, Moore County, and remanding to the trial court. Heard in the Supreme Court 15 November 1996.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for plaintiff-appellee.

Vosburg & Fullenwider, by Ann Marie Vosburg, for defendant-appellant.

FRYE, Justice.

There are two issues on this appeal. The first is whether the trial court improperly reconsidered defendant's status as the dependent spouse at the alimony modification hearing, and the second is whether there has been a change of circumstances warranting a mod-

ification of the alimony order in this case. We answer the first issue in the negative and we remand the second issue for further proceedings consistent with this opinion.

The following facts and circumstances are pertinent to this appeal. Bruce T. Cunningham, Jr. (plaintiff) and Janet F. Cunningham (defendant) were married in 1972 and lived together as husband and wife until their separation on 28 March 1988. In 1973, upon his graduation from law school, plaintiff joined the law firm of defendant's father and remained with that firm until 1992. For the years immediately prior to the parties' separation, plaintiff's gross income ranged from approximately $100,000 to $125,000 per year. Defendant was not employed outside the home on a full-time basis at any time during the course of the marriage.

At the time of the parties' 1 January 1989 separation agreement, plaintiff and defendant had accumulated a marital estate of approximately $450,000. The separation agreement effectuated an approximately equal division of the estate, with defendant receiving the marital home, valued at $140,000 with a $30,000 mortgage debt, and $115,000 in investments from the parties' investment portfolio. Plaintiff received approximately $225,000 in investments from the investment portfolio. The separation agreement also provided that plaintiff would pay alimony to defendant in "the sum of one half [plaintiff's] monthly salary after first deducting social security," that plaintiff would pay one-half of any bonuses received from employment after deducting social security, that the alimony was separate from the property settlement, and that the amount of the alimony payment could be modified upon a substantial change of circumstances. On 26 June 1989, the separation agreement was incorporated by reference into the divorce decree.

In 1992, plaintiff's former father-in-law reduced plaintiff's salary, changing it from approximately all of the actual gross receipts plaintiff produced to one-half of the actual gross receipts plaintiff produced for the firm. Plaintiff left the firm shortly thereafter and began practice with a different law firm, earning a salary of approximately $42,000 per year. As of 31 December 1993, defendant's investment portfolio was valued at approximately $335,000, producing taxable income to her of more than $30,000 in 1993. In addition, defendant's home debt had decreased to $2,000, and her income earned from part-time employment was $7,000, compared to $2,400 during the marriage.

On 16 July 1992, plaintiff's motion to modify the payment of alimony was denied because a material change of circumstances was not found. Plaintiff did not appeal. On 17 September 1993, plaintiff filed a second motion to modify or terminate his alimony obligation. After a hearing, the trial court made findings of fact and the following conclusions of law:

> 1. That the Court concludes as a matter of law that the Plaintiff has failed to meet his burden of establishing [that] a material change of circumstances has occurred from the time of the entry of the last order of this Court.
>
> 2. That the Court concludes as a matter of law that the Defendant is a dependent spouse in accordance with G.S. 50-16.1(3).
>
> 3. That the Court concludes as a matter of law that the Plaintiff continues to have sufficient estate and earnings to meet his obligation to pay permanent alimony.

On 25 August 1994, the trial court denied plaintiff's motion to modify, and plaintiff appealed to the Court of Appeals. A majority of the Court of Appeals' panel reversed and remanded. Defendant appeals to this Court based on the dissenting opinion.

At the outset, we note that an alimony order originates in one of two ways: (1) an original court order, pursuant to N.C.G.S. §§ 50-16.1 *et seq.*[1], or (2) by agreement of the parties. A court order awarding alimony requires that the petitioner be found to be a "dependent spouse" as defined in N.C.G.S. § 50-16.1(3) (1987) (amended 1995). This determination is not always undertaken by the court when alimony is part of a private agreement between the parties and is then incorporated into a court order such as a divorce decree. However, once an agreement between the parties is incorporated into a court order, the agreement is treated as a court order for purposes of modification. *See Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983).

In the instant case, there is an existing order for alimony based upon a separation agreement incorporated into the parties' divorce decree. The modification of an existing order of alimony is governed by N.C.G.S. § 50-16.9 which provides in pertinent part:

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1. We note that the alimony statutes, N.C.G.S. §§ 50-16.1 *et seq.*, have been amended; however, the amendments apply to actions filed on or after October 1, 1995. Thus, the amendments do not apply to the instant case.

> (a) An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

N.C.G.S. § 50-16.9(a) (1987) (amended 1995).

[1] The first issue before us on this appeal is whether the trial court improperly reconsidered defendant's status as the "dependent spouse" upon plaintiff's motion to modify or terminate the order of alimony. We conclude that defendant's status as the dependent spouse is not properly reconsidered upon a motion to modify and we further conclude that it was not reconsidered in the instant case.

In *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982), we stated: "Plaintiff's status as the supporting spouse, defendant's status as the dependent spouse and her entitlement to alimony were permanently adjudicated by the original [alimony] order." What the Court meant by this statement was that the trial court, on a modification hearing, does not retry the issues tried at the original hearing. *See id.* What *is* properly considered at a modification hearing is whether there has been a material change in the parties' circumstances which justifies a modification or termination of the alimony order. *See* N.C.G.S. § 50-16.9.

"To determine whether a change of circumstances under [N.C.]G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under [N.C.]G.S. 50-16.5." *Rowe*, 305 N.C. at 187, 287 S.E.2d at 846. The reference to these circumstances or factors at the modification hearing is not to redetermine the statuses of dependent spouse and supporting spouse or to determine whether the original determination was proper. Rather, the reference to the circumstances or factors used in the original determination is for the purpose of comparing the present circumstances with the circumstances as they existed at the time of the original determination in order to ascertain whether a material change of circumstances has occurred.

N.C.G.S. § 50-16.5, entitled "Determination of amount of alimony," provides in pertinent part:

> (a) Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings,

earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case.

N.C.G.S. § 50-16.5(a) (1987) (amended 1995). Where the original alimony order is pursuant to N.C.G.S. §§ 50-16.1 *et seq.*, the trial judge will usually have made findings of fact and conclusions of law in reference to the circumstances or factors set out in N.C.G.S. § 50-16.5(a). Where, on the other hand, the alimony order originates from a private agreement between the parties, there may be few, if any, findings of fact as to these circumstances or factors set out in the court decree awarding alimony. In the latter case, determining whether there has been a material change in the parties' circumstances sufficient to justify a modification of the alimony order may require the trial court to make findings of fact as to what the original circumstances or factors were in addition to what the current circumstances or factors are.

Upon a showing of changed circumstances, the trial court must consider the current circumstances with regard to the factors listed in N.C.G.S. § 50-16.5 and determine whether the original alimony order should be modified. "As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe*, 305 N.C. at 187, 287 S.E.2d at 846. The power of the court to modify an alimony order is not power to grant a new trial or to retry the issues of the original hearing, but only to adapt the decree to some distinct and definite change in the financial circumstances of the parties. *See generally* 2 Robert E. Lee, *North Carolina Family Law* § 152 (4th ed. 1979); 2A Nelson, *Divorce and Annulment* § 17.07 (2d ed. rev. 1961).

In *Rowe*, the trial court had concluded that there had not been a substantial change of circumstances sufficient to warrant a modification of the original alimony order. *Rowe*, 305 N.C. at 182, 287 S.E.2d at 843. On appeal, this Court affirmed the Court of Appeals' decision that there had been a change of circumstances sufficient to warrant modification of the order. *Id.* at 187, 287 S.E.2d at 846. The trial court had made findings of fact on the dependent spouse's financial circumstances, including her income, expenses, and estate; and this Court held that, under those facts, there had been a change of circumstances as a matter of law and that a modification of the alimony order was warranted. *Id.* at 188, 287 S.E.2d 846-47. In so holding, this Court noted that "[w]e emphasize, however, that defendant [depend-

ent spouse] can rely on the original finding of *entitlement* in the consent order." *Id.* at 188, 287 S.E.2d at 847 (emphasis added). We interpret this to mean that the defendant's status as the dependent spouse would not be at issue on remand or in future modification hearings; at issue would be only whether any change of circumstances justified a modification or termination of the alimony order.

In *Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986), this Court also addressed the issue of whether a substantial change of circumstances had occurred justifying the modification or termination of the alimony order. This Court concluded that the trial court's findings of fact supported the trial court's conclusions that a material change of circumstances had occurred and that "plaintiff is no longer a dependent spouse," which in turn supported the order terminating the alimony obligation. *Id.* at 460-61, 342 S.E.2d at 867. This Court then noted that "[o]nly a 'dependent spouse' is entitled to alimony." *Id.* at 461, 342 S.E.2d at 867.

The issue before this Court in *Marks* was the effect the alleged change of circumstances had on the dependent spouse's financial needs and whether the change warranted a modification or termination of the alimony order. This Court held that the trial court had not erred in terminating the supporting spouse's obligation to pay alimony because the change in circumstances at issue had eliminated the dependent spouse's financial need. *See id.* at 460-61, 342 S.E.2d at 866-67. This Court simply quoted the conclusion of the trial court, that "plaintiff is no longer a dependent spouse," when in fact it was the plaintiff's financial need, or dependency, as it related to the factors in N.C.G.S. § 50-16.5, not her status as a dependent spouse as defined in N.C.G.S. § 50-16.1(3), that was at issue. Therefore, while the term "dependent spouse" was used in *Marks*, we do not interpret *Marks* as establishing that the status of "dependent spouse" may properly be redetermined at a modification hearing, especially in light of this Court's holding in *Rowe* that defendant's status as dependent spouse was "permanently adjudicated."

Accordingly, on a motion to modify or terminate an order of alimony, the focus of the trial court is not on the question of status or entitlement, but rather on whether the amount of alimony as ordered should be modified or terminated. It is appropriate for the trial court to consider whether the dependent spouse's financial need, that is, dependency, as it relates to the factors in N.C.G.S. § 50-16.5 has changed.

In the instant case, the trial court stated in its conclusions of law that defendant "is a dependent spouse." The findings of fact indicate that the court properly considered factors listed in N.C.G.S. § 50-16.5 as they related to the financial needs of defendant and the ability of plaintiff to pay. *See Rowe*, 305 N.C. at 187, 287 S.E.2d at 846. It is clear from these findings of fact that the trial court did *not* revisit the issues agreed upon by the parties in their original agreement, that is, defendant's status as the dependent spouse and plaintiff's status as the supporting spouse.

Therefore, if the trial court's findings of fact on the N.C.G.S. § 50-16.5 factors are sufficient to support the conclusion that plaintiff "failed to meet his burden of establishing [that] a material change of circumstances has occurred," it was not improper for the court to state as a conclusory matter, as in *Marks*, that "Defendant is [or continues to be] a dependent spouse" and to deny plaintiff's motion to modify. Accordingly, we conclude that the trial court did not improperly reconsider defendant's status as the dependent spouse, and we reverse that part of the Court of Appeals' opinion that holds otherwise.

We then come to the second and central issue of this appeal—whether the trial court's findings of fact are sufficient to support its conclusion that a material change of circumstances was not shown in this case. The majority of the panel of the Court of Appeals held that there had been a substantial change in circumstances based on the decrease in plaintiff's income and the increase in defendant's assets and income. The dissent concluded that no change of circumstances had occurred as a matter of law, especially given that the parties' agreement incorporated an automatic adjustment provision for the alimony payments. We conclude that the trial court's findings of fact are insufficient for us to determine as a matter of law whether there has been a change of circumstances sufficient to require a modification or termination of the alimony order.

[2] The parties' agreement, incorporated in the divorce decree, included a provision that automatically adjusted the amount of alimony payments to account for the supporting spouse's income fluctuations. The agreement provided that "Husband agrees to pay Wife as alimony for her sole use and benefit the sum of one half his monthly salary after first deducting social security." This provision indicates that changes in the supporting spouse's income were foreseeable and that the parties agreed to the mechanism to account for these changes in income to prevent repeated litigation on this issue.

Therefore, although the alimony agreement can be modified upon a showing of changed circumstances, a sufficient change in circumstances would not ordinarily be a change that was contemplated by the original agreement and for which a provision was made therein for appropriate adjustment. *Britt v. Britt*, 49 N.C. App. 463, 473, 271 S.E.2d 921, 927 (1980). Accordingly, due to the existence of the automatic adjustment provision, the fact that plaintiff's income has changed since the time of the original agreement is not a sufficient basis for determining that a substantial change of circumstances exists to warrant a modification of the alimony order absent a showing that the change in income hinders his ability to meet his obligation to pay alimony.

As noted above, the circumstances to be considered by the trial court upon a motion to modify or terminate alimony are those listed in N.C.G.S. § 50-16.5, that is, the parties' estates, earnings, earning capacity, condition, accustomed standard of living and other facts of the particular case. In the instant case, the trial court heard evidence and made findings of fact related to these factors. Among these was a finding that "the standard of living of the Defendant and the monthly needs of the Defendant have remained substantially the same." A component of the accustomed standard of living that the parties maintained during their marriage was a frugal lifestyle with substantial saving and investing. Defendant has continued this lifestyle since the divorce, living frugally and saving and investing substantial portions of the alimony payments. As a result, defendant's estate, primarily represented by her investment portfolio, has increased substantially.

[3] As to defendant's income, the increase in her income from part-time work alone is not a sufficient change in circumstances to warrant a modification. Throughout the marriage and since that time, defendant has suffered from an anxiety condition that interferes with her obtaining full-time employment. At the time of the parties' separation, defendant was earning about $2,400 a year from part-time work. At the time of the modification hearing, her income had increased to approximately $7,000. While this is an increase in income, this alone is not sufficient to warrant a modification of the alimony order.

In addition to her income from part-time employment, defendant also receives taxable income from her investments. Defendant contends that the parties did not use the capital gain or income from their investments to meet their reasonable monthly needs during the

marriage. Thus, defendant contends, the capital gains from her investments should not be the basis of a finding of changed circumstances since she has been maintaining the standard of living established during the marriage, which includes reinvesting the capital gains.

We have held that an increase in the value of the dependent spouse's property after the entry of the alimony decree is an important consideration in determining whether there has been a change in circumstances. *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966). We have also held that "the trial court['s] consideration of the 'estates' of the parties is intended primarily for the purpose of providing it with another guide in evaluating the earnings and earning capacity of the parties, and not for the purpose of determining capability of self-support through estate depletion." *Williams v. Williams*, 299 N.C. 174, 184, 261 S.E.2d 849, 856 (1980). Nevertheless, as we said in *Sayland*, the purpose of alimony is not merely to increase the dependent spouse's estate to pass on to her heirs. *Sayland*, 267 N.C. at 384, 148 S.E.2d at 222.

[4] In the instant case, the trial court's order contains findings of fact regarding the increase in the value of defendant's investment portfolio since the entry of the original alimony decree and the amount of taxable income produced by these investments. However, it is unclear from the findings of fact whether the increase in taxable income generated by defendant's investments is less than, equal to, or more than necessary to support herself, while maintaining her accustomed standard of living, without depleting her estate. We therefore remand the change of circumstances issue for consideration by the trial court in light of the principles set forth in this opinion. On remand, the trial court may, in its discretion, allow the parties to offer additional evidence.

Accordingly, the decision of the Court of Appeals is reversed in part and the case remanded to that court for further remand to the District Court, Moore County, for further proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED.

Justice ORR concurring.

While I agree with the majority's ultimate conclusions, I find the opinion clouding even further the apparent distinction between

"dependent spouse" and "dependency." The majority's reliance on *Rowe v. Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982), concludes "that defendant's status as the dependent spouse is not properly reconsidered upon a motion to modify . . . ." As such, the opinion seems to say that dependency in the context of the amount of alimony to be paid can be considered upon a motion to modify, but the dependent status cannot. Such a distinction does not appear to make any sense to me, nor do I find support for this distinction in *Rowe*.

In looking at the applicable statutes dealing with alimony as applied to this case, N.C.G.S. § 50-16.1 defines "dependent spouse" as "a spouse . . . who is actually substantially dependent upon the other spouse for his or her maintenance and support . . . ." N.C.G.S. § 50-16.1 (1987) (amended 1995).

Having determined first that one spouse is a dependent spouse and thus the other a supporting spouse, the inquiry pursuant to G.S. § 50-16.2 turns to whether the dependent spouse is entitled to alimony. Upon a finding of entitlement, the final inquiry would be under G.S. § 50-16.5 as to the amount of alimony.

Obviously, upon a showing of a change in circumstances, the entitlement issue could not be relitigated. Likewise, the relationship between the parties, specifically, which one is a supporting spouse and which one is a dependent spouse, could not be relitigated. However, it is unquestioned that the amount of alimony to be paid is subject to modification and I would contend that upon a proper showing, a "dependent spouse" could be shown to no longer be dependent under the statutory definition. Therefore, under the statutory scheme, at a modification hearing, if a party is not a "dependent spouse," then regardless of entitlement, there can be no award of alimony.

The Court of Appeals opinion in *Rowe v. Rowe*, 52 N.C. App. 646, 280 S.E.2d 182 (1981), was directly on point, and as I read the Supreme Court's decision in *Rowe*, was neither overruled nor contradicted by this Court. Judge Clark, writing for the majority, states:

> Defendant's argument that the court's initial determination of dependency is not subject to reconsideration on a subsequent motion under G.S. 50-16.9 is untenable. As we have explained herein, G.S. 50-16.9 calls for a completely new examination of the factors which necessitated the initial award of alimony in order

> to determine whether any of these circumstances have changed. When the list of circumstances enumerated in G.S. 50-16.5 is properly employed, the conclusion is inescapable that defendant, although formerly dependent, is no longer so. Certainly one of the ultimate circumstances which might change under G.S. 50-16.9, would be the defendant's condition of dependency. We hold that as a matter of law based on the undisputed fact that, as defendant herself has stated, her "separate income is well over what [she] spend[s] for living expenses," the evidence established a change of circumstances requiring modification of the consent order to reflect a finding that defendant is not a dependent spouse and to vacate the award of alimony. We leave intact that portion of the consent order wherein the court found, pursuant to the parties' agreement, that there were grounds for alimony under G.S. 50-16.2. Defendant may, therefore, still seek modification of the order under G.S. 50-16.9 should her circumstances change such that she once again is substantially in need of plaintiff's support and maintenance. She may rely on the finding of entitlement in the consent order as *res judicata* and need only establish her dependency.

Rowe, 52 N.C. App. at 656, 280 S.E.2d at 188.

When *Rowe* reached this Court, the primary issues dealt with whether the consent order was modifiable and whether the consent order and the property settlement could be integrated. The next issue was whether there had been a change of circumstances. It is in this discussion, *which affirmed the Court of Appeals on the issue*, that language quoted in the majority opinion in the case *sub judice* is found. To the extent this Court held in *Rowe* that the status of a dependent spouse is permanently adjudicated, I would read it to mean that the original issue of the relationship between the parties in the case *sub judice* as to supporting and dependent spouse cannot be relitigated. As to the language in the majority opinion that "defendant can rely on the original finding of entitlement," I agree to the extent that an entitlement determination cannot be relitigated.

Thus, I would hold that "dependency"—meaning whether the previously adjudicated "dependent spouse" is still dependent as defined by our statutes—is a perfectly appropriate issue to consider upon a motion to modify based on a change in circumstances.

JOHN M. SOLES, PETITIONER-APPELLEE v. THE CITY OF RALEIGH CIVIL SERVICE COMMISSION, RESPONDENT AND THE CITY OF RALEIGH, INTERVENOR-APPELLANT

No. 280PA95

(Filed 10 February 1997)

1. **Constitutional Law § 105 (NCI4th)— occupation—due process protection—property interest**

Whether an individual has a constitutional right to due process protection with respect to an occupation depends on whether that individual possesses a property interest or right in continued employment.

Am Jur 2d, Constitutional Law §§ 580, 583, 584, 812, 813.

2. **Municipal Corporations § 378 (NCI4th)— city employee—continued employment—no protected property interest—procedural due process not required**

A city employee did not have a constitutionally protected property interest in continued employment by the city because personnel policies enacted by the city establish that "just cause" must be shown before a city employee may be discharged, and the employee was thus not entitled to procedural due process, where the city's personnel policies were not incorporated into the employee's contract of employment, and the city's charter specifically vested in the city manager the absolute discretion to fire employees.

Am Jur 2d, Constitutional Law §§ 580, 583, 584, 592, 593.

Termination of public employment: right to hearing under due process clause of Fifth or Fourteenth Amendment—Supreme Court cases. 48 L. Ed. 2d 996.

3. **Municipal Corporations § 380 (NCI4th)— dismissal of city employee—absence of just cause—burden on employee—no due process violation**

Assuming the existence of a situation in which a city employee was entitled to due process protection, a Civil Service Commission rule placing the burden on the employee to show by a preponderance or greater weight of the evidence that he was

terminated without just cause did not violate the employee's procedural due process rights.

Am Jur 2d, Administrative Law §§ 360, 351; Constitutional Law §§ 814, 815.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 119 N.C. App. 88, 457 S.E.2d 746 (1995), affirming judgment holding unconstitutional a provision in Raleigh Civil Service Act Rule .0504 entered by Allen (W. Steven, Sr.), J., at the 6 July 1992 Civil Session of Superior Court, Wake County. Heard in the Supreme Court 13 February 1996.

Law Offices of Jack B. Crawley, Jr., by Jack B. Crawley, Jr., for petitioner-appellee.

Thomas A. McCormick, City Attorney, by Dorothy K. Woodward, Associate City Attorney, for intervenor-appellant.

Edelstein and Payne, by M. Travis Payne; and Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, by John W. Gresham, on behalf of North Carolina Civil Liberties Union Legal Foundation, Raleigh Professional Fire Fighters Association, and North Carolina Association of Educators, amici curiae.

LAKE, Justice.

The petitioner, John Soles, was hired by the City of Raleigh ("the City") on 5 April 1984 as an Engineering Aide I, a position Soles held until 13 August 1986, when the City promoted him to Engineering Aide II. On 2 November 1990, Soles traveled to a work site in a City-owned carryall truck with his supervisor, Junious Nichols, and a co-worker, David Smith. When they arrived at the work site, Nichols left the vehicle. Soles and Smith stayed in the truck. Shortly thereafter, Smith smelled a strong marijuana odor coming from the back of the truck. Smith turned around and saw Soles smoking from a red and silver pipe. Soles had his head ducked down so that he could not be seen from the street. The incident was reported to Nichols, who in turn reported the incident to his supervisor and the City Engineer, Jimmie Beckom.

An internal investigation corroborated Smith's accusations. During the course of that investigation, Detective Ken Mathias, an officer with the Raleigh Police Department's Vice and Narcotics Division, and his dog, Peddy, examined all of the Transportation

Department's carryall trucks. Peddy was trained to detect the presence of controlled substances. Without being directed to the truck involved in the incident, Peddy signaled that marijuana had been present in the vehicle used by Soles, Nichols and Smith on 2 November 1990.

On 2 December 1990, after completing its internal investigation, the City terminated Soles' employment for "personal conduct detrimental to City service" pursuant to City of Raleigh Standard Procedure 300-14, Rev. B, Section 4.2(k). Following written notification of his termination, Soles appealed unsuccessfully to the City Manager. Soles thereafter petitioned for an administrative hearing with the Raleigh Civil Service Commission ("the Commission") alleging that he had been "dismissed without justifiable cause." A hearing on Soles' petition was held on 17 July 1991 and 31 July 1991, and evidence was presented by both parties. On 19 September 1991, the Commission affirmed Soles' dismissal. The Commission's final decision included the following pertinent findings of fact and conclusions of law:

> 27. Mr. Soles was terminated on December 2, 1990, in accordance with City of Raleigh Standard Procedure 300-14, Rev. B, Sec. 4.2(k).
>
> . . . .
>
> CONCLUSIONS OF LAW
>
> . . . .
>
> *The petitioner failed to establish by the greater weight of the evidence that he was terminated without justifiable cause.*
>
> The City of Raleigh adequately complied with its policies, procedures, and regulations regarding drug use by City employees and in the terminating of the employee in this case.
>
> There was good cause sufficient to warrant the employees' [sic] termination from employment.

(Emphasis added.) On 11 October 1991, having exhausted all of his administrative remedies, Soles appealed the Commission's final decision by filing a petition for judicial review with the Wake County Superior Court. Soles alleged, *inter alia*, that the Commission's conclusion that he had "failed to establish by the greater weight of the evidence that he was terminated without justifiable cause" (based

upon the Commission's application of the burden of proof set forth in Rule .0504 of the Rules of the Raleigh Civil Service Commission) violated his constitutional rights. On 21 December 1992, the superior court reversed the Commission's decision on the grounds that the burden of proof set forth in Rule .0504 violated Soles' constitutional right to procedural due process. The City appealed, and on 6 June 1995, the Court of Appeals unanimously affirmed the superior court's decision.

The City now argues that the Court of Appeals erred in affirming the decision of the superior court in two respects: (1) by holding that Soles had a property right in continued employment with the City, thereby entitling him to procedural due process protection; and (2) by holding that Rule .0504 of the Rules of the Raleigh Civil Service Commission violated Soles' procedural due process rights.

[1], [2] The City first argues that the Court of Appeals erred by concluding that Soles was entitled to procedural due process protection. Whether an individual has a constitutional right to due process protection with respect to an occupation depends on whether that individual possesses a property interest or right in continued employment. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 84 L. Ed. 2d 494, 501 (1985). Soles contends, and the Court of Appeals agreed, that because the personnel policies enacted by the City establish that "just cause" must be shown before a City employee may be discharged, Soles indeed had a constitutionally protected property interest in his continued employment. In reaching this conclusion, the Court of Appeals noted that the city provision was similar to the "just cause" provision contained in the State Personnel Act, N.C.G.S. § 126-35, and that "our courts have previously established" that N.C.G.S. § 126-35 creates a property interest in continued employment. *Soles*, 119 N.C. App. at 91, 457 S.E.2d at 749. We disagree.

"North Carolina courts have repeatedly held that absent some form of contractual agreement between an employer and [an] employee establishing a *definite* period of employment, the employment is presumed to be an 'at-will' employment, terminable at the will of either party, irrespective of the quality of performance by the other party." *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987). In *Harris*, this Court clearly established that an employer's personnel manual or policies are not part of an employee's contract of employment unless expressly included in that

contract. *Id.* at 630, 356 S.E.2d at 359. We find no evidence that the City's personnel policies were in any manner incorporated into the petitioner's contract.

Contrary to the holding below, the City's personnel policies do not compare to the rights given State employees pursuant to N.C.G.S. § 126-35. Section 126-35 states in pertinent part:

> No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.

N.C.G.S. § 126-35 (1995). The State Personnel Act is, by statute, a part of each qualifying state employee's contract. The City's personnel policy, on the other hand, is not a state statute or city ordinance passed into law. Unlike such a legislative mandate, the City's personnel policy was "designed so as not to restrict operating personnel but to help them solve problems . . . in a fair and equitable manner." City of Raleigh Standard Procedure 300-14, § 1.2 (1984). Thus, by its very terms, the City's personnel policy is not intended to restrict management options.

It is also important to note that municipal corporations are agencies of the State and have no power except that which is granted by the legislature. *Town of Emerald Isle v. North Carolina*, 320 N.C. 640, 656, 360 S.E.2d 756, 766 (1987). The City of Raleigh's charter specifically vests in the City Manager the absolute discretion to fire employees. Act of Apr. 23, 1949, ch. 1184, sec. 26, 1949 N.C. Sess. Laws 1442, 1464. The charter is a legislative enactment which only the legislature can amend. The City's personnel policies were written by the City's Personnel Director and approved by the City Manager. These policies are not contained in the City's Code of Ordinances. No internal operating procedure can divest the City Manager of the discretion granted by the legislature. Absent a legislative adoption, the City's policies serve merely as managerial guidelines which, standing alone, impart no rights to any employee. Accordingly, we hold that petitioner Soles possessed no constitutionally protected property interest in his continued employment with the City.

While unnecessary based on our holding above, we also elect, because of its importance, to discuss the City's second assignment of error.

[3] In its second assignment of error, the City contends that the Court of Appeals erred in its application of procedural due process to

the facts of this case. Specifically, the City argues that the Court of Appeals erred by holding that Raleigh Civil Service Commission Rule .0504 violated Soles' procedural due process rights. Pursuant to Rule .0504 of the Rules of the Raleigh Civil Service Commission, a terminated employee has the burden of establishing by the greater weight of the evidence that the action taken against him was unjustified. Assuming a situation existed in which an employee was entitled to procedural due process protection, we agree with the City and hold that the allocation of the burden of proof to a disciplined employee does not violate the employee's guarantees of procedural due process.

In order to determine what "process" is "due," the United States Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18 (1976), set forth a balancing test. The Court in *Mathews* described due process as a flexible process that "calls for such procedural protections as the particular situation demands," *id.* at 335, 47 L. Ed. 2d at 33, and set out three factors to consider in determining what process is due in a given situation:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

The Supreme Court has stated that retaining employment is an important private interest. *Loudermill*, 470 U.S. at 543, 84 L. Ed. 2d at 504. The Court of Appeals is correct in stating that "[s]ubstantial weight must therefore be accorded [the employee's] interest in retaining the employment in which he possessed a constitutionally protected property right." *Soles*, 119 N.C. App. at 96, 457 S.E.2d at 751. However, the employee's interest in retaining employment is not absolute and must be tempered by public interest. *See Arnett v. Kennedy*, 416 U.S. 134, 40 L. Ed. 2d 15 (1974).

Turning to the second factor outlined in *Mathews*, we must determine whether Rule .0504, placing the burden of proof on an employee to show by the preponderance or greater weight of the evidence that he was terminated without cause, created a substantial risk that the

employee would be terminated in error. The Court of Appeals determined that the risk of error would "indisputably be minimized if the appropriate 'substitute procedural safeguard' was employed in circumstances such as these—i.e., the City was required to carry the burden of proving its employee was terminated based upon cause." *Soles*, 119 N.C. App. at 96, 457 S.E.2d at 752. We disagree.

In *Addington v. Texas*, 441 U.S. 418, 60 L. Ed. 2d 323 (1979), the Supreme Court analyzed different burdens of proof. According to the Court, the "preponderance of the evidence" standard is a roughly equal allocation of the risk of error between litigants. *Id.* at 423, 60 L. Ed. 2d at 329. Moreover, the Court of Appeals ignored many of the procedural safeguards embodied in the Civil Service Act. Employees have the right to be represented by counsel and recover attorneys' fees if they prevail and to conduct discovery, present evidence, subpoena witnesses, and cross-examine opposing witnesses at an evidentiary hearing before the Commission.

Furthermore, the Supreme Court, in *Lavine v. Milne*, 424 U.S. 577, 47 L. Ed. 2d 249 (1976), stated that while the placement of the burden of proof is rarely without consequence and frequently dispositive of the outcome of the litigation, "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." 424 U.S. at 585, 47 L. Ed. 2d at 256. Only when a fundamental right has been at issue has the Court found a constitutional right to a certain allocation of proof. *See Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982) (fundamental right of family integrity required clear and convincing evidence to support a decision terminating parental rights); *Addington v. Texas*, 441 U.S. 418, 60 L. Ed. 2d 323 (fundamental right to physical liberty required clear and convincing evidence before involuntary commitment to a state mental facility); *Speiser v. Randall*, 357 U.S. 513, 2 L. Ed. 2d 1460 (1958) (fundamental right to freedom of speech requires burden of proof to fall on government). Continued public employment is not a fundamental right guaranteed by the United States Constitution. *Dunn v. Town of Emerald Isle*, 722 F. Supp. 1309, 1312 (E.D.N.C. 1989), *aff'd*, 918 F.2d 955 (4th Cir. 1990). Where, as here, no fundamental right is at issue, the allocation of the burden of proof in civil cases is irrelevant to constitutional questions of procedural due process.

Finally, the third factor set out in *Mathews* tips the balance in favor of the City. In *Arnett v. Kennedy*, the Court held that due

process did not demand a pre-termination evidentiary hearing for a federal employee who could be terminated only for cause. Justice Powell, in a concurring opinion, agreed with this result but reached it by applying the balancing test he later set forth in *Mathews*. Justice Powell explained:

> [T]he Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the [workplace], foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial.

Arnett, 416 U.S. at 168, 40 L. Ed. 2d at 41 (Powell, J., concurring). Clearly, if it is permissible to dismiss an employee without any evidentiary hearing whatsoever, it is similarly permissible to discharge an employee after an evidentiary hearing in which the burden of proof is placed on the employee.

While significant weight must be given a city employee's private interest in retaining employment, that interest is not so great as to convince this Court that Rule .0504 is constitutionally infirm. Rule .0504 places a very lenient standard on the disciplined employee. The risk of an erroneous deprivation is small, and the government interest involved is substantial.

For the reasons stated herein, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Wake County, for entry of judgment consistent with this decision.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. COYE HAVEN KIRKPATRICK

No. 338A96

(Filed 10 February 1997)

Criminal Law § 1140 (NCI4th Rev.)— habitual felon adjudications—same convictions—use to enhance and aggravate sentence

The trial court could properly rely on defendant's present adjudication as an habitual felon to enhance defendant's present sentence from a Class I to a Class C felony and then use his 1987 habitual felon adjudication as an aggravating factor to increase the enhanced sentence when both habitual felon adjudications were based upon the same three convictions. However, the trial court could not consider as separate aggravating factors both the status of being an habitual felon and the felonies underlying the habitual felon adjudication.

Am Jur 2d, Criminal Law §§ 598, 599.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender. 19 ALR2d 227.

Justice FRYE dissenting.

Justice WEBB joins in this dissenting opinion.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 86, 472 S.E.2d 371 (1996), finding no error in a trial that resulted in a sentence of forty-six years' imprisonment for uttering an instrument bearing a forged endorsement, enhanced by the finding that defendant is an habitual felon, entered by Allen (J.B., Jr.), J., on 21 April 1994 in Superior Court, Alamance County. Heard in the Supreme Court 12 December 1996.

Michael F. Easley, Attorney General, by J. Mark Payne, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant worked at Po' Folks restaurant in Burlington, North Carolina, during 1993. That fall Sherri Mann worked at the restaurant for approximately three weeks. After leaving her employment there, Mann did not receive her final paycheck in the amount of $24.05. On 7 November 1993 defendant was arrested after he attempted to cash Mann's check at a convenience store.

On 20 April 1994 a jury found defendant guilty of uttering a check bearing a forged endorsement, a Class I felony, in violation of N.C.G.S. § 14-120. The following day the trial court conducted a separate proceeding on the charge of being an habitual felon. Based on evidence that defendant pled guilty to breaking and entering and larceny in 1972, felony larceny in 1982, and felony larceny in 1984, the jury determined that defendant met the habitual felon requirements pursuant to N.C.G.S. § 14-7.1. The finding that defendant is an habitual felon required the trial court to enhance defendant's sentence to that of a Class C felony. N.C.G.S. § 14-7.6 (1993).

The presumptive term for a Class C felony is fifteen years; however, the trial court may impose a sentence greater or lesser than the presumptive term upon consideration of aggravating and mitigating factors. N.C.G.S. § 15A-1340.4(a), (f) (1988) (repealed effective 1 October 1994; reenacted as N.C.G.S. § 15A-1340.16(b) effective 1 October 1994). Here, the trial court found as factors in aggravation that "defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement" and that "defendant has previously been adjudicated as an habitual offender on April 27, 1987 and received a 15 year sentence." The trial court also found three factors in mitigation: (1) that defendant exercised caution to avoid serious bodily harm or fear to other persons; (2) that when confronted by a police officer on 7 November 1993, defendant was cooperative; and (3) that defendant was a good employee and a hard worker. The trial court then determined that the aggravating factors outweighed the mitigating factors and sentenced defendant to forty-six years' imprisonment, thirty-one more than the presumptive term of fifteen years.

The record further indicates that defendant was also adjudicated an habitual felon in 1987 following his conviction for possession of stolen property. The 1987 adjudication was based on the same three guilty pleas as the 1994 habitual felon adjudication. Not considered in either determination of defendant's status as an habitual felon were

defendant's 1976 guilty plea to breaking and entering a motor vehicle and larceny from an auto, his 1977 guilty plea to felonious attempted safecracking, and his 1986 guilty plea to possession of stolen property. These three guilty pleas served as the bases for the trial court's finding of the "prior convictions" aggravating factor here.

The sole issue is whether the trial court could find the adjudication of defendant as an habitual felon in 1987 as a factor in aggravation of defendant's current sentence. Defendant contends that in considering the 1987 habitual felon adjudication, the trial court impermissibly relied on defendant's status as an habitual felon to first enhance defendant's sentence from a Class I to a Class C felony and then to aggravate the enhanced sentence. He argues that not only is it improper to "double use" his habitual felon status, but it is equally inappropriate to aggravate a current sentence based on the severity, or lack thereof, of a prior punishment.

In making his argument, defendant insinuates that the trial court considered the sentence for his prior habitual felon adjudication rather than the status created. In his findings concerning the existence of aggravating factors, the trial court stated that: "In case 86 CrS 1826 the defendant has previously been adjudicated as an habitual offender on April 27, 1987 and received a 15 year sentence." Defendant has not demonstrated from this statement that the trial court improperly relied on defendant's prior sentence. We conclude from the record that the trial court was merely finding that defendant had been previously adjudicated an habitual felon rather than commenting on the minimal sentence defendant received, as defendant argues.

We therefore turn to defendant's primary argument that in enacting the Fair Sentencing Act, the legislature intended that a defendant's past criminal record be considered only once during the sentencing process and that here the trial court impermissibly used defendant's record dually by considering his 1987 habitual felon adjudication to both enhance and aggravate his current sentence.

Pursuant to the Fair Sentencing Act, the trial court may consider any aggravating factors it finds proved by the preponderance of the evidence that are reasonably related to the purposes of sentencing. N.C.G.S. § 15A-1340.4(a); *State v. Ahearn*, 307 N.C. 584, 595, 300 S.E.2d 689, 696 (1983). We have held that factors which relate to the character or conduct of the offender may serve as justification for increasing or decreasing the presumptive term. *State v. Chatman*,

308 N.C. 169, 180, 301 S.E.2d 71, 78 (1983). The status of being an habitual felon is a characteristic that, in the trial court's discretion, may warrant an increase in the presumptive term.

> The primary purpose of a recidivist statute is
>
> to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

Rummel v. Estelle, 445 U.S. 263, 284, 63 L. Ed. 2d 382, 397 (1980). Defendant has prior convictions for: (1) felonious breaking and entering a motor vehicle and larceny from a vehicle, (2) felonious attempted safecracking, and (3) possession of stolen property, in addition to the three felonies upon which his habitual felon status is based. Such history of criminal conduct clearly relates to the character of this defendant, specifically to a persistent inability to stay within the confines of the law. A primary purpose of sentencing is to punish an offender with the degree of severity that his culpability merits. *State v. Thompson*, 318 N.C. 395, 397-98, 348 S.E.2d 798, 800 (1986). Here, defendant's recidivist nature is a direct reflection on his culpability, thereby permitting the trial court to find as a factor in aggravation that the defendant had previously been adjudicated an habitual felon.

Further support for our decision is found in *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). In *Roper* the defendant was convicted of first-degree murder, first-degree rape, and first-degree kidnapping and was adjudicated an habitual felon. The defendant appealed on the basis that the trial court used the same felonies both to establish the habitual felon status and to aggravate the kidnapping conviction. He argued that since those prior convictions were essential elements of the habitual felon "crime," their use as an aggravating factor was prohibited by *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983) (holding that the trial court erred in finding an element of the crime also to be a factor in aggravation). This Court held that the status of habitual felon is not a crime in and of itself. The *Blackwelder* limitation therefore did not apply because the prior convictions were not essential

elements of the kidnapping crime for which defendant was convicted. *Roper*, 328 N.C. at 363, 402 S.E.2d at 615.

We discern little difference between what this Court sanctioned in *Roper* and what occurred here. It is clearly permissible for the sentencing court to rely on prior criminal convictions punishable by more than sixty days' confinement to aggravate a current sentence even where those convictions serve as the basis of an habitual felon adjudication. Likewise, the trial court may in its discretion consider as a factor in aggravation the fact that a defendant was previously adjudicated an habitual felon, in addition to enhancing punishment based on a later finding of the same. We caution only that the trial court cannot consider as separate aggravating factors both the status of being an habitual felon and the felonies underlying the habitual felon adjudication.

Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice FRYE dissenting.

The question raised by the appeal in this case may be restated as follows: May a defendant whose sentence for an offense has been enhanced because he is a habitual felon have that sentence further increased because he was previously adjudged and punished as a habitual felon when the same convictions were used as the basis for both habitual felon determinations? I think not.

Defendant pled guilty to three felonies—in 1972, 1982, and 1984. In 1987, defendant pled guilty to another felony and, based on the three prior felonies, was determined to be a habitual felon and accordingly received an enhanced sentence. In 1994, defendant was found guilty of uttering a check bearing a forged endorsement—a Class I felony with a presumptive sentence of two years. Based on the same 1972, 1982, and 1984 convictions, defendant was again determined to be a habitual felon, thus enhancing the uttering offense to a Class C felony with a presumptive sentence of fifteen years. The question then is whether the court may enhance defendant's sentence for the 1994 conviction based on the habitual felon determination in 1994 and then further increase the sentence by the fact that, based on the same 1972, 1982, and 1984 convictions, he was determined to be, and was sentenced as, a habitual felon in 1987. The majority says yes. I dissent.

I do not believe that the legislature, in enacting the Fair Sentencing Act, intended that the same convictions could be used as a basis for enhancing a sentence in one case (1987), then enhancing the sentence in a subsequent case (1994) while further increasing that sentence by finding as an aggravating factor that "defendant has previously been adjudicated as an habitual offender." Our decision in *Roper* does not require this result. I would not expand *Roper*. We should draw the line somewhere.

Justice WEBB joins in this dissenting opinion.

TANYA M. TISE, EXECUTRIX OF THE ESTATE OF AARON G. TISE, JR. v. YATES CONSTRUCTION COMPANY, INC.

No. 300PA96

(Filed 10 February 1997)

Sheriffs, Police, and Other Law Enforcement Officers § 22 (NCI4th)— death of police officer—negligence by city—intervening criminal act

The trial court did not err by granting the City's 12(b)(6) motion to dismiss where plaintiff's decedent died when a road grader was driven over his police car; plaintiff alleged negligence by the grader owner; the grader owner asserted negligence by the City in that officers had earlier gone to the site but had been unable to locate any suspects or information about who should be contacted about the equipment; the City moved to dismiss based on the public duty doctrine; and that motion was granted by the trial court and the Court of Appeals affirmed. Assuming that the City owed and breached a duty of care, the third party criminal acts broke the chain of causation.

Am Jur 2d, Sheriffs, Police and Constables §§ 90-180.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 582, 471 S.E.2d 102 (1996), affirming an order entered 15 March 1995 by Bridges, J., in Superior Court, Forsyth County. Heard in the Supreme Court 13 December 1996.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Gusti W. Frankel; and Linda S. Abramovitz, Assistant City Attorney, for appellee City of Winston-Salem.

Bennett & Blancato, LLP, by Richard V. Bennett and William A. Blancato, for defendant-appellant.

FRYE, Justice.

This case arose out of an accident involving two Winston-Salem police officers that resulted in the death of one police officer and the serious injury of the other. The following facts and circumstances are pertinent to this appeal. In June 1992, Aaron G. Tise, Jr. (Tise) was employed as a police officer with the Winston-Salem Police Department. The instant action was brought to recover damages for Tise's wrongful death, which plaintiff, as executrix of Tise's estate, alleged was proximately caused by the negligence of defendant, Yates Construction Company, Inc. (Yates).

In her complaint filed 24 June 1994, plaintiff alleged the following facts: At the time of his death on 26 June 1992, Tise was employed as a lieutenant with the Winston-Salem Police Department. Yates was engaged in a construction project in the vicinity of New Walkertown Road in Winston-Salem, North Carolina, and had several pieces of heavy grading equipment on the site. In the early morning hours of 26 June 1992, Winston-Salem police responded to a call that unknown persons were tampering with the equipment at the construction site. Upon arrival at the site, the officers were unable to locate any suspects and were also unable to locate any information regarding who should be contacted about the security of the equipment. The officers left the scene.

Plaintiff further alleged in her complaint that after the officers left the scene, four individuals went to the construction site and began tampering with the grading equipment. One of the individuals, later identified as Conrad Crews, climbed onto a grader, started it, and drove it onto the roadway and proceeded toward East Drive. The disturbance was reported to the Winston-Salem Police Department, and Lieutenant Tise, along with other officers, responded. As Tise was sitting in his parked patrol car on East Drive, Crews drove the grader onto the patrol car, crushing Tise, who died as a result of his injuries. Plaintiff alleged that Yates was negligent in various respects, including, *inter alia*, that it knew or should have known that there was a substantial risk that its construction equipment would be subject to tampering or attempted operation by unauthorized persons

and that it failed to provide safety devices or other appropriate security to prevent the unauthorized operation of the equipment.

Yates filed its answer on 22 September 1994, denying plaintiff's allegations of negligence. Pursuant to N.C.G.S. § 97-10.2(e), Yates asserted that actionable negligence on the part of the City of Winston-Salem (City) had "joined and concurred with any negligence" on the part of Yates in causing Tise's death, thereby barring subrogation rights of the City for workers' compensation benefits paid to Tise's estate and reducing damages recoverable by plaintiff. Yates also alleged that the City had waived its governmental immunity pursuant to N.C.G.S. § 160A-485.

The City filed a notice of appearance and answer on 26 October 1994, denying any allegations of negligence and asserting North Carolina's public duty doctrine as a bar to Yates' attempt to cut off the City's subrogation rights under N.C.G.S. § 97-10.2(e). On 3 January 1995, the City moved to dismiss Yates' allegations against it, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Yates filed a motion to amend its answer on 28 February 1995 to allege the City's negligence in more detail. Yates' motion to amend its answer and the City's motion to dismiss were called for hearing before Judge Forrest D. Bridges at the 13 March 1995 Civil Session of Superior Court, Forsyth County. In an order entered 15 March 1995, Judge Bridges allowed both motions. Yates appealed to the Court of Appeals from the trial court's order granting the City's motion to dismiss for failure to state a claim upon which relief could be granted. The Court of Appeals, in a unanimous opinion, affirmed. Yates' petition for discretionary review was allowed by this Court on 30 July 1996.

The sole question before this Court is whether the Court of Appeals erred in affirming the trial court's order granting summary judgment in favor of the City on the issue of whether actionable negligence of the City, as Tise's employer, joined and concurred with the negligence of Yates in causing Tise's death.

N.C.G.S. § 97-10.2, the statute defining the rights under the North Carolina Workers' Compensation Act that are not affected by liability of a third party and rights and remedies against third parties, provides in pertinent part:

> (e) The amount of compensation and other benefits paid or payable on account of [work-related] injury or death shall be admissible in evidence in any proceeding against the third party.

> In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff. If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that *actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death*, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding.

N.C.G.S. § 97-10.2(e) (1991) (emphasis added). If the jury finds that the employer's actionable negligence joined and concurred with the negligence of the third party in producing the injury or death, the court must reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation. *Id.*

In the instant case, Yates alleged that the City, through its police department, negligently handled the initial call to the construction site and that such negligence was a proximate cause of Tise's death. Specifically, Yates alleged that the Winston-Salem police officers who had responded to the initial complaint at the construction site (1) had failed to take all reasonable precautions to prevent further tampering and theft of the grading equipment, (2) had ineffectively attempted to disable the equipment, and (3) had failed to contact any representative of Yates about trespassers at the site and/or tampering with the equipment until after the fatal incident. Yates argues that these allegations, when taken as true, sufficiently allege that the City's negligence joined and concurred with its negligence to cause Tise's death so as to bar the City's subrogation rights under N.C.G.S. § 97-10.2(e) and, therefore, were sufficient to withstand the City's motion to dismiss.

In determining whether Yates has alleged sufficient facts showing the City's negligence to withstand a motion to dismiss, we are guided by the standard of the reasonable person of ordinary prudence. "Actionable negligence is the failure to exercise that degree of care

which a reasonable and prudent person would exercise under similar conditions." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992). " 'To recover damages for actionable negligence, a plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach.' " *Mozingo v. Pitt County Memorial Hosp.*, 331 N.C. 182, 187, 415 S.E.2d 341, 344 (1992) (quoting *Waltz v. Wake County Bd. of Educ.*, 104 N.C. App. 302, 304-05, 409 S.E.2d 106, 107 (1991), *disc. rev. denied*, 330 N.C. 618, 412 S.E.2d 96 (1992)). With respect to the legal duty owed, in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), we specifically adopted the general common law rule known as the public duty doctrine, which provides that "a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Id.* at 370-71, 410 S.E.2d at 901.

In the instant case, the City, in its notice of appearance and answer, asserted the public duty doctrine in its motion to dismiss for failure to state a claim upon which relief could be granted as a bar to Yates' attempt to cut off the City's subrogation rights under N.C.G.S. § 97-10.2(e). The trial court granted the City's motion to dismiss. On appeal, the Court of Appeals, in affirming the order of the trial court, held that "Yates has not sufficiently alleged facts disclosing that a duty was owed by the City to Lieutenant Tise, an essential element of actionable negligence," and that, therefore, its claims attempting to bar the City's subrogation rights pursuant to N.C.G.S. § 97-10.2(e) must fail. *Tise v. Yates Construction Co.*, 122 N.C. App. 582, 589, 471 S.E.2d 102, 107 (1996).

We have some doubt as to the applicability of the public duty doctrine to the circumstances of this case. However, we decline to decide that issue. Assuming *arguendo* that the City owed its employee Tise a duty of care and that the City breached this duty in the manner alleged by Yates, we nevertheless conclude that the trial court did not err in granting the City's motion to dismiss.

The general rule is that the intervening or superseding criminal acts of another preclude liability of the initial negligent actor when the injury is caused by the criminal acts. As our Court of Appeals noted in *Muse v. Charter Hosp. of Winston-Salem*, 117 N.C. App. 468, 452 S.E.2d 589, *aff'd*, 342 N.C. 403, 464 S.E.2d 44 (1995),

> [t]he doctrine of superseding, or intervening, negligence is well established in our law. In order for an intervening cause to relieve

> the original wrongdoer of liability, the intervening cause must be a new cause, which intervenes between the original negligent act and the injury ultimately suffered, and which breaks the chain of causation set in motion by the original wrongdoer and becomes itself solely responsible for the injury. *Hayes v. City of Wilmington*, 243 N.C. 525, 540, 91 S.E.2d 673, 685 (1956).

Muse, 117 N.C. App. at 476, 452 S.E.2d at 595.

In discussing the doctrine of superseding, or intervening, negligence, we have said:

> "An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote."

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 236, 311 S.E.2d 559, 566 (1984) (quoting *Harton v. Forest City Tel. Co.*, 141 N.C. 455, 462, 54 S.E. 299, 301-02 (1906)). We also said:

> " 'The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another[] is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury.' " [*Butner v. Spease*, 217 N.C. 82, 89, 6 S.E.2d 808, 812 (1939).]

Hairston, 310 N.C. at 237, 311 S.E.2d at 567 (quoting *Riddle v. Artis*, 243 N.C. 668, 671, 91 S.E.2d 894, 896-97 (1956)).

In the instant case, the police officers responding to the initial call to the construction site investigated and acted to prevent the criminal acts of unknown third parties. While the officers were called to the site to investigate possible tampering with the grader equipment, Tise's injuries caused by the criminal acts of third parties in their unauthorized operation of the grader could not have been foreseeable from the officers' acts of attempting to disable the grader. The criminal acts in this case were an intervening cause that relieved the City of any actionable negligence by cutting off the proximate cause flowing from the acts of the agents of the City in attempting to disable the grader. This superseding cause was a new cause, which intervened between the original negligent act of the City and the injury ultimately suffered by Tise. The third party criminal acts in this

case broke the chain of causation set in motion by the police officers. Accordingly, the trial court did not err in granting the City's motion to dismiss.

For the foregoing reasons, different from those stated by the Court of Appeals, we affirm the decision of the Court of Appeals, which affirmed the trial court's order granting the City's motion to dismiss Yates' allegations of the City's actionable negligence, and we remand this case to the Court of Appeals for further remand to the Superior Court, Forsyth County, for further proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA v. ENOS LEE WALLACE

No. 76PA96

(Filed 10 February 1997)

1. Criminal Law § 131 (NCI4th Rev.)— court's rejection of plea arrangement after concurrence—new evidence

The trial judge did not err by rejecting a plea arrangement in which he had earlier concurred allowing defendant to plead guilty to second-degree murder and receive a sentence of twenty years on the basis that new evidence recited in open court in support of defendant's tendered guilty plea revealed for the first time that defendant shot the victim through the victim's front screen door since this was not merely a tangential fact; this evidence would have supported defendant's conviction of first-degree murder on a theory of felony murder; and this information also constituted additional evidence of defendant's premeditation and deliberation since he had to shoot the victim through an obstruction. N.C.G.S. § 15A-1021(c).

Am Jur 2d, Criminal Law §§ 484, 489, 491.

2. Constitutional Law § 169 (NCI4th)— court's rejection of plea arrangement—double jeopardy inapplicable

The trial judge's rejection of a plea arrangement after defendant had tendered a plea of guilty to second-degree murder in open

court pursuant to the arrangement did not violate defendant's right against double jeopardy where the trial court refused to accept the guilty plea and never imposed a sentence.

Am Jur 2d, Criminal Law § 258.

3. Criminal Law § 131 (NCI4th Rev.)— plea arrangement—tender of guilty plea—rejection by court—State not limited as to charge or sentence at trial

Defendant was not entitled to be tried only for second-degree murder and to receive a sentence of only twenty years on the ground that defendant acted in reliance upon a plea arrangement to his detriment when he tendered a plea of guilty to second-degree murder in open court pursuant to the arrangement where the trial judge rejected the plea of guilty by withdrawing his concurrence to the plea arrangement in accordance with N.C.G.S. § 15A-1021(c) upon hearing for the first time during the State's recitation of evidence in support of defendant's tendered plea of guilty that defendant shot the victim through a screen door.

Am Jur 2d, Criminal Law §§ 258, 271.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a judgment imposing a sentence of life imprisonment entered by Sitton, J., on 10 March 1992 in Superior Court, Mecklenburg County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 November 1996.

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

Leslie C. Rawls for defendant-appellant.

MITCHELL, Chief Justice.

Defendant, Enos Lee Wallace, was indicted for first-degree murder on 1 July 1991. A proposed plea bargain by which defendant would plead guilty to second-degree murder was rejected by Judge Beverly T. Beal on 11 October 1991. Defendant was tried at the 2 March 1992 Criminal Session of Superior Court, Mecklenburg County, Judge Claude S. Sitton presiding, and was found guilty by the jury. After a capital sentencing proceeding, the jury was unable to reach unanimous agreement as to a recommendation for punishment. Judge Sitton therefore imposed a sentence of life imprisonment as required by law. The Public Defender's Office was appointed to per-

fect the appeal, but no appeal was filed. On 22 January 1996, Judge Chase Saunders appointed defendant's present attorney to petition this Court for a writ of certiorari. On 4 April 1996, this Court allowed defendant's petition for a writ of certiorari.

The State's evidence tended to show *inter alia* that on 1 June 1991, John Tyson and defendant, who were neighbors, fought at Tyson's home. Roberta Bryant testified that she was living in the other half of Tyson's duplex in June 1991. She first saw the victim, Tyson, at about 12:30 p.m. when he was standing outside talking to his son. She next saw the victim when he was standing by his car. Defendant was with the victim, and Minnie Bell was standing on the other side of the victim's car. Tyson and defendant were arguing. This lasted a few minutes and was followed by a scuffle during which both Tyson and defendant fell into a nearby bush. Tyson said, "Look what you done; you tore my badge off [meaning Tyson's ID tag]." Defendant's brother came upon the scene, and defendant threw a malt liquor beer bottle which hit his brother. Defendant and Tyson then continued their argument, while defendant's brother tried to break it up by telling defendant to leave the victim alone.

Tyson went into his apartment and appeared on his porch carrying a hammer. The scuffle between defendant and Tyson then began again. Defendant told Tyson, "Man, I'm going to prove to you you'll die today; I'll be back." Bryant chatted with the victim for a short while, and then both of them went back into their respective homes.

About ten minutes later, as Bryant stood at her screen door, she saw defendant running back up the sidewalk. She could see that defendant had a small black pistol in his hand. Defendant was heading directly towards the victim's home. Bryant heard two shots. As defendant reached the front steps of the victim's apartment, Bryant closed her front door. She heard two more shots followed by the slam of a screen door. Bryant then went outside and saw Tyson lying in Minnie Bell's yard.

[1] In an assignment of error, defendant contends that the trial court committed prejudicial error by refusing to enforce the proposed plea agreement by which defendant was to plead guilty to second-degree murder and receive a sentence of twenty years' imprisonment. Defendant argues that Judge Beal was bound by his initial concurrence in this particular plea arrangement because no inconsistent information had been presented and because defendant had tendered

a plea of guilty in reliance on the plea arrangement. Defendant further argues that his subsequent prosecution violated the prohibition against double jeopardy.

N.C.G.S. § 15A-1021(c) provides:

> If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a particular sentence, they may, with the permission of the trial judge, advise the judge of the terms of the arrangement and the reasons therefor in advance of the time for tender of the plea. . . . The judge may indicate to the parties whether he will concur in the proposed disposition. *The judge may withdraw his concurrence if he learns of information not consistent with the representations made to him.*

N.C.G.S. § 15A-1021(c) (1988) (emphasis added). There is no absolute right to have a tendered guilty plea accepted. *State v. Collins*, 300 N.C. 142, 148, 265 S.E.2d 172, 176 (1980). A plea agreement involving a sentence recommendation by the State must first have judicial approval before it can be effective; it is merely an executory agreement until approved by the court. N.C.G.S. § 15A-1023(b) (1988); *State v. Hudson*, 331 N.C. 122, 148, 415 S.E.2d 732, 746 (1992), *cert. denied*, 506 U.S. 1055, 122 L. Ed. 2d 136 (1993).

A review of the transcript in this case tends to show the following: On 11 October 1991, the prosecutor and defense counsel appeared before Judge Beal in chambers to discuss a proposed plea arrangement for defendant. The proposed arrangement was that defendant would plead guilty to second-degree murder and receive a sentence of twenty years. Judge Beal asked for a factual statement, and the prosecutor gave it to him. The prosecutor added that the parties had previously conferred with Judge Fulton on 27 September 1991, at which time a twenty-year sentence had also been offered.

Judge Beal, the prosecutor, and defendant's counsel returned to open court, where the judge proceeded to ask defendant the usual questions when taking a guilty plea. The prosecutor then gave a summary of the evidence. During this recitation, the prosecutor mentioned for the first time that witnesses to the crime had stated that the victim was inside his house when defendant approached, firing his gun towards the front door. At least two of the shots went through the front door, one of them hitting the victim while he was inside. Upon hearing this evidence for the first time, Judge Beal held an

unrecorded conference with counsel at the bench and thereafter went on the record as follows:

> I have heard the factual basis which has been stated by the State in regard[] to this case, but it is the opinion of the Court that the factual basis of that is such that I cannot accept this plea to [second-]degree murder, and I will reject the plea and order the case be continued.

On 21 November 1991, the parties appeared before Judge Shirley L. Fulton, at which time defendant's counsel stated that the parties had appeared on 5 November 1991 before Judge Marvin Gray, who stated he would agree to sentence defendant to fifty years. Defendant declined the offer. Defense counsel told Judge Fulton that Judge Fulton had earlier indicated that she would sentence defendant to twenty years, and argued that defendant now stood in double jeopardy. Judge Fulton ruled that, with regard to the proposed plea arrangement, there was no agreement binding upon Judge Beal and defendant and refused to allow defendant to plead guilty to second-degree murder and to sentence him to twenty years' imprisonment.

Finally, on 18 February 1992, the parties appeared before Judge Sitton, who was to preside over the trial of the case, which was to be tried as a capital first-degree murder. Defendant's counsel stated to Judge Sitton that the basis upon which Judge Beal had rejected the plea arrangement was that the victim had been shot through his front screen door. With regard to the rejection of the plea arrangement by Judge Beal, Judge Sitton made the following pertinent findings of fact:

> That the matter was taken into open court in [courtroom] 2201 before the Honorable Beverly Beal; and,
>
> That when he heard a recitation of the evidence setting forth factual situations around the alleged events, the Court rejected the plea, learning for the first time that the victim had been shot through a doorway;
>
> That the Defendant did respond to certain questions prior to that time but that the end result was that the plea was rejected, within the discretion of the Honorable Beverly T. Beal, on October the 11th, 1991[.]

Judge Sitton also prohibited any mention of defendant's earlier tendered guilty plea at trial.

Defendant argues that Judge Beal should not have rejected the plea arrangement on the basis that new evidence recited in open court in support of defendant's tendered guilty plea revealed for the first time that defendant shot the victim through the victim's front screen door. According to defendant, this was only a "tangential" fact. We disagree. The sanctity of the home is of utmost importance, and one ought to be able to feel safe there. *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Further, this evidence would have supported defendant's conviction for first-degree murder on a theory of felony murder. *See* N.C.G.S. § 14-17 (1993). It also constituted additional evidence of defendant's premeditation and deliberation since he had to shoot at the victim through an obstruction. This argument is without merit.

[2] Defendant also argues that Judge Beal's rejection of the plea arrangement after he had tendered a plea of guilty to second-degree murder in open court violated his rights against double jeopardy. The Double Jeopardy Clause prohibits a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and in certain situations, multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). Additionally, the Supreme Court of the United States has noted that "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Mabry v. Johnson*, 467 U.S. 504, 507, 81 L. Ed. 2d 437, 442 (1984). None of those events occurred here because Judge Beal rejected the plea arrangement, refused to accept the guilty plea, and never imposed a sentence. The fact that defendant tendered a plea of guilty which Judge Beal rejected is irrelevant. No plea arrangement was ever accepted. Therefore, principles of double jeopardy do not apply. This assignment of error is overruled.

[3] In his second assignment of error, defendant contends that the trial court committed prejudicial error by denying his motion for an order that he be tried for no crime greater than second-degree murder. Defendant argues that by tendering his plea of guilty to second-degree murder in open court, he had acted in reliance upon the plea arrangement to his detriment. He maintains that, as a result, the State should only have been allowed to try him for second-degree murder and that he could only have received the same sentence of twenty years he had agreed to in the rejected plea arrangement. We disagree.

The district attorney enjoys broad discretion to determine whether to try a defendant for first-degree murder, a lesser offense, or to accept a plea to second-degree murder. *State v. Lineberger*, 342 N.C. 599, 467 S.E.2d 24 (1996). A "prosecutor may rescind his offer of a proposed plea arrangement at any time before it is consummated by *actual entry of the guilty plea* and the acceptance and approval of the proposed sentence by the trial judge." *State v. Marlow*, 334 N.C. 273, 280, 432 S.E.2d 275, 279 (1993). Here, there was no "actual entry of the guilty plea" as that phrase was employed in *Marlow*, as upon hearing for the first time during the State's recitation of evidence in support of defendant's tendered plea of guilty that defendant shot the victim through a screen door, the trial court rejected the plea of guilty by withdrawing his concurrence to the plea arrangement according to the terms of N.C.G.S. § 15A-1021(c). This assignment of error is without merit and is overruled.

For the foregoing reasons, we conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

THREE GUYS REAL ESTATE, A NORTH CAROLINA GENERAL PARTNERSHIP v. HARNETT COUNTY, A BODY POLITIC, GEORGE JACKSON, IN HIS OFFICIAL CAPACITY AS HARNETT COUNTY PLANNING DIRECTOR, AND THOMAS TAYLOR, IN HIS OFFICIAL CAPACITY AS HARNETT COUNTY SUBDIVISION ADMINISTRATOR

No. 242PA96

(Filed 10 February 1997)

Zoning § 19 (NCI4th)— plat map for subdivision—county approval— exemption

The trial court should have issued a declaratory judgment that plaintiff's plat shows a division of land that is exempt from Harnett County's subdivision regulations and a writ of mandamus directing the Harnett County subdivision administrator to affix to plaintiff's plat a certificate so stating where plaintiff was the owner of an undeveloped tract of approximately 231.37 acres; plaintiff submitted to the Harnett County Planning Department a plat which showed a division of the land containing 23 parcels, each in excess of ten acres, without any street right of way or

other access; plaintiff requested that the Planning Department certify the plat as exempt from the County's subdivision regulations, thereby allowing plaintiff to record the plat; the plat contained a certificate indicating that the surveyor certified that the plat met the requirements of N.C.G.S. § 47-30(f)(11)(d); the Harnett County subdivision manager informed plaintiff that the plat did not qualify as exempt; plaintiff brought this action seeking a declaratory judgment that the plat is exempt from Harnett County's subdivision regulations; and the trial court found that access for services such as law enforcement, fire or rescue operations would be prohibitive and inadequate and that the purpose of the subdivision ordinance would be circumvented as to the promotion of public health, safety, and general welfare if the plat was developed in its current form, and concluded that the plat was not exempt. The language of N.C.G.S. § 153A-335(2) is clear and unambiguous; plaintiff's division of land is not subject to any regulations enacted pursuant to N.C.G.S. §§ 153A-330 to -335 because it shows a division of land into parcels greater than ten acres and no street right-of-way is involved. The general health, safety, and welfare language of N.C.G.S. § 153A-331 cannot invalidate the specific exception clearly stated in N.C.G.S. § 153A-335(2). No other construction can reasonably be accomplished without doing violence to the legislative language. Furthermore, while N.C.G.S. § 153A-331 represents a broad, general grant of power to include provisions in a county's subdivision ordinance, the exemptions in N.C.G.S. § 153A-335 are specific, direct, withdrawals of county authority to regulate specified divisions of land.

Am Jur 2d, Zoning and Planning §§ 529, 531, 534, 558.

Validity of zoning ordinance deferring residential development until establishment of public services in area. 63 ALR3d 1184.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 362, 469 S.E.2d 578 (1996), modifying and affirming a declaratory judgment entered by Farmer, J., on 9 January 1995 in Superior Court, Harnett County. Heard in the Supreme Court 12 December 1996.

Grainger R. Barrett for plaintiff-appellant.

Dwight W. Snow for defendant-appellees.

ORR, Justice.

Plaintiff is the owner of an undeveloped tract of real property containing approximately 231.37 acres located in Harnett County, North Carolina. In late 1993, plaintiff submitted a plat of the property, dated 27 April 1993, to the Harnett County Planning Department. This plat showed a division of land entitled "Weswood 4" containing twenty-three parcels, each of which was in excess of ten acres. The plat did not indicate any street right-of-way or other access to the subdivision lots.

Plaintiff requested that the Planning Department certify the plat as exempt from Harnett County's subdivision regulations, thereby allowing plaintiff to record the plat with the Harnett County Register of Deeds pursuant to N.C.G.S. § 47-30(f)(11), which provides that every plat shall contain the following specific information:

> (11) Notwithstanding any other provision contained in this section, it is the duty of the surveyor, by a certificate on the face of the plat, to certify to one of the following:
>
> a. That the survey creates a subdivision of land within the area of a county or municipality that has an ordinance that regulates parcels of land;
>
> b. That the survey is located in such portion of a county or municipality that is unregulated as to an ordinance that regulates parcels of land;
>
> c. That the survey is of an existing parcel or parcels of land;
>
> d. That the survey is of another category, such as the recombination of existing parcels, a court-ordered survey, or other exception to the definition of subdivision;
>
> e. That the information available to the surveyor is such that the surveyor is unable to make a determination to the best of his or her professional ability as to provisions contained in (a) through (d) above.
>
> However, if the plat contains the certificate of a surveyor as stated in a., d., or e. above, then the plat shall have, in addition to said surveyor's certificate, a certification of approval, or no approval required, as may be required by local ordinance from the appropriate government authority before the plat is presented for recordation. If the plat con-

> tains the certificate of a surveyor as stated in b. or c. above, nothing shall prevent the recordation of the plat if all other provisions have been met.

N.C.G.S. § 47-30(f)(11) (Supp. 1996). N.C.G.S. § 153A-335(2) excepts from the statutory definition of "subdivision" and exempts from county subdivision regulations the "division of land into parcels greater than 10 acres if no street right-of-way dedication is involved." Thus, a survey of a division of land that is described in N.C.G.S. § 153A-335(2) falls under N.C.G.S. § 47-30(f)(11)(d) and requires a certification of "no approval required" before the plat may be presented for recordation. The Weswood 4 plat contained a certificate indicating that the surveyor certified that the plat met the requirements of N.C.G.S. § 47-30(f)(11)(d). However, defendant Thomas Taylor, acting as Harnett County subdivision administrator, informed plaintiff that plaintiff's plat did not qualify as exempt and was therefore subject to Harnett County's subdivision regulations.

Thereafter, plaintiff brought this action seeking (1) a declaratory judgment that the plat of the Weswood 4 division of land is exempt from Harnett County's subdivision regulations, and (2) a writ of mandamus directing Taylor to certify the plat as exempt from the regulations. After filing this action, plaintiff submitted a "revised" plat of the Weswood 4 division of land which showed a series of private driveway easements providing access to the parcels.

The trial court found that the series of private driveway easements "for all intents and purposes would be open for public use." The trial court also found that "[a]ccess to the 23 lots of Weswood 4 Subdivision for county services such as law enforcement, fire or rescue operations would be prohibitive and inadequate." The trial court further found that "[t]he purpose of the Harnett County Subdivision Ordinance would be circumvented as far as the promotion of public health, safety and general welfare of the County if the Weswood 4 Subdivision plat was developed in its current form." Based on its findings, the trial court concluded as a matter of law that the Weswood 4 plat was not exempt from Harnett County's subdivision regulations.

Plaintiff appealed to the Court of Appeals. The Court of Appeals first stated:

> In this case, defendants admitted that plaintiff's plat map of the Weswood 4 subdivision "does not show dedicated rights of way from SR 1103 [the only marked road located near, but not

> providing any direct access to, twenty-two of the twenty-three parcels] . . . ." Notwithstanding such admission, the trial court, in its finding of fact #11, found that the series of private driveway easements, by which plaintiff intends to provide access to the various Weswood 4 subdivision lots and which were to be maintained pursuant to a driveway maintenance agreement, were "for all intents and purposes . . . open for public use." This finding was in error, for there was no evidence whatsoever in the record to support such finding. Hence, the conclusions and decree of the trial court that the plat map is not exempt from the Harnett County Subdivision Regulations are invalid.

Three Guys Real Estate v. Harnett County, 122 N.C. App. 362, 366, 469 S.E.2d 578, 581 (1996). This portion of the opinion of the Court of Appeals is correct.

However, the Court of Appeals went on to hold that "even though plaintiff's plat map may not fall within the definition of 'subdivision' contained in Harnett County's Subdivision Regulations, defendants are not required to approve the map for recordation if plaintiff's proposed use of its land as shown thereon would be a danger to the health, safety and welfare of the community." *Id.* at 369, 469 S.E.2d at 582. The Court of Appeals reasoned that because the enabling legislation for county regulation of subdivisions includes a general statement of objective to promote the health, safety, and welfare of communities, *see* N.C.G.S. § 153A-331 (1991), exemption of the plat of a subdivision that endangered public health, safety, and welfare would be contrary to legislative intent. Therefore, the Court of Appeals held that because access to the Weswood 4 lots for such county services as law enforcement, fire, or rescue operations would be prohibitive and inadequate, thereby endangering the public health, safety, and welfare, defendants were not required to approve plaintiff's plat for recordation. We disagree.

Harnett County's power to regulate subdivisions is authorized and controlled by N.C.G.S. §§ 153A-330 through -335. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). "If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993).

N.C.G.S. § 153A-330 provides that "[a] county may by ordinance regulate the subdivision of land within its territorial jurisdiction." N.C.G.S. § 153A-331, upon which the Court of Appeals relies, provides that "[a] subdivision control ordinance may provide for . . . the distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create conditions essential to public health, safety, and the general welfare." N.C.G.S. § 153A-335 defines "subdivision" and provides:

> the following is not included within this definition and is not subject to any regulations enacted pursuant to this Part [N.C.G.S. §§ 153A-330 to -335]:
>
> . . . .
>
> (2) The division of land into parcels greater than 10 acres if no street right-of-way dedication is involved[.]

N.C.G.S. § 153A-335(2) (1991). This language is clear and unambiguous. As the Court of Appeals correctly concluded, plaintiff's division of land falls within this exception. Plaintiff's plat shows a division of land into parcels greater than ten acres, and no street right-of-way dedication is involved. Therefore, according to the statute, plaintiff's division of land is not subject to *any* regulations enacted pursuant to N.C.G.S. §§ 153A-330 to -335.

Defendants argue that N.C.G.S. § 153A-331 includes a statement of purpose to protect the public health, safety, and welfare and that recordation of plaintiff's plat would allow plaintiff to circumvent this purpose. Defendants further argue that the statutory mandate that this chapter of the General Statutes should be construed broadly, *see* N.C.G.S. § 153A-4 (1991), requires a holding that plaintiff's plat is not exempt so that the purpose is not circumvented. We recognize that when a statute is ambiguous or unclear in its meaning, a "construction of [the] statute which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without doing violence to the legislative language." *N.C. Baptist Hosps. v. Mitchell*, 323 N.C. 528, 532, 374 S.E.2d 844, 846 (1988). However, assuming *arguendo* that under the facts of this case, N.C.G.S. § 153A-335(2) and N.C.G.S. § 153A-331 may not be read together without resulting in some ambiguity or conflict, the general health, safety, and welfare language of N.C.G.S. § 153A-331 cannot invalidate the specific exemption clearly stated in N.C.G.S. § 153A-335(2). The language of N.C.G.S. § 153A-335(2) itself is not ambiguous, and plaintiff's

division of land falls, without question, under this exception. No other construction can reasonably be accomplished without doing violence to the legislative language.

Furthermore, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Trustees of Rowan Tech. College v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985). N.C.G.S. § 153A-331 represents a broad, general grant of power to include provisions in a county's subdivision ordinance. The exemptions of N.C.G.S. § 153A-335 are specific, direct withdrawals of county authority to regulate specified divisions of land. Therefore, although the two statutes may conflict as applied to these facts, N.C.G.S. § 153A-335(2) must control.

We cannot assume that the General Assembly intended for plaintiff's division of land to no longer be exempt from the county subdivision regulations because it might endanger the public health, safety, and welfare. The General Assembly did not include such a proviso in N.C.G.S. § 153A-335. Instead, the General Assembly clearly exempted the division of land into parcels greater than ten acres if no street right-of-way dedication is involved. Plaintiff's division of land falls squarely within this exception. Therefore, the trial court should have issued a declaratory judgment that plaintiff's plat shows a division of land that is exempt from Harnett County's subdivision regulations and a writ of mandamus directing the Harnett County subdivision administrator to affix to plaintiff's plat a certificate so stating.

For the foregoing reasons, the decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to Superior Court, Harnett County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

DIANE WHITFORD v. DESSIE PITTMAN GASKILL AND ALICE PITTMAN LEWIS DURHAM

No. 399PA95

(Filed 10 February 1997)

1. **Principal and Agent § 25 (NCI4th)— general power of attorney—authority to make gift of realty**

An attorney-in-fact acting pursuant to a broad general power of attorney lacks the authority to make a gift of the principal's real property unless that power is expressly conferred. Accordingly, the power of attorney set forth in N.C.G.S. § 32A-1 and the powers granted attorneys-in-fact by N.C.G.S. § 32A-2(1), standing alone, do not authorize an attorney-in-fact to make gifts of the principal's real property.

Am Jur 2d, Agency § 31.

2. **Principal and Agent § 25 (NCI4th)— power of attorney—power to "transfer" realty—authority to make gift**

Where language was added to a statutory short-form power of attorney giving the attorney-in-fact the power "to transfer the real estate known as the homeplace that I inherited from my mother," the attorney-in-fact had the authority to make a gift of the homeplace realty, since "transfer" is a word ordinarily used to represent a conveyance of property by sale or gift.

Am Jur 2d, Agency § 31.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 119 N.C. App. 790, 460 S.E.2d 346 (1995), affirming an order granting partial summary judgment in favor of the plaintiff entered by Phillips, J., at the 22 June 1992 Civil Session of Superior Court, Carteret County. Heard in the Supreme Court 12 March 1996.

Nelson W. Taylor, III, for plaintiff-appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, III, for defendant-appellants.

LAKE, Justice.

Defendants appeal from a decision of the Court of Appeals holding that a statutory short-form power of attorney must expressly con-

fer the authority to make a gift of real property in order to be valid, and that the power of attorney here did not convey such authority.

George W. Pittman, Jr., now deceased, owned and lived in his family homeplace on a parcel of land in Carteret County, North Carolina. Mr. Pittman became concerned about what would happen to the homeplace when he died. Mr. Pittman wanted to be assured that the homeplace would not be taken from his wife, Rose Lupton Pittman, and specifically, that neither his daughter, the plaintiff, his wife's daughter from a previous marriage, nor any federal agency could take the property upon his death.

On 18 November 1988, Mr. Pittman met with John Harris, an attorney, and conveyed his concerns regarding the property. Harris prepared a power of attorney giving Mrs. Pittman authority to act for Mr. Pittman including the power to transfer real property. The power of attorney generally followed but modified the statutory short-form power of attorney set forth in N.C.G.S. § 32A-1 and stated in pertinent part that Mrs. Pittman had

> full power to act in my name, place and stead in any way which I myself could do if I were personally present with respect to the following matters as each of them is defined in Chapter 32A of the North Carolina General Statutes to the extent that I am permitted by law to act through an agent.

Moreover, the power of attorney stated that Mrs. Pittman had the specific authority to conduct

> real property transactions, *including the power to transfer the real estate known as the homeplace that I inherited from my mother.*

(Emphasis added.) The italicized phrase above was added to the statutory short-form power of attorney found in N.C.G.S. § 32A-1. Mr. Pittman signed the power of attorney. Shortly thereafter, Harris prepared a deed conveying the property from Mr. Pittman to Dessie Pittman Gaskill and Alice Pittman Lewis Durham, the defendants and Mr. Pittman's sisters. Mrs. Pittman signed the deed at the direction of Mr. Pittman and in the presence of both Mr. Pittman and a notary public. The deed was subsequently recorded in the Carteret County Register of Deeds office. Mrs. Pittman delivered the deed to the defendants on 23 November 1988. At the time of delivery, the property was worth $75,000. The defendants did not pay the Pittmans any consideration for the property.

Mr. Pittman died intestate on 22 April 1990. Mrs. Pittman and the plaintiff were then the only persons entitled to inherit under the Intestate Succession Act of North Carolina. Mrs. Pittman is now deceased, and thus plaintiff (Mr. Pittman's daughter) and Mrs. Pittman's daughter, the two persons Mr. Pittman specifically sought to deny, would be entitled to so inherit the homeplace.

On 24 October 1990, plaintiff initiated this action alleging that the deed to the defendants signed by Mrs. Pittman as attorney-in-fact for Mr. Pittman was void. In an amended complaint, plaintiff alleged that the deed was invalid because Mr. Pittman was not mentally competent at the time he signed the power of attorney. On 25 February 1992, plaintiff filed a motion for summary judgment. The trial court heard the motion and granted partial summary judgment in plaintiff's favor after finding that the deed signed by Mrs. Pittman was void and of no effect. On appeal, the Court of Appeals affirmed the trial court and held that an attorney-in-fact may not convey real property by gift unless the power of attorney expressly confers the authority to make gifts of real property. *Whitford v. Gaskill*, 119 N.C. App. 790, 792, 460 S.E.2d 346, 347 (1995).

The defendants' appeal raises two intertwined issues. First, does an attorney-in-fact have the authority to make gifts of real property on behalf of the principal if not expressly authorized to do so in the power of attorney? Second, if specific authorization is required, is the word "transfer," when added to the standard wording of the statutory short-form power of attorney, sufficient to confer express authorization to make gifts of real property?

Whether an attorney-in-fact has the authority to make gifts of real property without being expressly authorized to do so in the power of attorney document is a question of first impression in North Carolina. Nearly every jurisdiction that has considered this issue has concluded that:

> [a] general power of attorney authorizing an agent to sell and convey property, even though it authorizes him to sell for such price and on such terms as to him shall seem proper, implies a sale for the benefit of the principal, and does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal.

Annotation, *Power of attorney as authorizing gift or conveyance or transfer without a present consideration*, 73 A.L.R. 884 (1931). *See*

also Johnson v. Fraccacreta, 348 So. 2d 570 (Fla. Dist. Ct. App. 1977); *King v. Bankerd*, 303 Md. 98, 492 A.2d 608 (1985); *Brown v. Laird*, 134 Or. 150, 291 P. 352 (1930). The basic premise behind the majority rule is that an attorney-in-fact is presumed to act in the best interests of the principal. *See Bankerd*, 303 Md. at 108, 492 A.2d at 613. Since the power to make a gift of the principal's property is potentially hazardous or adverse to the principal's interests, such power will not be lightly inferred from broad grants of power contained in a general power of attorney. *Id.*

[1] Based on these principles and in accord with the majority of jurisdictions which have considered this issue, we hold that an attorney-in-fact acting pursuant to a broad general power of attorney lacks the authority to make a gift of the principal's real property unless that power is expressly conferred. Accordingly, the power of attorney set forth in N.C.G.S. § 32A-1 and the powers granted attorneys-in-fact by N.C.G.S. § 32A-2(1), standing alone, do not authorize an attorney-in-fact to make gifts of the principal's real property. This, however, does not end our consideration in the instant case.

[2] In the case *sub judice*, Mr. Pittman executed a short form power of attorney pursuant to N.C.G.S. § 32A-1 naming his wife, Rose Lupton Pittman, attorney-in-fact. The power of attorney conferred upon Mrs. Pittman the authority to make decisions regarding Mr. Pittman's real property pursuant to the powers set forth in N.C.G.S. § 32A-2(1). As above determined, N.C.G.S. §§ 32A-1 and 32A-2(1), standing alone, would not authorize Mrs. Pittman to make a gift of Mr. Pittman's property. However, the power of attorney executed by Mr. Pittman went beyond the short form and expressly provided that Mrs. Pittman's powers were to include "the power to transfer the real estate known as the homeplace that I inherited from my mother." The word "transfer" is primarily defined by *Webster's Dictionary* as "the conveyance of right, title, or interest in either real or personal property from one person to another *by sale, gift, or other process.*" *Webster's Third New International Dictionary* 2427 (1976) (emphasis added). Transfer is also defined by *Black's Law Dictionary* as:

> An act of the parties, or of the law, by which the title to property is conveyed from one person to another. *The sale and every other method, direct or indirect, of disposing of or parting with property* or with an interest therein, or with the possession thereof, or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or

> without judicial proceedings, *as a conveyance, sale, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise.* The word is one of general meaning and may include the act of giving property by will.

Black's Law Dictionary 1497 (6th ed. 1990) (emphasis added). Finally, an alternative definition of transfer found in *Black's Law Dictionary* provides that transfer means "to sell or to give." *Id.* The common thread connecting each of these definitions is that the word "transfer" is a word ordinarily used to represent a conveyance of property by sale or by gift. Using this definition of the word "transfer," the language added in this case to the power of attorney reads, "the power to [convey by sale or by gift] the real estate known as the homeplace that I inherited from my mother." Accordingly, we hold that the power of attorney executed by Mr. Pittman did expressly confer upon Mrs. Pittman, as Mr. Pittman's attorney-in-fact, the power to make a gift of the property in dispute. Further, aside from this construction of the meaning of the word "transfer" added to the statutory short form power of attorney, this meaning appears to have been the intent of the principal under the circumstances of this case.

We note that the North Carolina legislature, in 1995, amended N.C.G.S. §§ 32A-1 and 32A-2. The amendment adds a section to the statutory short-form power of attorney giving the principal the ability to confer upon the attorney-in-fact the authority to make gifts to individuals and charities in accordance with the principal's personal history of gift-giving. The principal must specifically acknowledge (by initialing this section) his or her intent to confer the authority to make gifts. The 1995 amendment does not affect our decision as it relates to general powers of attorney executed prior to the effective date of the amendment nor does it affect our decision as it relates to the attorney-in-fact's authority to make gifts subsequent to the amendment where there is no personal history of gift-giving.

For the reasons stated herein, while we agree with the decision of the Court of Appeals as to the law regarding general powers of attorney, we reverse the decision of the Court of Appeals with respect to its interpretation of the power of attorney in the case *sub judice* and remand this case to that court for further remand to the Superior Court, Carteret County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

GEORGIA RAY ANDERSON v. JULIUS RUBIN HOLLIFIELD

No. 384A96

(Filed 10 February 1997)

1. **Appeal and Error § 291 (NCI4th)— notice of appeal not given—treated as petition for certiorari**

The Court of Appeals had the authority to review a trial court's judgment in an automobile accident case even though plaintiff never filed a notice of appeal from the judgment. Construing Appellate Rules 27(c) and 21(a)(1) together, the appellate court has the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely matter.

Am Jur 2d, Appellate Review § 339.

2. **Trial § 526 (NCI4th)— automobile accident—damages—verdict of one dollar—motion to set aside denied—no abuse of discretion**

There was no abuse of discretion in an automobile accident case where the jury awarded $1.00 in damages and the trial court denied plaintiff's motion to set aside the verdict as against the weight of the evidence. The record demonstrates that defendant contested the existence of all of plaintiff's alleged injuries and the jury was presented with all of the evidence, was instructed properly on the law, and made its decision accordingly. It cannot be concluded from the "cold record" that the trial court's ruling in denying plaintiff's motion to set aside the verdict on the issue of damages probably amounted to a substantial miscarriage of justice.

Am Jur 2d, Judgments § 331.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 426, 473 S.E.2d 399 (1996), reversing the judgment denying plaintiff's motion to set aside the verdict on the issue of damages entered by Warren, J., on 1 March 1995 in Superior Court, Gaston County. Heard in the Supreme Court 10 December 1996.

James R. Carpenter and Barrett O. Poppler for plaintiff-appellee.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by Rex C. Morgan; and Colombo & Robinson, by William C. Robinson, for defendant-appellant.

Stanley & Rhodes, L.L.P., by James M. Stanley, Jr., on behalf of The North Carolina Association of Defense Attorneys, amicus curiae.

MITCHELL, Chief Justice.

This case arose as a result of an automobile accident that occurred on 18 December 1992. Evidence at trial tended to show that plaintiff, Georgia Ray Anderson, was driving her unmarked police vehicle on Franklin Boulevard in Gastonia. She stopped at the intersection of Franklin Boulevard and South Chester Street. Defendant, Julius R. Hollifield, was operating a 1968 Ford pickup truck directly behind the vehicle driven by plaintiff. As plaintiff stopped at the intersection, defendant failed to stop in time and collided with the rear of plaintiff's vehicle. Photographs taken at the scene revealed no visible damage to either vehicle, and neither driver appeared to be seriously injured at the time.

At the close of trial on 13 February 1995, the trial court submitted two questions to the jury and received the following answers from the members of the jury:

> 1. Did the negligence of the Defendant, Julius Rubin Hollifield, cause injury to the Plaintiff, Georgia Ray Anderson?
>
> ANSWER: Yes.
>
> 2. What amount is the Plaintiff, Georgia Ray Anderson, entitled to recover for personal injuries?
>
> ANSWER: $1.00.

Plaintiff moved to set aside the verdict as to issue two on the grounds that it was against the greater weight of the evidence. The trial court denied plaintiff's motion and entered judgment in accordance with the jury's verdict on 1 March 1995.

Plaintiff appealed to the Court of Appeals. A divided panel of the Court of Appeals reversed the trial court's judgment and remanded the case for a new hearing on the issue of damages "related solely to

plaintiff's acute cervical sprain." *Anderson v. Hollifield*, 123 N.C. App. 426, 431, 473 S.E.2d 399, 402 (1996). The majority opinion in the Court of Appeals stated "that there are numerous rule violations by plaintiff in this case," *id.* at 429, 473 S.E.2d at 400, but treated the appeal as before the court on a petition for writ of certiorari and addressed the issues raised by plaintiff. Judge Smith dissented, reasoning that the appeal should not have been heard because of violations of the appellate rules. *Id.* at 431-33, 473 S.E.2d at 402-03. Defendant appeals to this Court as a matter of right by virtue of Judge Smith's dissent.

[1] The first issue on appeal is whether the Court of Appeals had jurisdiction to review the trial court's judgment. Defendant notes that plaintiff has never filed a notice of appeal from the judgment entered by the trial court as required by Rule 3(a) of the Rules of Appellate Procedure. He maintains that such a failure to file a notice of appeal deprives the appellate courts of jurisdiction to rule upon the merits of plaintiff's appeal.

Under Rule 3(a) of the North Carolina Rules of Appellate Procedure, any party entitled by law to appeal from a judgment of a superior court rendered in a civil action may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner. Appellate Rule 27(c) provides in pertinent part: "Courts may not extend the time for taking an appeal . . . prescribed by these rules or by law." Appellate Rule 21(a)(1) provides: "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments . . . of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." Construing these rules together, we conclude that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner. Therefore, we conclude that the Court of Appeals properly granted certiorari in this case.

[2] By another assignment of error, defendant argues that the Court of Appeals erred in reversing the trial court's denial of plaintiff's motion to set aside the jury's verdict on the issue of damages. We agree.

This Court has defined the standard for appellate review of discretionary rulings by trial courts granting or denying motions to set aside verdicts and order new trials.

> Appellate review "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). The trial court's discretion is " 'practically unlimited.' " *Id.* [at 402], 290 S.E.2d at 603 (quoting from *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915)). A "*discretionary* order pursuant to [N.C.]G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Id.* at 484, 290 S.E.2d at 603. "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-85, 290 S.E.2d at 604. "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E.2d at 605.

Campbell v. Pitt County Memorial Hosp., 321 N.C. 260, 264-65, 362 S.E.2d 273, 275-76 (1987) (alterations in original).

In reaching its decision to reverse the trial court's order denying plaintiff's motion to set aside the jury's verdict on the issue of damages, the Court of Appeals' majority relied upon the mistaken assumption that "[d]efendant does not dispute that his negligence caused the acute cervical sprain suffered by plaintiff." *Anderson*, 123 N.C. App. at 430, 473 S.E.2d at 401. A review of the record demonstrates that defendant contested the existence of all of plaintiff's alleged injuries, including the alleged cervical sprain, and there is no indication whatsoever that defendant ever conceded that plaintiff suffered a cervical sprain as a result of this accident. Although defendant's answer admitted that the accident was caused by his negligence, the answer specifically denied the existence of either proximate cause or damages. Further, cross-examination of plaintiff's treating physician, Dr. Blake, by counsel for defendant tended to show that plaintiff had significant degenerative disc disease that preexisted the accident and that neck pain from this condition could have become manifest without the accident. It is the jury's function to weigh the evidence and to determine the credibility of witnesses. In this case, the jury was presented with all of the evidence, was instructed properly on the law, and made its decision accordingly. Therefore, we cannot conclude from the "cold record" that the trial court's ruling in denying plaintiff's motion to set aside the verdict on

the issue of damages probably amounted to a substantial miscarriage of justice.

For the reasons stated herein, we conclude that the Court of Appeals did not err in treating this purported appeal as a petition for writ of certiorari. We reverse the decision of the Court of Appeals which reversed the judgment of the trial court and remand this case to that court for further remand to the Superior Court, Gaston County, for reinstatement of its judgment.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. LORENZO MANLEY

No. 139A96

(Filed 10 February 1997)

1. **Criminal Law § 914 (NCI4th Rev.)— first-degree murder—unanimity on theory—instructions—no plain error**

The trial court's instructions did not permit the jury to find defendant guilty of first-degree murder without unanimously finding that he was guilty based on either malice, premeditation, and deliberation or on felony murder and were not plain error where the court instructed the jurors that they could not reach a verdict until they were unanimous; in instructing on the verdict sheet, the court told the jury, "Whatever your unanimous verdict is . . . place an X on the line beside that verdict"; and the jury placed a check beside both murder based on malice, premeditation, and deliberation and based on the felony murder rule, which shows the jury was unanimous on both theories.

Am Jur 2d, Homicide §§ 541, 542; Trial §§ 1750-1753, 1788.

2. **Homicide § 718 (NCI4th)— first-degree murder—verdict sheet—theory of conviction**

It is the better practice for the trial court in a first-degree murder case to submit a verdict sheet which requires the jury to specify the theory upon which it convicted defendant.

Am Jur 2d, Homicide §§ 541, 542.

3. Constitutional Law § 312 (NCI4th)— counsel's failure to object—not ineffective assistance of counsel

Defendant did not have the ineffective assistance of counsel because his trial counsel failed to object to the charge or to the verdict sheet submitted to the jury where the appellate court has held that there was no error in the charge or in the submission of the verdict sheet.

Am Jur 2d, Criminal Law §§ 748-753, 984-987.

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 right to and incidents of jury trial. 3 ALR4th 601.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Grant (Cy A.), J., at the 25 September 1995 Criminal Session of Superior Court, Pitt County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 15 October 1996.

The defendant was tried for first-degree murder in a case in which the State did not seek the death penalty. The evidence tended to show that on 7 January 1994, State's witness Arem Muhammad was at a convenience store which was owned and operated by him and his family. His cousin Maher; brother Frank; son Ashraf; and uncle Marif Muhammad, the victim, were also present.

The defendant entered the store that evening and requested permission to use the bathroom. He was denied permission to do so, and an argument ensued. Maher pushed the defendant out the door. The defendant then drew a pistol and began to shoot into the store. After the defendant stopped firing, Arem noticed that Marif had been shot. Arem then went to the door and fired several shots at the defendant. Maher went outside and fired shots into the air.

The victim was shot six times. One of the bullets struck his heart, and he died as a result of this wound.

The defendant was hit in the lower leg by a shot fired by Arem. He went to a hospital, and someone there notified the police.

The jury found the defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. On 28 September 1995, Judge Grant sentenced him to a mandatory term of life imprisonment. The defendant appealed to this Court.

Michael F. Easley, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Steven M. Fisher for defendant-appellant.

WEBB, Justice.

[1] The defendant first assigns error to the jury instructions. He says the instructions on first-degree murder based on malice, premeditation, and deliberation and first-degree murder based on felony murder were such that the jury could find him guilty of first-degree murder without a unanimous verdict. No objection was made to the charge, and the defendant asks us to consider this assignment of error under the plain error rule. N.C. R. App. P. 10(c)(4).

The court instructed the jury on unanimity as follows:

> Now, members of the jury, I will tell you that a verdict is not a verdict until all 12 of you agree unanimously as to what your decision shall be. You may not render a verdict by majority vote.

The court explained the verdict sheet to the jury as follows:

> Now, if the jury finds beyond a reasonable doubt that the defendant is guilty of first-degree murder, you have to determine on what basis he was found guilty of first-degree [murder]. Whether it was on the basis of malice, premeditation and deliberation and/or under the first-degree felony murder rule. He can be found guilty on one of these two basis [sic] or both of them. But if he's found guilty of first-degree murder by you, have the foreperson place an X on the line beside "guilty of first-degree murder," and then have the foreperson place an X on the line beside which basis. . . . Whatever your unanimous verdict is have the foreperson place an X on the line beside that verdict.

The verdict sheet provided in pertinent part as follows:

We, the jury, return as our unanimous verdict that the defendant, Lorenzo Manley, is:

1. _____ Guilty of first-degree murder on the basis of:

A. _____ malice, premeditation, and deliberation

and/or

B. _____ first-degree felony murder rule;

The jury checked each blank.

The defendant contends that this charge allowed the jury to find him guilty of first-degree murder without unanimously finding that he was guilty based on either malice, premeditation, and deliberation or on felony murder. We do not agree. The court instructed the jurors that they could not reach a verdict until they were unanimous. In instructing the jury on the verdict sheet, the court told it, "Whatever your unanimous verdict is . . . place an X on the line beside that verdict." The jury placed a check beside both murder based on malice, premeditation, and deliberation and on the felony murder rule, which shows the jury was unanimous on both theories. There was no error in the charge.

[2] The court in this case followed what we have said is the better practice and submitted a verdict sheet which required that the jury specify the theory upon which it convicted the defendant. *State v. Clark*, 325 N.C. 677, 684, 386 S.E.2d 191, 195 (1989). We note that we have never held it is reversible error not to submit a verdict sheet in a murder case. *See State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986).

This assignment of error is overruled.

[3] In his second assignment of error, the defendant contends he had ineffective assistance of counsel because his trial counsel did not object to the charge or the verdict sheet submitted. We have held there was no error in the charge or the submission of the verdict sheet. The defendant's counsel was not ineffective for not objecting to them. This assignment of error is overruled.

NO ERROR.

KAREN D. CICOGNA v. JOHN H. HOLDER

No. 125A96

(Filed 10 February 1997)

1. Automobiles and Other Vehicles 592 (NCI4th)— intersection accident—traffic light—contributory negligence improperly submitted

The trial court erred by submitting an issue of contributory negligence to the jury where all of the evidence tended to show that plaintiff was proceeding through an intersection pursuant to a green light when she was struck by defendant's vehicle which violated the red light, and there was no evidence of anything that would have put plaintiff on notice that defendant would not obey the traffic light.

Am Jur 2d, Automobiles and Highway Traffic §§ 422, 423; Negligence §§ 1108-1114.

2. Appeal and Error § 524 (NCI4th)— partial new trial

This case is remanded for a new trial only on the issue of damages where the jury found negligence and contributory negligence; the trial court erred in submitting the contributory negligence issue to the jury; the evidence as to negligence and contributory negligence was separate; and the verdict as to contributory negligence should not have affected the negligence issue.

Am Jur 2d, Appellate Review §§ 808-812.

Grant of new trial on issue of liability alone, without retrial of issue of damages. 34 ALR2d 988.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases. 5 ALR5th 875.

Appeal of right by the plaintiff pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 121 N.C. App. 787, 467 S.E.2d 911 (1996), finding no error in a judgment entered by Bowen (Wiley F.), J., on 17 February 1994, in Superior Court, Lee County. Heard in the Supreme Court 10 September 1996.

The plaintiff brought this action to recover for personal injury and property damage received in a collision between her automobile and a pickup truck driven by the defendant. The plaintiff testified that on 20 September 1992, she was operating her automobile in a westerly direction on Raleigh Street in Sanford. She stopped for a traffic light at the intersection of Raleigh Street and Lee Avenue. When the traffic light facing her turned green, she started into the intersection. She testified that she looked both ways and did not see the defendant's vehicle although he was "right there."

As the plaintiff entered the intersection, the defendant was traveling in a northerly direction on Lee Avenue in his truck. He drove into the intersection and collided with the plaintiff. The defendant did not introduce any evidence.

Over the plaintiff's objection, the court submitted the issue of contributory negligence to the jury, and the jury answered favorably to the defendant. The court entered a judgment accordingly and dismissed the action. The Court of Appeals found no error, and Judge Wynn dissented.

The plaintiff appealed to this Court.

Staton, Perkinson, Doster, Post, Silverman and Adcock, by Jonathan Silverman and Elizabeth Myrick Boone, for plaintiff-appellant.

Teague, Rotenstreich and Stanaland, L.L.P., by Kenneth B. Rotenstreich and Laurie R. Stegall, for defendant-appellee.

WEBB, Justice.

[1] The question raised by this appeal involves the quantum of evidence necessary to submit contributory negligence to the jury when the plaintiff's vehicle is struck by another vehicle while the plaintiff is proceeding through an intersection pursuant to a green light. There is no evidence in this case that there was anything that would have put the plaintiff on notice that the defendant would not obey the traffic light. Absent such evidence, contributory negligence should not have been submitted to the jury. The plaintiff was not required to anticipate that the defendant would be negligent. *Penland v. Greene*, 289 N.C. 281, 221 S.E.2d 365 (1976). The only evidence presented was that the plaintiff had the green light and was struck by the defendant, who violated the red light. This is not sufficient evidence of contrib-

utory negligence by the plaintiff to submit contributory negligence to the jury.

This case is similar to *Jones v. Schaffer*, 252 N.C. 368, 114 S.E.2d 105 (1960), in which we said a person "has a right to assume that any motorist approaching from his left on the intersecting street will stop in obedience to the red light facing him unless and until something occurs that is reasonably calculated to put him on notice that such motorist will unlawfully enter the intersection." *Id.* at 375, 114 S.E.2d at 111; *see also Myrick v. Peeden*, 113 N.C. App. 638, 439 S.E.2d 816, *disc. rev. denied*, 336 N.C. 781, 447 S.E.2d 426 (1994); *Snead v. Holloman*, 101 N.C. App. 462, 400 S.E.2d 91 (1991).

The defendant relies principally on two cases: *Bass v. Lee*, 255 N.C. 73, 120 S.E.2d 570 (1961), and *Frugard v. Pritchard*, 112 N.C. App. 84, 434 S.E.2d 620 (1993), *rev'd on other grounds*, 338 N.C. 508, 450 S.E.2d 744 (1994). Neither is helpful to him. Each of these cases reiterates the rule that a motorist, although he has the green light, must keep a proper lookout. In each case, however, there was evidence of negligence in addition to a collision in an intersection. In *Bass*, a passenger in the defendant's automobile warned him that the vehicle approaching the intersection would not stop. In *Pritchard*, the defendant was looking to the right and waving to friends as he entered the intersection. This was additional evidence that the defendant did not keep a proper lookout. There was no such evidence regarding the plaintiff in the case before us.

[2] We hold it was error to submit contributory negligence to the jury in this case. In ordering a new trial, it is within the discretion of this Court whether to grant a new trial on all issues. If the issue which was erroneously submitted did not affect the entire verdict, there should not be a new trial on all issues. *See Fortune v. First Union Nat'l Bank*, 323 N.C. 146, 371 S.E.2d 483 (1988); *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 292 N.C. 557, 234 S.E.2d 605 (1977). In this case, the evidence as to negligence and contributory negligence was separate. The verdict as to contributory negligence should not have affected the negligence issue.

We therefore remand this case to the Court of Appeals for further remand to Superior Court, Lee County, for a new trial on the issue of damages.

REVERSED AND REMANDED.

JOE CARTER, REBECCA W. CARTER AND CRYSTAL VENTURES CORPORATION, A NORTH CAROLINA CORPORATION v. STANLY COUNTY, A COUNTY IN THE STATE OF NORTH CAROLINA, WILLIAM DWIGHT SMITH, CHAIRMAN OF THE STANLY COUNTY COMMISSIONERS; DONNIE JOE WHITLEY, PAUL EDWARD BOWERS, SR., THOMAS EDWARD UNDERWOOD, MELVIN K. HUNEYCUTT, COUNTY COMMISSIONERS; THE STANLY COUNTY HEALTH DEPARTMENT, JERRY L. BURLESON, J. MICHAEL HATLEY, DR. PAUL B. HOUNSHELL, JR., EDWIN (PETE) R. JOHNSON, DONNA T. BAUCOM, DR. SAMUEL G. GRIFFIN, DR. LOUIS C. KANDL, DR. SAMUEL E. THOMPSON, EDWARD (RUSTY) R. KERR, O. DAVID WILLIAMS, JR., DONNIE JOE WHITLEY, MEMBERS OF THE STANLY COUNTY BOARD OF HEALTH; DR. JOSEPH BARRY BASS, JR., BENJAMIN WASHINGTON AND MICHAEL GOFORTH

No. 350A96

(Filed 10 February 1997)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 123 N.C. 235, 472 S.E.2d 378 (1996), affirming the order granting defendants' motion for summary judgment entered by Stephens (Ronald L.), J., on 20 June 1995 in Superior Court, Stanly County. Heard in the Supreme Court on 10 December 1996.

Richard M. Warren for plaintiff-appellants.

Frank B. Aycock, III; and Parker, Poe, Adams & Bernstein, L.L.P., by Fred T. Lowrance; and Michael W. Taylor for defendant-appellees.

Michael F. Easley, Attorney General, by D. Sigsbee Miller, Assistant Attorney General, amicus curiae.

North Carolina Association of County Commissioners, by Kimberly Martin Grantham, amicus curiae.

PER CURIAM.

AFFIRMED.

EVA MAE MONK, PLAINTIFF v. COWAN TRANSPORTATION, INC., TY PRUITT DIVISION, AND JAMES ATWOOD McCAIN, DEFENDANTS, AND COWAN TRANSPORTATION, INC. AND JAMES ATWOOD McCAIN, THIRD-PARTY PLAINTIFFS v. PAULETTE HERMAN CHURCH, ADMINISTRATRIX OF THE ESTATE OF CHARLES KEITH HERMAN, THIRD-PARTY DEFENDANT

No. 120PA96

(Filed 10 February 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 121 N.C. App. 588, 468 S.E.2d 407 (1996), reversing summary judgment entered on 7 November 1994 by Caldwell, J., at the 17 October 1994 Session of Superior Court, Mecklenburg County, and remanding the case for a trial on the merits. Heard in the Supreme Court 14 November 1996.

Pulley, Watson, King & Lischer, P.A., by Richard N. Watson, Julie Cheek Woodmansee, and Stella A. Boswell, for plaintiff-appellee.

Kennedy Covington Lobdell & Hickman, L.L.P., by F. Fincher Jarrell, for defendant-appellants.

PER CURIAM.

The Court agrees with the holding of the opinion of the Court of Appeals that the judgment of the trial court should be reversed and the cause remanded for trial on the merits. However, we specifically disavow the language in the Court of Appeals' opinion holding that no genuine issue of material fact exists as to the actual ownership of the vehicle.

AFFIRMED.

NORTH CAROLINA BOARD OF EXAMINERS FOR SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS v. NORTH CAROLINA STATE BOARD OF EDUCATION, BOBBY R. ETHERIDGE, SUPERINTENDENT OF PUBLIC INSTRUCTION, NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, GUILFORD COUNTY BOARD OF EDUCATION, DAVIE COUNTY BOARD OF EDUCATION, IREDELL COUNTY BOARD OF EDUCATION, MECKLENBURG COUNTY BOARD OF EDUCATION, COLUMBUS COUNTY BOARD OF EDUCATION, BURKE COUNTY BOARD OF EDUCATION, LAURA SZENASY, JANE IRENE FERREE, ELIZABETH TUTTLE CARTER, PATRICIA YODER, KATHY WIANT, AND BERNADINE ARMSTRONG

No. 177A96

(Filed 10 February 1997)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 122 N.C. App. 15, 468 S.E.2d 826 (1996), reversing an order of summary judgment for defendants entered by Cashwell, J., on 30 August 1994 in Superior Court, Wake County. On 12 June 1996 this Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court 11 December 1996.

Randall, Jervis, & Hill, by John C. Randall, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, and Barbara A. Shaw, Assistant Attorney General, for defendant-appellants.

Kilpatrick & Cody, by Neil I. Levy, for the American Speech-Language-Hearing Association, amicus curiae.

PER CURIAM.

Chief Justice Mitchell and Justices Frye, Whichard, and Lake voted to affirm the decision of the Court of Appeals for the reasons stated in the majority opinion by Smith, J. Justices Webb, Parker, and Orr voted to reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion by Greene, J. Accordingly, the decision of the Court of Appeals is affirmed.

We hold that defendants' petition for discretionary review of additional issues was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

KENZIE SALAAM v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 183PA96

(Filed 10 February 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 83, 468 S.E.2d 536 (1996), reversing and remanding an opinion and award of the Industrial Commission, filed 3 November 1994, which denied additional compensation based on a change of condition. Heard in the Supreme Court 11 December 1996.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner; and Elizabeth F. Kuniholm for plaintiff-appellee.

Michael F. Easley, Attorney General, by Elisha H. Bunting, Jr., Special Deputy Attorney General, for the State.

Teague, Campbell, Dennis & Gorham, L.L.P., by Linda Stephens and Gregory M. Willis, on behalf of North Carolina Association of Defense Attorneys, amicus curiae.

Brooks, Stevens & Pope, P.A., by Daniel C. Pope, Jr., and Patricia Wilson Medynski, on behalf of Alexsis Risk Management Services, Inc., and GAB Robins of North America, Inc., amici curiae.

Young Moore and Henderson P.A., by B.T. Henderson II, J. Aldean Webster III, and J.D. Prather, on behalf of National Association of Independent Insurers, amicus curiae.

Kathleen Shannon Glancy, Chair, NCATL Worker's Comp. Committee; Robin E. Hudson, Chair, NCATL Workers' Rights Section; Elizabeth F. Kuniholm, NCATL Vice-President; and Pulley, Watson, King & Lischer, by Tracy K. Lischer, on behalf of North Carolina Academy of Trial Lawyers and North Carolina Association of Women Attorneys, amici curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

NORTH CAROLINA STATE BAR, PETITIONER v. HON. ORLANDO F. HUDSON, RESPONDENT, AND CLARENCE C. MALONE, JR., RESPONDENT

No. 223PA96

(Filed 10 February 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of an order entered 1 May 1996 in the Court of Appeals reversing an order entered by Hudson, J., on 16 April 1996, *nunc pro tunc* 9 April 1996, in Superior Court, Durham County; remanding the case to the trial court for entry of an order dismissing respondent Clarence C. Malone, Jr.'s petition for judicial review filed in that court; and vacating an order entered 20 March 1996 staying enforcement of the order of the North Carolina State Bar Disciplinary Hearing Commission suspending respondent Malone's law license. Heard in the Supreme Court 13 December 1996.

Carolin D. Bakewell and Deanna Brocker for petitioner-appellee.

Loflin and Loflin, by Thomas F. Loflin III; and Michaux and Michaux, P.A., by Eric C. Michaux, for respondent-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STATE OF NORTH CAROLINA v. ROY LEE DAVIDSON

No. 369A96

(Filed 10 February 1997)

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 326, 473 S.E.2d 389 (1996), reversing the conviction of the defendant of second-degree murder, which conviction occurred on 7 June 1995 in Superior Court, Iredell County. Heard in the Supreme Court 11 December 1996.

Michael F. Easley, Attorney General, by Melissa Taylor, Associate Attorney General, for the State-appellant.

Lassiter & Lassiter, P.A., by T. Michael Lassiter, Jr. for defendant-appellee.

PER CURIAM.

Reversed for the reasons stated in the dissenting opinion of Judge Eagles. Remanded to the Court of Appeals for further remand to Superior Court, Iredell County, for the reinstatement of the judgment entered upon the defendant's conviction.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. THOMAS M. LARRY

No. 189A95

(Filed 7 March 1997)

1. Jury § 146 (NCI4th)— capital murder—jury selection—instruction—no error

There was no prejudicial error during jury selection for a capital first-degree murder prosecution where the court instructed prospective jurors that "[i]f the jury finds beyond a reasonable doubt the existence of all facts necessary to impose the death penalty, the law of North Carolina requires that the juror vote to recommend that the defendant be sentenced to death." The judge emphasized to the jury that the instruction contained general information about the proceedings, explained that he would give full instructions after the presentation of the evidence, and full and proper instructions were given at the sentencing proceeding.

Am Jur 2d, Criminal Law § 628; Homicide § 510.

2. Jury § 119 (NCI4th)— capital murder—jury selection—defense questions excluded—no error

The defendant in a capital first-degree murder prosecution did not show an abuse of discretion or prejudice where the court sustained the State's objections to two of defendant's questions during jury selection. Defendant was allowed to ask other questions to achieve the same inquiry sought by both questions and no juror was accepted to whom defendant had legal objections upon any ground.

Am Jur 2d, Criminal Law § 913; Jury § 210.

3. Jury § 112 (NCI4th)— capital murder—jury selection—motion for individual voir dire—victim a police officer—relevant—denial of motion not error

The trial court did not err during jury selection for a capital first-degree murder prosecution by denying defendant's motion for individual *voir dire* of prospective jurors or by denying defendant's motion to disqualify the venire where both motions were based on defendant's contention that the fact that the victim was a police officer was not relevant. The court did not err by allowing the State to present evidence that the victim was a

police officer, there was no need for individual *voir dire* to prevent prospective jurors from learning that fact, and there was no error in not disqualifying the jury because they heard some of the prospective jurors volunteer that they knew this case involved the killing of an officer.

Am Jur 2d, Evidence § 328; Jury § 198.

4. Criminal Law § 363 (NCI4th Rev.)— murder of police officer—uniformed police officers in courtroom—motion to exclude denied—no abuse of discretion

The trial court did not abuse its discretion in a capital first-degree murder prosecution for the killing of an off-duty police officer by denying defendant's motion to exclude uniformed police officers from the courtroom because they would improperly influence the jury. The court stated in denying the motion that it would consider the motion further if there was anything that went beyond an occasional appearance on an individual basis by a uniformed officer who might be a witness or a spectator.

Am Jur 2d, Trial § 254.

5. Homicide § 257 (NCI4th)— capital murder—premeditation and deliberation—sufficiency of evidence

There was sufficient evidence of premeditation and deliberation in a capital first-degree murder prosecution where defendant's conduct before and after the killing supports a finding that the scuffle with the victim did not overcome defendant's faculties and reason. Defendant carried a loaded gun into a Food Lion and used it to accomplish a robbery; a witness testified that she saw defendant point the gun at the victim and say, "If you move, you're dead"; a Food Lion cashier who witnessed the incident heard the robber say, "Don't move or I'll kill you"; and several witnesses testified that defendant fired two or more shots with a pause in between.

Am Jur 2d, Homicide §§ 46, 52, 228, 439, 472.

Jury instructions as to presumption of deliberation and premeditation. 96 ALR2d 1435.

Modern status of the rules requiring malice aforethought, deliberation, or premeditation as elements of murder in the first degree. 18 ALR4th 961.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-*Gregg* cases. 64 ALR4th 755.

6. Criminal Law § 914 (NCI4th Rev.)— capital murder—instructions—unanimity on theory of murder—no plain error

There was no plain error in a capital first-degree murder prosecution where defendant contended that the instructions given by the court did not require the jury to be unanimous on the theory of first-degree murder it used to support its verdict. A similar argument was overruled in *State v. Alford*, 339 N.C. 562, the record of which included a verdict sheet similar to the one in this case, as well as a polling of the jurors. The jury here received proper instructions and there is no risk that the jury was not unanimous as to either theory upon which it based its finding of guilty of first-degree murder.

Am Jur 2d, Criminal Law §§ 675, 918; Homicide § 511; Trial §§ 838, 1437.

7. Homicide § 552 (NCI4th)— capital murder—instruction on second-degree murder refused—no error

The trial court did not err in a capital prosecution for first-degree murder by not instructing the jury on the lesser included offense of second-degree murder. Although defendant contends that it is unconstitutional to require him to negate premeditation and deliberation in order to be entitled to an instruction on second-degree murder, the State has the burden of proving the elements of first-degree murder beyond a reasonable doubt. Due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction.

Am Jur 2d, Homicide §§ 496, 511, 530, 533, 544.5; Trial §§ 1427, 1430.

Modern status of law regarding cure of error in instruction as to one offense by conviction of higher or lesser offense. 15 ALR4th 118.

8. Homicide §§ 552, 558 (NCI4th)— capital murder—instruction on second-degree murder and manslaughter—carrying gun to robbery—refusal to give instruction—no error

The evidence in a capital prosecution for first-degree murder did not support an instruction on the lesser included offenses of second-degree murder and manslaughter; the uncontradicted evidence that defendant carried a loaded gun to commit a robbery and threatened to kill the victim if the victim moved is sufficient positive evidence of premeditation and deliberation.

Am Jur 2d, Homicide §§ 496, 511, 530, 533, 544.5; Trial §§ 1427, 1430.

Modern status of law regarding cure of error in instruction as to one offense by conviction of higher or lesser offense. 15 ALR4th 118.

9. Homicide § 588 (NCI4th)— capital murder—imperfect self-defense—instruction refused—no error

The trial court did not err in a capital prosecution for first-degree murder by not instructing the jury on imperfect self-defense where there was positive, uncontradicted evidence that defendant formed an intent to kill with malice and after premeditation and deliberation. Defendant did not act without murderous intent.

Am Jur 2d, Homicide §§ 249, 519.

Modern status and rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.

Accused's right in homicide case to have jury instructed as to both unintentional shooting and self-defense. 15 ALR4th 983.

10. Evidence and Witnesses § 82 (NCI4th)— capital murder—victim's status as police officer—relevant

The trial court did not err in a first-degree murder prosecution by allowing the State to present evidence that the decedent was a police officer. Although defendant contends that this evidence was not relevant and that the danger of prejudice outweighed the probative value, the victim's status as a police officer led him to pursue defendant, which led to defendant shooting him. The actions of an officer who arrived at the scene of the crime shortly after the shooting and the identity of the victim as

a police officer are clearly circumstances which throw light upon the crime. Other witnesses' references to the victim as "Officer Buitrago" simply incorporated the title "Officer."

Am Jur 2d, Criminal Law § 378; Evidence § 328.

Sympathy to accused as appropriate factor in jury consideration. 72 ALR3d 842.

11. Criminal Law § 1366 (NCI4th Rev.)— capital sentencing—killing during course of robbery—theory of conviction—no error in submitting

The trial court did not err during a capital sentencing proceeding by submitting the aggravating circumstance that the killing was committed during the course of an armed robbery where defendant argued that the conviction based on premeditation and deliberation was infirm, so that the only theory of conviction was the felony murder rule and the court erred by submitting the underlying felony as an aggravating circumstance. However, the trial court did not err in relation to the conviction based on premeditation and deliberation and the trial court properly submitted the circumstance. N.C.G.S. § 15A-2000(e)(5).

Am Jur 2d, Homicide §§ 43, 46, 554.

Sufficiency of evidence, for purpose of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-*Gregg* cases. 64 ALR4th 755.

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.

12. Criminal Law §§ 1381, 694 (NCI4th Rev.)— capital sentencing—victim an off-duty police officer—mitigating circumstance that victim a voluntary participant in crime—not submitted

The trial court did not commit plain error in a capital sentencing proceeding by failing to submit the statutory mitigating circumstance that the victim was a voluntary participant in

defendant's homicidal conduct or consented to the homicidal act where the victim was an off duty police officer who pursued defendant after a robbery. The evidence did not support the submission of the N.C.G.S. § 15A-2000(f)(3) mitigating circumstance in that the victim had nothing to do with the armed robbery and merely attempted to apprehend defendant when defendant fled. Furthermore, the court submitted a nonstatutory mitigating circumstance of whether the shot was fired as a result of a struggle between defendant and the victim and whether that had mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599, 628; Homicide § 554; Trial § 1760.

13. Evidence and Witnesses § 2877 (NCI4th)— capital sentencing—cross-examination of defendant

Defendant was not prejudiced in a capital sentencing hearing by the prosecutor's cross-examination of him where defendant argued that the total effect of the prosecutor's questions about defendant's reliance on counsel, his plea to a prior crime, and a suggestion that defendant testified because his counsel told him that was the only way to save his life violated his constitutional rights to counsel and to enter a plea of guilty to the prior crime while maintaining his innocence. Defendant did not request a jury instruction on these rights, concedes that the prosecutor is allowed to impeach by evidence of prior crimes, and the court sustained defendant's objections to improper questions or comments by the prosecutor.

Am Jur 2d, Criminal Law § 985.

Modern status of rules and standards in state courts as to adequate representation of client. 2 ALR4th 27.

Adequacy of defense counsel's representation of criminal client regarding prior conviction. 14 ALR4th 227.

14. Criminal Law §§ 433, 475 (NCI4th Rev.)— capital sentencing—prosecutors' argument—defendant's failure to testify at guilt phase—failure to plead guilty

References in the prosecutor's closing argument in a capital sentencing proceeding to defendant's failure to testify or to his election to plead not guilty were harmless beyond a reasonable doubt. The prosecutor's single reference to defendant's failure to

testify at the guilt-innocence proceeding could not have contributed to the imposition of the death penalty because the reference was made during the sentencing proceeding in which defendant testified; the jury had already found defendant guilty and there is no danger that the reference caused the jury to presume defendant's guilt or to regard his silence as indicative of guilt. The single reference to defendant's failure to plead guilty was made during an argument that the jury should not find the existence of the nonstatutory mitigating circumstance that defendant had acknowledged wrongdoing and the prosecutor offered other reasons for not finding this circumstance. While there may be a possibility that the reference could have persuaded one or more jurors not to find the existence of this mitigating circumstance, the weighing process was not compromised.

Am Jur 2d, Appellate Review § 763; Criminal Law § 705; Trial § 577.

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.

15. Criminal Law §§ 464 (NCI4th Rev.)— capital sentencing—prosecutor's argument—possibility of parole—death as deterrent

Any error in a capital sentencing hearing was harmless beyond a reasonable doubt where defendant contended that the prosecutor improperly urged the jury to consider the possibility of parole in its sentencing deliberations in three sections of his argument. The court sustained defendant's objections to the first statement, and the defendant failed to object to the second and third. These arguments focused on the importance of the jury's duty and suggested that the death penalty would specifically deter defendant from committing future crimes, both permissible lines of argument.

Am Jur 2d, Criminal Law § 628; Trial §§ 566, 575, 576.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.

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

16. Criminal Law § 458 (NCI4th Rev.)— capital sentencing— prosecutor's argument—characterizations of mitigating circumstances

The prosecutor's argument in a capital sentencing hearing was not improper where defendant argued that the prosecutor misrepresented the nature of mitigation by characterizing mitigation as credit for defendant or an excuse for his crime. Prosecutors may legitimately attempt to deprecate or belittle the significance of mitigating circumstances, and the trial court correctly instructed the jury on mitigation.

Am Jur 2d, Criminal Law § 598; Homicide §§ 463, 464; Trial § 572.

17. Criminal Law § 444 (NCI4th Rev.)— capital sentencing— prosecutor's argument—defendant's character

The prosecutor's arguments about defendant's character in a capital sentencing hearing were not improper; the character of a defendant is an appropriate consideration during sentencing and several of defendant's nonstatutory mitigating circumstances placed his character at issue.

Am Jur 2d, Criminal Law § 598; Homicide §§ 298, 463; Trial § 682.

18. Criminal Law § 454 (NCI4th Rev.)— capital sentencing— prosecutor's argument—victim a police officer—a martyr to the cause of good

The prosecutor's argument in a capital sentencing hearing did not render the trial fundamentally unfair where the defendant contended that the prosecutor's argument that the victim, a police officer, was a martyr to the cause of good was improperly designed to appeal to the jury's sympathy for the victim.

Am Jur 2d, Criminal Law § 291; Trial §§ 572, 649, 666.

Sympathy to accused as appropriate factor in jury consideration. 72 ALR3d 842.

19. Criminal Law § 449 (NCI4th Rev.)— capital sentencing— prosecutor's argument—judgment of prosecutor

The prosecutor in a capital sentencing hearing did not improperly ask the jury to rely on the judgment of the prosecutor.

Am Jur 2d, Criminal Law § 291; Homicide § 463; Trial §§ 499, 572.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused—modern state cases. 88 ALR3d 449.

20. Criminal Law § 467 (NCI4th Rev.)— capital sentencing—prosecutor's argument—presumptions from the evidence

Statements by the prosecutor in a capital sentencing hearing which defendant contended were outside the evidence were based on reasonable inferences from the evidence presented and were within the wide latitude allowed to counsel during jury arguments in the sentencing proceeding.

Am Jur 2d, Criminal Law § 940; Homicide § 560.

Propriety and prejudicial effect of prosecuting attorney's arguing new matter or points in his closing summation in criminal case. 26 ALR3d 1409.

21. Criminal Law § 1366 (NCI4th Rev.)— capital sentencing—*prior robbery convictions*—separate aggravating circumstances

The trial court did not err in a capital sentencing hearing by submitting each of defendant's four prior robbery convictions as separate aggravating circumstances under N.C.G.S. § 15A-2000(e)(3). The State presented distinct evidence that defendant had been convicted for committing one common law robbery and three separate armed robberies. Although defendant argues that the prior robbery convictions should have been submitted under one aggravating circumstance, this would not have altered the evidence in aggravation received and considered by the jury, and weighing aggravators and mitigators is not a process of mathematical computation.

Am Jur 2d, Criminal Law §§ 572, 598, 599; Homicide § 554.

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.

22. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—nonstatutory mitigating circumstances—peremptory instruction different from statutory circumstances

The trial court did not err in a capital sentencing hearing by refusing to give a peremptory instruction for nonstatutory mitigating circumstances that was similar to that for statutory mitigating circumstances. Although defendant argues that there is no constitutionally valid basis for treating nonstatutory mitigating circumstances differently than statutory ones and states that the jury should be required to give some weight to both, the Constitution does not require a State to ascribe any specific weight to particular circumstances. The rule in North Carolina does not prevent the sentencing jury from considering or from giving effect to any mitigating evidence in recommending a sentence.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 841, 1760.

23. Criminal Law § 1402 (NCI4th Rev.)— death sentence—proportionate

A death penalty for a first-degree murder was proportionate where the record supported the five aggravating circumstances found by the jury; the jury's failure to find certain mitigating circumstances was a rational result from the evidence; and there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. This case is distinguishable from each of those cases in which the North Carolina Supreme Court has found the death penalty disproportionate. Defendant was convicted under the theory of premeditation and deliberation as well as under the felony murder rule; the finding of premeditation and deliberation indicates a more cold-blooded and calculated crime. The jury's finding of the four prior conviction of a violent felony aggravating circumstances is also significant; none of the cases in which the death sentence was disproportionate have included this aggravating circumstance. This case is more similar to cases in which the death penalty was found proportionate than to those in which the sentence was found disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

Am Jur 2d, Criminal Law § 628; Homicide § 556.

STATE v. LARRY

[345 N.C. 497 (1997)]

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by DeRamus, J., on 28 April 1995 in Superior Court, Forsyth County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals on an additional conviction of robbery with a firearm was allowed 4 April 1996. Heard in the Supreme Court 14 October 1996.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

ORR, Justice.

Defendant was found guilty of robbery with a firearm and of the first-degree murder of Robert Buitrago on the basis of malice, premeditation, and deliberation and under the felony murder rule. The evidence at trial tended to show that on 15 January 1994, at approximately 9:30 p.m., defendant robbed a Food Lion grocery store in Winston-Salem. Cynthia Pennell, a Food Lion employee who had access to the safe, saw defendant standing in the front part of the store and asked if she could help him. He said that she could open the safe for him and that if she did not, she was a dead woman. He pointed a small black revolver at her. Pennell went to the safe and opened it. Defendant took at least $1,700 from the safe and put it in a box. He put the box under his arm and went outside. Throughout the robbery, he pointed the gun at others in the store, telling them not to move.

The murder victim, Robert Buitrago, an off-duty police officer, was a customer waiting in line at a register when the robbery occurred. One witness, Chastity Adams, saw defendant point the gun at Buitrago and say, "If you move, you're dead." The cashier for Buitrago's line had her back to defendant but heard him say, "Don't move or I'll kill you." Defendant ran from the store, and Buitrago chased him. When Buitrago caught up with defendant outside the store, near the front doors, a struggle ensued, and defendant fatally shot Buitrago with the handgun. Some witnesses said there was one shot, and some said there were two or more shots. Buitrago died from a single gunshot wound to the chest. Defendant fled on foot.

After witnesses identified defendant as the perpetrator, police obtained arrest warrants and subsequently found defendant hiding in a residence in Winston-Salem. Patrick Huey of the Forsyth County Sheriff's Department testified that he overheard defendant making a statement during a phone conversation from the Forsyth County jail, after his arrest. Huey testified that defendant told the person on the other end that "when they were brought in that they would be kept separate inside the jail and for them not to tell them anything, that he wasn't going to, and that they would not find the weapon; that he was the only one [who] knew where it was."

At the sentencing proceeding, the State presented evidence that defendant previously had been convicted once for common law robbery and three times for armed robbery. The jury found as four separate aggravating circumstances that defendant previously had been convicted of a violent felony. The jury also found as an aggravating circumstance that the murder was committed while defendant was engaged in the commission of a robbery. The jury found the statutory mitigating circumstances that the murder was committed while defendant was mentally or emotionally disturbed and 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 also found five nonstatutory mitigating circumstances as well as the catchall mitigating circumstance. However, the jury recommended a sentence of death. The court sentenced defendant to death for the first-degree murder conviction and to a consecutive term of forty years' imprisonment for the armed robbery conviction. Defendant appealed to this Court and brings forth the following assignments of error for our review.

JURY SELECTION AND PRETRIAL

I.

[1] Defendant contends that the trial court committed prejudicial error during its preselection instruction to the jury. We disagree. Over defendant's objection, the court instructed prospective jurors that "[i]f the jury finds beyond a reasonable doubt the existence of all facts necessary to impose the death penalty, the law of North Carolina requires that the juror vote to recommend that the defendant be sentenced to death." Defendant argues that this instruction improperly ignored the highly subjective nature of the capital sentencing process. However, we cannot find that defendant could have been prejudiced by the instruction. The judge emphasized to the jury

that the instruction contained general information about the proceedings, and he explained that after the presentation of evidence, the court would give the jury the full instructions that were relevant. A review of the transcript reveals that the court gave full and proper instructions at the sentencing proceeding. This assignment of error is overruled.

II.

[2] Defendant next contends that the trial court erred in sustaining the State's objection to two questions posed by defendant during jury selection. We disagree.

> "The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and impartial verdict." *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992). Pursuant to N.C.G.S. § 15A-1214(c), counsel may question prospective jurors concerning their fitness or competency to serve as jurors to determine whether there is a basis to challenge for cause or whether to exercise a peremptory challenge. N.C.G.S. § 15A-1214(c) (1988). The trial judge has broad discretion to regulate jury *voir dire*. *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994). "In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *Id.* The right to an adequate *voir dire* to identify unqualified jurors does not give rise to a constitutional violation unless the trial court's exercise of discretion in preventing a defendant from pursuing a relevant line of questioning renders the trial fundamentally unfair. *Morgan v. Illinois*, 504 U.S. 719, 730 n.5, 119 L. Ed. 2d 492, 503 n.5 (1992); *Mu'Min v. Virginia*, 500 U.S. 415, 425-26, 114 L. Ed. 2d 493, 506 (1991).

State v. Fullwood, 343 N.C. 725, 732-33, 472 S.E.2d 883, 886-87 (1996). The trial court may refuse to allow the defense to ask questions that are overly broad, incomplete, or hypothetical, or questions that attempt to "stake-out" a potential juror and cause him to pledge himself to a decision in advance of the evidence to be presented. *See, e.g., State v. Davis*, 340 N.C. 1, 23, 455 S.E.2d 627, 638, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 83 (1995); *State v. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 873 (1995).

Defendant fails to show an abuse of discretion or prejudice. He does not argue that any juror was accepted to whom he had legal objections upon any ground. Defendant was allowed to ask other questions to achieve the same inquiry sought by both of the questions to which the court sustained the State's objection. *See State v. Bishop*, 343 N.C. 518, 534-35, 472 S.E.2d 842, 850 (1996), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 65 U.S.L.W. 3506 (1997). The first question occurred during the defense counsel's *voir dire* of prospective juror Robertson:

> Q. . . . . If the defendant chose not to testify in this matter, would you hold it against him?
>
> A. No, I would not.
>
> Q. Would you think he were more likely guilty if he didn't take the witness stand?
>
> MR. SAUNDERS: Objection.
>
> THE COURT: Sustained.
>
> Q. If he didn't take the witness stand, would you not afford him the presumption of innocence?
>
> A. No, I would not.
>
> Q. No, you wouldn't give him the presumption?
>
> A. I mean yes, I would.
>
> Q. You wouldn't hold it against him.
>
> A. Right.

Defendant was clearly allowed to elicit the information sought from prospective juror Robertson. The second question at issue occurred during the defense counsel's *voir dire* of prospective juror Howard:

> Q. . . . . If [defendant is] convicted of first degree murder, do you agree that—you agree that all first degree murders do not necessarily deserve the death penalty?
>
> A. Yes.
>
> Q. Would it be fair to say you would not automatically vote for the death penalty if the defendant were convicted of first degree murder?

A. That's correct.

Q. You heard the prosecutor outline what they contend that the facts cover; that at the end of first phase of the case, if the defendant is found guilty of going in the Food Lion and robbing and leaving and, while leaving, shooting and killing a man and you found him guilty, would you think that the death penalty was the appropriate punishment?

MR. SAUNDERS: Objection.

THE COURT: Sustained.

Q. Would you automatically vote for the death penalty under that set of facts?

MR. SAUNDERS: Objection.

Q. Would you be willing to listen to other evidence after you found the defendant guilty of punishment [sic]?

A. Yes.

Q. Would you [be] able to consider evidence offered, mitigating evidence offered for the defendant?

A. Yes.

Q. You understand mitigation tends to make life sentence more appropriate?

A. Yes.

Again, defendant was clearly allowed to elicit the information sought from prospective juror Howard. This assignment of error is overruled.

III.

[3] Defendant next contends that the trial court erred in denying defendant's motion for individual *voir dire* of prospective jurors. Individual *voir dire* of prospective jurors in capital cases is addressed by N.C.G.S. § 15A-1214(j), which provides: "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." The trial court's decision to deny individual *voir dire* of

prospective jurors will not be disturbed absent a showing of an abuse of discretion. *E.g.*, *State v. Short*, 322 N.C. 783, 788, 370 S.E.2d 351, 354 (1988).

Defendant's argument is based on his contention in Issue X that the fact that Buitrago was a police officer was not relevant and was inadmissible. Defendant argues that he was entitled to question prospective jurors who already knew that Buitrago was a police officer without communicating that information to other prospective jurors. We hold in Issue X that the court did not err in allowing the State to present evidence that the victim was a police officer. Therefore, there was no need for individual *voir dire* to prevent prospective jurors from learning that information. This assignment of error is overruled.

IV.

Defendant also contends that the trial court erred in denying defendant's motion to disqualify the jury venire because the venire heard some of the prospective jurors volunteer that they knew this case involved the killing of a police officer. Because we hold in Issue X that this information was admissible, this assignment of error is without merit.

V.

[4] Defendant next contends that the trial court erred in denying defendant's motion to exclude uniformed police officers from the courtroom because they would improperly influence the jury. We disagree. In denying the motion, the court stated:

> The motion is denied but without prejudice as to first consideration, Mr. Clary. The Court's not going to prohibit a uniformed officer from coming. But if there is some kind of concerted demonstration or show of force or something like that, otherwise something that would go beyond just an occasional appearance on an individual basis by [a] uniformed officer who may be a witness or who may be a spectator. Without anything more than that, the Court's going to allow that. Not prohibit that. But we'll consider the motion further, if necessary. At this point, the Court's going to deny it.

After reviewing the transcript, we conclude that the court did not abuse its discretion in making this ruling. This assignment of error is overruled.

GUILT-INNOCENCE PROCEEDING

VI.

[5] Defendant contends that the trial court erred in denying defendant's motion to dismiss because there was insufficient evidence from which the jury could reasonably conclude that defendant formed an intent to kill after premeditation and deliberation. We disagree.

> When considering a motion to dismiss for insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each element of the offense charged and of the defendant being the perpetrator of the offense. The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. First-degree murder is the unlawful killing of another human being with malice, premeditation, and deliberation. "Premeditation means that the act was thought out beforehand for some length of time, however short; but no particular amount of time is necessary for the mental process of premeditation." *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Deliberation is an intent to kill carried out in a "cool state of blood" without the influence of a violent passion or a sufficient legal provocation.

State v. Harden, 344 N.C. 542, 554, 476 S.E.2d 658, 663 (1996) (citations omitted).

Defendant argues that *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981), requires that the evidence must support a finding that he deliberated the specific intent to kill before the struggle with the victim began. However, in *State v. Harden*, we refuted this argument. "Deliberation may occur during a scuffle or a quarrel between the defendant and the victim if the emotions produced by the scuffle or quarrel have not overcome the defendant's faculties and reason." *State v. Harden*, 344 N.C. at 555, 476 S.E.2d at 664.

The evidence in this case, viewed in the light most favorable to the State, was sufficient to support a finding that defendant premeditated and deliberated the killing. Defendant's conduct before and after the killing supports a finding that the scuffle with the victim did not overcome defendant's faculties and reason. "Premeditation and deliberation are usually proved by circumstantial evidence because they are mental processes that ordinarily are not readily susceptible to proof by direct evidence. On many occasions, this Court has enu-

merated some of the circumstances which tend to support a proper inference of premeditation and deliberation." *State v. Ginyard*, 334 N.C. 155, 158, 431 S.E.2d 11, 13 (1993) (citation omitted). Several such circumstances are applicable in this case.

First, the fact that defendant carried a loaded gun into the Food Lion and used it to accomplish the robbery supports an inference that he anticipated the need to use deadly force in a possible confrontation. *See State v. Bell*, 338 N.C. 363, 389, 450 S.E.2d 710, 724 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 861 (1995); *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991); *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985). Second, Chastity Adams, a Food Lion customer who witnessed the incident, testified that she saw defendant point the gun at the victim and say, "If you move, you're dead," and Lou Blevins, a Food Lion cashier who witnessed the incident, testified that she heard the robber say, "Don't move or I'll kill you." We have held that "threats and declarations made by the defendant against the victim" are "generally considered probative of the existence of premeditation and deliberation." *See, e.g., State v. McCray*, 342 N.C. 123, 129, 463 S.E.2d 176, 180 (1995). This testimony also supports the inference that defendant anticipated the need to use deadly force in a possible confrontation. Third, although a few witnesses testified that they heard only one shot, several witnesses testified that defendant fired two or more shots, with a pause in between. "[S]ome amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger." *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). We conclude that the totality of the evidence, when viewed in the light most favorable to the State, was sufficient to support a finding that the murder was premeditated and deliberate. Therefore, the trial court did not err in denying defendant's motion to dismiss the first-degree murder charge.

VII.

[6] Next, defendant contends that the trial court committed plain error because its instructions did not require the jury to be unanimous on the theory of first-degree murder it used to support its verdict. We disagree.

> The plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, . . . it can be fairly said "the instructional mistake had a

probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977), *quoted in State v. Odom*, 307 N.C. at 661, 300 S.E.2d at 378. When reviewing an instruction for plain error, we must examine the entire record and determine if the alleged instructional error had a probable impact on the jury's finding of guilt. *State v. Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79.

The court instructed the jury on unanimity as follows:

> I instruct you that a verdict is not a verdict until all 12 jurors agree unanimously as to what your decision shall be. You may not render a verdict by majority vote. You all have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> In the course of deliberations, each of you should not hesitate to re-examine your own views and change your opinion if it's erroneous. However, none of you have should [sic] surrender your honest convictions as to the weight or the effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict at this time.
>
> When you have reached a unanimous verdict, have your foreman mark the appropriate places on the verdict form which will be sent in to you a few moments after you enter the jury room.

When instructing the jury on filling out the verdict sheet, the court said:

> With respect to the possible finding of guilty of first degree murder, there is also a space under there, if that box is checked or X'd and represents the unanimous decision of the jury for the jury to answer whether the finding, unanimous finding of guilt of first degree murder was on the basis of malice, premeditation,

and deliberation or under the first degree felony murder rule or both.

And if it's under one of those two theories, then the foreman would indicate yes that it is. Otherwise, no. And if it's under both, of course, the answer would be yes as to both of them. But that would be the finding of the jury--up to the finding of the jury. And would be filled in only if the jury unanimously finds the defendant guilty of first degree murder and fills in the blank space to the left of that possible verdict.

Also, the verdict sheet clearly indicates that the jury found defendant guilty of both premeditated and deliberate murder and felony murder. In addition, when taking the verdict during the guilt phase, the clerk said to the jury:

In file number 94 CrS 1451, we, the jury, unanimously find the defendant, Thomas Michael Larry, guilty of first degree murder on the basis of malice, premeditation, and deliberation and under the first degree felony murder rule.

Members of the jury, are these your verdicts so say you all?

The members of the jury gave an affirmative indication, and defendant declined an opportunity to poll the jurors individually.

In *State v. Alford*, 339 N.C. 562, 575, 453 S.E.2d 512, 519 (1995), we overruled a similar argument by the defendant that the court's disjunctive instruction, which informed the jury that it could convict under either or both theories of first-degree murder, allowed a conviction on a theory not found by all jurors beyond a reasonable doubt. The record in *State v. Alford* also included a verdict sheet similar to the one in this case, as well as a polling of the jurors. In the case before us, after reviewing the record, we conclude that the jury received proper instructions from the trial court and that there is no risk that the jury was not unanimous as to either theory upon which it based its finding of guilty of first-degree murder. This assignment of error is overruled.

VIII.

[7] Defendant also contends that the trial court erred in not instructing the jury on the lesser included offenses of second-degree murder and manslaughter. We disagree.

A lesser included offense instruction must be given if the evidence " 'would permit a jury rationally to find [the defendant] guilty

of the lesser offense and acquit him of the greater.' " *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983) (quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401 (1980)), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

> The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Skipper, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). Second- degree murder and manslaughter are lesser included offenses of first-degree murder. *E.g.*, *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989). Therefore, the question before us is whether there was positive, uncontradicted evidence of each element of first-degree murder. First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Graves*, 343 N.C. 274, 278, 470 S.E.2d 12, 15 (1996).

Defendant first argues that this standard is unconstitutional because it would violate the principles of fundamental fairness found in both the state and federal Constitutions to require him to negate premeditation and deliberation in order to be entitled to an instruction on second-degree murder. We disagree. The State has the burden of proving the elements of first-degree murder beyond a reasonable doubt. "[I]f the State's evidence is sufficient to satisfy its burden of proving each element of first-degree murder, including premeditation and deliberation, and there is no evidence other than defendant's denial that he committed the crime to negate these elements, the trial court should not instruct the jury on second-degree murder." *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 153 (1995).

> [D]ue process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence.

Hopper v. Evans, 456 U.S. 605, 611, 72 L. Ed. 2d 367, 373 (1982) (emphasis added).

[8] Second, defendant argues that the evidence supported an instruction on the lesser included offenses. We conclude that because there was positive, uncontradicted evidence of each element of first-degree murder, an instruction on lesser included offenses was not required. Malice may be presumed from the use of a deadly weapon. *Id.* The uncontradicted evidence that defendant used a firearm satisfies the malice requirement. We held in Issue VI that there was positive evidence of an intent to kill formed after premeditation and deliberation. The only evidence of premeditation and deliberation that was contradicted was the number of shots fired. However, even without considering the number of shots fired, the uncontradicted evidence that defendant carried a loaded gun to commit a robbery and threatened the victim that he would kill him if he moved is sufficient positive evidence of premeditation and deliberation. Because the State presented evidence of each element of first-degree murder that was positive and uncontroverted, the trial court did not err in declining to submit the lesser included offenses. This assignment of error is overruled.

IX.

[9] Defendant next contends that the trial court erred in not instructing the jury on imperfect self-defense. We disagree.

> 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.

State v. Lyons, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995).

> Perfect self-defense excuses a defendant altogether for a killing if all four elements above exist at the time of the killing. Imperfect self-defense renders a defendant guilty of at least voluntary manslaughter if the first two elements above exist at the time of the killing but the defendant, *without murderous intent*, either was the aggressor in bringing on the affray or used excessive force.

Id. (emphasis added). We held in Issue VIII that there was positive, uncontradicted evidence that defendant formed an intent to kill with malice and after premeditation and deliberation. Therefore, defendant did not act "without murderous intent" and was not entitled to an instruction on imperfect self-defense. *See State v. Baldwin*, 330 N.C. 446, 465, 412 S.E.2d 31, 42 (1992) (defendant was not entitled to an instruction on imperfect self-defense where the uncontradicted evidence shows that the events leading to the shooting were initiated by defendant with murderous intent). This assignment of error is overruled.

X.

[10] Defendant contends that the trial court erred in allowing the State to present evidence that the decedent was a police officer because the evidence was not relevant and was unfairly prejudicial to defendant. We disagree.

" '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). As a general rule, "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 (1992). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C.G.S. § 8C-1, Rule 403 (1992).

"We have interpreted Rule 401 broadly and have explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). "Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. at 131, 463 S.E.2d at 181.

After reviewing the transcript, we conclude that the challenged evidence was relevant and that the trial court did not abuse its discretion in deciding that the danger of unfair prejudice did not outweigh the probative value. Sergeant S.H. Mayberry of the Winston-Salem Police Department arrived on the crime scene shortly after the shooting. She testified, over defendant's objection, that she recognized the victim to be "Officer Robert Buitrago with the Winston-Salem Police Department." She also testified, over defendant's objection, that she removed the victim's badge before he was transported to the hospital. Defendant also complains that other law enforcement officers who testified referred to the victim as "Officer Buitrago." Sergeant Mayberry's actions upon arriving at the scene of the crime and the identity of the victim as a police officer are clearly circumstances which throw light upon the crime. The victim's status as a police officer led him to pursue defendant, which led to defendant shooting him. The witnesses' references to the victim as "Officer Buitrago" simply incorporated the title "officer." This assignment of error is overruled.

SENTENCING PROCEEDING

XI.

[11] Defendant contends that the trial court erred in submitting the aggravating circumstance that the killing was committed during the course of an armed robbery. *See* N.C.G.S. § 15A-2000(e)(5) (1988) (amended 1994). Defendant argues that because his conviction for first-degree murder based on premeditation and deliberation was infirm for the reasons argued in Issues VI-IX, the only proper theory of conviction of first-degree murder was based on the felony murder rule. Therefore, defendant argues, the trial court erred in submitting the underlying felony as an aggravating circumstance under *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979) (the (e)(5) aggravating circumstance may not be submitted to the jury if the jury found the defendant guilty only of felony murder based on the same felony), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). However, as we held in Issues VI-IX, the trial court did not err in relation to the conviction of first-degree murder based on premeditation and deliberation. Therefore, the trial court properly submitted the (e)(5) aggravating circumstance. This assignment of error is overruled.

XII.

[12] Defendant next contends that the trial court committed plain error in failing to submit to the jury the statutory mitigating circum-

stance that "[t]he victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act." *See* N.C.G.S. § 15A-2000(f)(3). "[T]he trial court must submit any statutory mitigating circumstance supported by the evidence. N.C.G.S. § 15A-2000(b)." *State v. DeCastro*, 342 N.C. 667, 688-89, 467 S.E.2d 653, 664, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 170 (1996). Defendant argues that the (f)(3) mitigating circumstance applies because in attempting to detain defendant, the victim voluntarily injected himself into the situation that resulted in his death. We disagree.

Our research reveals no North Carolina case interpreting the (f)(3) mitigating circumstance. However, the Supreme Court of Florida has interpreted a similar mitigating circumstance: "The victim was a participant in the defendant's conduct or consented to the act." *See Wuornos v. State*, 676 So. 2d 972, 975 (Fla.), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 384 (1996). In *Wuornos*, the defendant argued that the mitigating circumstance applied because the victim contributed to the acts leading to his death by seeking the services of a prostitute and thereby assuming the risk of suffering bodily harm. The court stated:

> It would be absurd to construe this language as applying whenever victims have engaged in some unlawful or even dangerous transaction that merely provided the killer a better opportunity to commit murder, which the victim did not intend. What the language plainly means is that the victim has knowingly and voluntarily participated with the killer in some transaction that in and of itself would be likely to result in the victim's death, viewed from the perspective of a reasonable person. An example would be two persons participating in a duel, with one being killed as a result.

Id. Also, in *Dill v. State*, 600 So. 2d 343 (Ala. Crim. App. 1991), *aff'd*, 600 So. 2d 372 (Ala. 1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993), the appellant argued that the trial court erred in failing to find a comparable mitigating circumstance, that "[t]he victim was a participant in the defendant's conduct or consented to it." The Alabama Court of Criminal Appeals stated, "The appellant's argument that Leon Shaw's refusal to give him cocaine made Shaw a participant in the appellant's conduct has no merit and is not a reasonable interpretation of the statute. [Alabama Code] Section 13A-5-51(3) contemplates a situation wherein the victim participated in the capital crime with the defendant." *Id.* at 364.

Defendant argues that the Model Penal Code interpretation of a substantially similar mitigating circumstance should be applied. The Model Penal Code mitigating circumstance states, "The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act." Model Penal Code § 210.6(4)(c) (1962). However, the Model Penal Code interpretation is no more sympathetic to defendant's argument. The Model Penal Code commentary states that the Model Penal Code mitigating circumstance that is substantially similar to N.C.G.S. § 15A-2000(f)(3)

> addresses the case where the victim is partially responsible for his own death. This circumstance obtains chiefly in two kinds of situations. First, there are occasions in which the defendant and his victim are engaged jointly in an activity highly dangerous to each. If each person's participation depends upon the cooperation of the other, a murder conviction may lie for the death of one actor, even though both share responsibility. An example may be the case of Russian Roulette, at least where the defendant actually fires the shot that kills his partner. A second situation within the scope of [the mitigating circumstance] is the true mercy killing. There the defendant's homicidal act may not have occurred had the victim not consented to it. In either of these contexts, the conduct of the victim in bringing about his own death deserves consideration as a mitigating factor in assigning a death sentence.

Model Penal Code § 210.6 cmt. 6, at 140-41 (footnote omitted).

In *Huffington v. State*, 304 Md. 559, 500 A.2d 272 (1985), *cert. denied*, 478 U.S. 1023, 92 L. Ed. 2d 745 (1986), the Maryland Court of Appeals applied this Model Penal Code commentary when defendant argued that the mitigating circumstance should have been submitted where the victim and the defendant were joint participants and coconspirators in an alleged drug sale. Holding that the evidence did not support the mitigating circumstance, the court stated: "The conduct which caused [the victim's] death related to [defendant's] carrying and concealing a loaded pistol and the firing of such pistol at [the victim's] back. It is beyond the stretch of anyone's imagination to say that [the victim] participated in this conduct." *Id.* at 583, 500 A.2d at 284.

Similarly, in the case at bar, we find absolutely no merit in defendant's argument that the victim participated in the conduct that caused the victim's death. Obviously, the victim had nothing to do with the

armed robbery; he merely attempted to apprehend defendant when defendant fled. Therefore, the evidence did not support submission of the (f)(3) statutory mitigating circumstance. Furthermore, defendant was not prevented from presenting, nor the jury from considering, evidence that the victim was killed as a result of the struggle between defendant and the victim. The court submitted the following nonstatutory mitigating circumstance: "Consider whether the shot was fired as a result of the struggle between the defendant and the victim and whether you deem this to have mitigating value." This assignment of error is overruled.

XIII.

[13] Defendant contends that he was prejudiced during the sentencing phase because the prosecutor unfairly cross-examined him. We disagree.

In *State v. Bronson*, 333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992), we said:

> The bounds of cross-examination are limited by two general principles: 1) the scope of the cross-examination rests within the sound discretion of the trial judge; and 2) the questions must be asked in good faith. A prosecutor's questions are presumed to be proper unless the record shows that they were asked in bad faith. Abuse of discretion is generally found when a prosecutor affirmatively places before the jury an incompetent and prejudicial matter by injecting his own knowledge, beliefs, or personal opinions or facts which are either not in evidence or not admissible.

(Citations omitted.)

Defendant advances several general complaints about the cross-examination, including the prosecutor's questions about defendant's reliance on counsel, a plea to a prior crime, and a suggestion that defendant testified because his counsel told him that was the only way he could save his life. Defendant argues that the total effect of the cross-examination violated his constitutional rights to the assistance of counsel and to enter a plea of guilt as to the prior crime while maintaining his actual innocence. However, defendant did not request a jury instruction on these rights. Defendant concedes that the prosecutor was allowed to impeach him by evidence of prior crimes. Furthermore, the court sustained the defendant's objections to improper questions or comments by the prosecutor. "[T]he sustaining of the objection advised the jurors that they should not con-

sider the question." *State v. Carter*, 342 N.C. 312, 324, 464 S.E.2d 272, 280 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 957 (1996). After a careful review of the transcript, we conclude that defendant was not prejudiced by the prosecutor's cross-examination of him during the sentencing proceeding. This assignment of error is overruled.

XIV.

[14] Defendant next contends that the trial court erred by overruling his objections to two comments by the prosecutor during closing argument in the sentencing proceeding. Defendant maintains that the comments impermissibly criticized his exercise of the constitutional rights not to testify and to plead not guilty. We hold that any references to defendant's failure to testify or to his election to plead not guilty were harmless beyond a reasonable doubt.

"A criminal defendant may not be compelled to testify, and any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent." *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994) (citing *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106 (1965)); *see* U.S. Const. amend. V; N.C. Const. art. I, § 23. "[T]he error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *State v. McCall*, 286 N.C. 472, 487, 212 S.E.2d 132, 141 (1975). The trial court's failure to give a curative instruction after the State's comment on an accused's failure to testify does not call for an automatic reversal, but requires this Court to determine if the error is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *State v. Baymon*, 336 N.C. at 758, 446 S.E.2d at 6; *State v. Reid*, 334 N.C. 551, 557, 434 S.E.2d 193, 198 (1993).

Similarly, a criminal defendant has a constitutional right to plead not guilty and be tried by a jury. U.S. Const. amend. VI; N.C. Const. art. I, § 24; *State v. Langford*, 319 N.C. 340, 345, 354 S.E.2d 523, 526 (1987). Reference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial. *State v. Thompson*, 118 N.C. App. 33, 41, 454 S.E.2d 271, 276, *disc. rev. denied*, 340 N.C. 262, 456 S.E.2d 837 (1995). The court's failure to give a curative instruction after such a reference does not warrant a reversal, however, if the State shows that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b); *State v. Thompson*, 118 N.C. App. at 41, 454 S.E.2d at 276.

Defendant complains that the prosecutor referred to his failure to testify when he argued:

> Now, there's one other time that you can hear about [defendant's] past, too. And that's if he takes the stand. He can be cross-examined about all those other prior convictions. But in this case, the defendant elected not to testify during the guilt or innocence phase. And he has a constitutional right to do that.
>
> But ask yourself this question: Why did he do that?
>
> [Objection overruled.]
>
> [PROSECUTOR]: Anyway, he testified yesterday that he wanted you to know the whole truth. You decide whether or not that was his motivation or not. I submit to you that wasn't his motivation. Whether or not you knew the truth was the fartherest [sic] thing from his mind. He had nothing to lose yesterday. You folks had already found him guilty. He had nothing to lose except get up there and try and convince you that he was remorseful about this crime.

Defendant complains that the prosecutor referred to his failure to plead guilty when he made the following argument as to why the jury should reject the nonstatutory mitigating circumstance that "the defendant has acknowledged wrongdoing in connection with these offenses of robbery with a firearm and first degree murder."

> What wrongdoing did he admit with respect to shooting Robert Buitrago? What did he tell his psychologist? The gun just went off. He didn't admit to any kind of murder in this case. He admitted to murder, he'd pled guilty, I assume.
>
> [Objection overruled.]

Assuming *arguendo* that the prosecutor's argument contained improper references to defendant's failure to testify and to his election to plead not guilty, the references were harmless beyond a reasonable doubt. The prosecutor's single reference to defendant's failure to testify at the guilt-innocence proceeding could not have contributed to the imposition of the death penalty. The reference was made during the sentencing proceeding, in which defendant testified. When the reference was made, the jury had already found defendant guilty of first-degree murder. There is no danger that the reference caused the jury to presume defendant's guilt or to regard his silence as indicative of guilt.

The prosecutor's single reference to defendant's failure to plead guilty was made during an argument that the jury should not find the existence of the nonstatutory mitigating circumstance that defendant had acknowledged wrongdoing in connection with the offenses of robbery with a firearm and first-degree murder. The prosecutor offered other reasons why the jury should not find this mitigating circumstance. However, there may be a possibility that the prosecutor's reference could have persuaded one or more jurors not to find the existence of this mitigating circumstance.

In *State v. McLaughlin*, 341 N.C. 426, 451, 462 S.E.2d 1, 14 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 879 (1996), this Court stated:

> [O]verwhelming evidence supported the jury's findings of the aggravating circumstances that defendant had been convicted of a prior violent felony and that the murder here was committed for pecuniary gain. When we consider the two aggravating circumstances found by the jury in light of the eight mitigating circumstances found by the jury, we are compelled to conclude that the trial court's failure to give a peremptory instruction, which may have caused one or more jurors to fail to find as a mitigating circumstance that defendant worked as a cook in the prison, was harmless error beyond a reasonable doubt.

In *State v. Taylor*, 304 N.C. 249, 288, 283 S.E.2d 761, 785 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983), this Court held that the improper submission of the underlying felony as an aggravating circumstance was harmless error because overwhelming evidence supporting other statutory aggravating circumstances convinced us that the weighing process had not been compromised.

Similarly, in the case at bar, overwhelming evidence supports the five aggravating circumstances found by the jury. When we consider these aggravating circumstances in light of the mitigating circumstances found by the jury, as well as the mitigating circumstance not found by the jury that defendant had acknowledged wrongdoing, we are convinced that the weighing process was not compromised. This assignment of error is overruled.

XV.

[15] Defendant also contends that the prosecutor made several grossly improper arguments to the jury at the sentencing proceeding. We disagree.

> Counsel is allowed wide latitude in the jury argument in both the guilt and sentencing phases. However, the objectives of the arguments in the two phases are different, and rhetoric that may be prejudicially improper in the guilt phase is acceptable in the sentencing phase. Further, the prosecutor's closing remarks must be taken in the context of his role as a zealous advocate for criminal convictions.

State v. Kandies, 342 N.C. 419, 452, 467 S.E.2d 67, 85, *cert. denied*, — U.S. —, 136 L. Ed. 2d 167 (1996).

First, defendant complains that in three sections of his argument, the prosecutor improperly urged the jury to consider the possibility of parole in its sentencing deliberations. The first such argument was a statement concerning future victims. The court sustained defendant's objections to this statement. As we noted above, the sustaining of the objection advised the jurors that they should not consider the statement. *See State v. Carter*, 342 N.C. at 324, 464 S.E.2d at 280. After reviewing the transcript, we conclude that in light of the court's sustaining of the objection, any error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b).

Defendant failed to object to the second and third sections of argument to which he now assigns error. "Therefore, the 'impropriety of the argument must be gross indeed in order for this Court to hold that [the trial court] abused [its] 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. Ball*, 344 N.C. 290, 309, 474 S.E.2d 345, 356 (1996) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)). The second section of argument challenged by defendant follows:

> You know, but we put him in jail for 25 years back in 1975, that didn't stop him. He got out after 11. Within six months, he committed another crime. Went back to jail for ten years, they kept him for three. That didn't stop him.
>
> The only thing that's going to stop him, members of the jury, I submit to you, is your sentence of death. That's the only thing that's going to stop him. You might think that maybe we're asking for too much because maybe if the Department of Correction would have kept him all those times, he wouldn't have committed this murder.

> But you see, members of the jury, we can't account for what everybody else does. We can only account for our own conduct. He's here today because of his conduct. You're here today because you're decent citizens. I'm here today because it's my job. We can only account for our own conduct. And you have a duty. And you might be upset about what the Department of Corrections has done, letting him go time and time again, but it still comes back to what your duty is. And I'm asking you to do that duty.

The third section of argument challenged by defendant contained similar language:

> These defense lawyers are going to get up here and argue to you about, oh, the robberies he's been sentenced for, he's 54 years on that. Going to be sentenced on this robbery here, no telling, up to forty years. And if you don't give him death, he's going to get life. They are going to try and convince you that that's enough punishment in this case. That that will keep him locked away.
>
> Members of the jury, the only way you can be sure of it is to vote for the death penalty in this case. And I submit to you, members of the jury, that you can do that by following the law and the facts.

After a careful review of the transcript, we conclude that these arguments did not constitute impermissible injection of the possibility of parole into the jury's sentencing deliberations. Instead, the arguments focused on the importance of the jury's duty and suggested that the death penalty would specifically deter defendant from committing future crimes, both permissible lines of argument by the prosecutor. *See State v. Jones*, 336 N.C. 229, 256, 443 S.E.2d 48, 61 (argument emphasizing the responsibility and duty of each juror and of the jury as a whole was not improper), *cert. denied*, — U.S. —, 130 L. Ed. 2d 423 (1994); *State v. Syriani*, 333 N.C. 350, 397, 428 S.E.2d 118, 144 (specific deterrence arguments are proper), *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

[16] Second, defendant argues that the prosecutor misrepresented the nature of mitigation by characterizing mitigation as "credit" for defendant or an "excuse" for his crime and by stating, in reference to a mitigating circumstance, that "because of that one incident in his life, you know, he's entitled to, you know, a life sentence regardless of the other 20 years of his life." After reviewing the transcript, we

conclude that these arguments were not improper. "[P]rosecutors may legitimately attempt to deprecate or belittle the significance of mitigating circumstances." *State v. Basden*, 339 N.C. 288, 305, 451 S.E.2d 238, 247 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 845 (1995). Furthermore, the trial court correctly instructed the jury on mitigation.

[17] [18] Third, defendant claims that the following argument by the prosecutor was improper:

> Robert Buitrago died a hero. He died for you. He gave his life for you.
>
> [Objection overruled.]
>
> [PROSECUTOR]: He gave his life so there would be no more victims, no more kids would have guns stuck in their face. . . .
>
> . . . .
>
> Robert Buitrago, folks, he was a martyr to the cause of good. A martyr. Don't you think it's fair that this man who has done nothing right his whole life, nothing but wrong his whole life, nothing but hurt people, don't you think it's right he should die a martyr to the cause of evil?

Defendant claims that comments about his own character, along with this argument, improperly reduced the jury's decision to who was the better person, the victim or the defendant. However, "[t]he character of a defendant is an appropriate consideration during sentencing." *State v. Campbell*, 340 N.C. 612, 638, 460 S.E.2d 144, 158 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 871 (1996). Where a defendant in a capital sentencing proceeding has placed his character at issue, the State may rebut this evidence. *State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981). Several of defendant's nonstatutory mitigating circumstances placed his character at issue. Therefore, the prosecutor's arguments about defendant's character, which were within the latitude allowed to counsel in arguments, were not improper.

Defendant also claims that this argument by the prosecutor was improperly designed to appeal to the jury's sympathy for the victim. However,

> [i]n *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735-36 (1991), the United States Supreme Court upheld the use of victim-impact statements during closing arguments unless the

victim-impact evidence is so unduly prejudicial that it renders the trial fundamentally unfair.

State v. Bishop, 343 N.C. at 554, 472 S.E.2d at 861. In *State v. Bishop*, we held that the prosecutor's arguments about the victim and what she could have accomplished served to inform the jury about the specific harm caused by the crime and did not render the trial fundamentally unfair. Similarly, in the case at bar, the prosecutor's argument did not render the trial fundamentally unfair.

[19] Fourth, defendant claims that the prosecutor improperly asked the jury to rely on the judgment of the prosecutor, rather than take full responsibility on itself for the sentencing recommendation, in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985), when he argued that defendant qualified for the death penalty because he was "the worst of the worst." After reviewing the transcript, we conclude that the prosecutor's statement did not suggest to the jurors that they should rely on the judgment of the prosecutor, rather than taking full responsibility on itself for the sentencing recommendation. Defendant also claims that the prosecutor made similar improper arguments in two other places in the transcript, to which he cites the transcript page numbers. However, we find no argument on either page cited that could be interpreted as being improper.

[20] Fifth, defendant cites five statements by the prosecutor which he claims were arguments based on aggravating circumstances not submitted to the jury and were outside the evidence. We have considered several of the statements earlier in this opinion. After a careful review of the transcript, we conclude that all of the statements challenged by defendant were based on reasonable inferences from the evidence presented and were within the wide latitude allowed to counsel during jury arguments in the sentencing proceeding. This assignment of error is overruled.

XVI.

Defendant contends that the collective effect of the improprieties in the cross-examination and the closing argument by the prosecution rendered his sentencing proceeding fundamentally unfair. We disagree. A review of the entire transcript of the sentencing proceeding reveals that defendant received a fair sentencing proceeding, free from any prejudice resulting from the cross-examination and closing argument of the prosecution.

XVII.

[21] Defendant next contends that the trial court erred in submitting each of defendant's four prior robbery convictions as separate aggravating circumstances under N.C.G.S. § 15A-2000(e)(3), which provides, "The defendant had been previously convicted of a felony involving the use or threat of violence to the person." We disagree.

We have held that N.C.G.S. § 15A-2000(e) permits the submission of separate aggravating circumstances pursuant to the same statutory subsection if the evidence supporting each is distinct and separate. *State v. Bond*, 345 N.C. 1, 478 S.E.2d 163 (1996) (court properly submitted three times the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed during the course of a felony based on three separate and distinct felonies committed by the defendant during the course of the murder); *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994) (court properly submitted two aggravating circumstances based on the same course of conduct where the defendant was convicted of two separate offenses against the same victim), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995). In the present case, the State presented distinct evidence that defendant had been convicted for committing one common law robbery and three separate armed robberies.

Defendant argues that the prior robbery convictions should have been submitted under one aggravating circumstance. However, this would not have altered the evidence in aggravation received and considered by the jury, and weighing aggravators and mitigators is not a process of mathematical computation. *See State v. Artis*, 325 N.C. 278, 340, 384 S.E.2d 470, 505-06 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). The trial court gave the following instruction to the jury:

> You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance and then weigh the aggravating circumstances so valued against the mitigating circumstances so valued, and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.

We hold that the court did not err in submitting each of defendant's four prior robbery convictions as separate aggravating circumstances under N.C.G.S. § 15A-2000(e)(3).

XVIII.

[22] Defendant contends that the trial court erred by refusing to give a peremptory instruction for nonstatutory mitigating circumstances that was similar to that for statutory mitigating circumstances, thereby requiring the nonstatutory mitigating circumstances to be mitigating as a matter of law like the statutory mitigating circumstances. Defendant argues that there is no constitutionally valid basis for treating nonstatutory mitigating circumstances differently than statutory ones and states that the jury should be required to give some weight to both. We disagree.

The United States Supreme Court's cases and our cases require that the sentencing jury be permitted to consider and give effect to mitigating evidence in recommending a sentence. *See McKoy v. North Carolina*, 494 U.S. 433, 442-43, 108 L. Ed. 2d 369, 381 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 318-19, 106 L. Ed. 2d 256, 277-78 (1989); *State v. Rouse*, 339 N.C. 59, 108, 451 S.E.2d 543, 570 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995). However, "the 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), and "the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer," *Harris v. Alabama*, —— U.S. ——, ——, 130 L. Ed. 2d 1004, 1014 (1995). These are tasks that "properly rest within the State's discretion to administer its criminal justice system." *Id.* In North Carolina, "[w]hether the jury finds a non-statutory mitigating circumstance depends not only upon whether that circumstance is supported by the evidence, but also upon whether the jury determines that circumstance to have mitigating value." *State v. Rouse*, 339 N.C. at 106, 451 S.E.2d at 570. This rule does not prevent the sentencing jury from considering or from giving effect to any mitigating evidence in recommending a sentence. This assignment of error is overruled.

XIX.

Defendant concedes that his remaining assignments of error, enumerated as Issues XIX through XXII and set out on pages 89 through 101 in his brief, concern issues that this Court has previously decided contrary to his position. Specifically, defendant contends that the trial court erred (a) in denying defendant's motion to allow the jury to

recommend life without parole, *see State v. Roseboro*, 344 N.C. 364, 474 S.E.2d 314 (1996); *State v. Fullwood*, 343 N.C. 725, 472 S.E.2d 883; (b) in its instruction to the jury on the nature of the life sentence and the possibility of parole, *see State v. Lee*, 335 N.C. 244, 439 S.E.2d 547; (c) in denying defendant's motion to examine prospective jurors on their perceptions of parole eligibility, *see State v. Roseboro*, 344 N.C. 364, 474 S.E.2d 314; *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995); and (d) in instructing the jury that it must be unanimous in order to answer Issue Three "no," *see State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 482 (1996). Defendant raises these issues to provide this Court an opportunity to reexamine its prior holdings. We have carefully considered defendant's arguments on these issues. We find no compelling reason to depart from our prior holdings, and we are not persuaded that prejudicial error occurred so as to warrant a new trial or sentencing proceeding.

PROPORTIONALITY REVIEW

XX.

[23] We now turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. We have examined the record, transcripts, and briefs in the present case and conclude that the record fully supports the five aggravating circumstances found by the jury: that the defendant had been previously convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3), submitted and found four times for four separate prior robbery convictions; and that the murder was committed by the defendant while the defendant was engaged in the commission of robbery, N.C.G.S. § 15A-2000(e)(5). We also find that the jury's failure to find certain submitted mitigating circumstances was a rational result from the evidence. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must now turn to our final statutory duty of proportionality review.

Proportionality review is designed 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). In conducting proportionality review, we determine whether "the sentence of death in the present case is excessive or disproportionate to the

penalty imposed in similar cases considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983); *accord* N.C.G.S. § 15A-2000(d)(2). We do not conclude that the imposition of the death penalty in this case is aberrant or capricious.

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994). It is also proper for this Court to compare this case with the cases in which we have found the death penalty to be proportionate. *Id.* Although we review all of the cases when engaging in this statutory duty, we will not undertake to discuss or cite all of those cases each time we carry out that duty. *Id.*

This case is distinguishable from each of those cases in which this Court has found the death penalty disproportionate. In three of those 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. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant either pled guilty or was convicted by the jury solely under the theory of felony murder. Here, defendant was convicted on the theory of premeditation and deliberation as well as under the felony murder rule. We have said that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. at 341, 384 S.E.2d at 506.

The jury's finding of the four "prior conviction of a violent felony" aggravating circumstances is also significant. *See id.* at 342, 384 S.E.2d at 507. "[N]one of the cases in which the death sentence was determined by this Court to be disproportionate have included this aggravating circumstance." *State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 752 (1995).

We conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment. Therefore, the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

For the foregoing reasons, we conclude that defendant received a fair trial, free from prejudicial error, and that the sentence of death entered in the present case must be and is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. KEITH BRADLEY EAST

No. 478A95

(Filed 7 March 1997)

1. Criminal Law § 115 (NCI4th Rev.)— discovery—psychiatric examination of defendant—preparation of written report for State

The trial court did not err by ordering defendant's psychiatrist, who had delivered an oral report of his examination of defendant to defense counsel, to prepare a written report of his findings for the State pursuant to N.C.G.S. § 15A-905(b). There is nothing in the statute that limits the trial court to production of existing written reports, and it would be unacceptable to allow the defense to keep secret critical evidence solely because that evidence was never placed in written form.

Am Jur 2d, Depositions and Discovery §§ 464-466.

2. Evidence and Witnesses § 2675 (NCI4th)— psychiatric examination of defendant—evaluation for trial—not privileged

A psychiatrist's report of the results of his examination of defendant was not protected by the psychologist-client privilege of N.C.G.S. § 8-53.3 where the psychiatrist was appointed by the trial court at the request of defense counsel to evaluate defendant's mental status rather than to treat defendant. Moreover, even if the examination results were privileged, the trial court could properly compel their disclosure on the ground that it was necessary to the administration of justice.

Am Jur 2d, Witnesses § 451.

Validity and construction of statutes providing for psychiatric evaluation of accused to determine mental condition. 32 ALR2d 434.

Privilege, in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient. 44 ALR3d 24.

3. Jury § 153 (NCI4th)— capital trial—jury selection—imposition of death penalty—question not improper

The prosecutor's question to each prospective juror in a capital trial, "And after having made that decision, if the people of the State of North Carolina prove to you beyond a reasonable doubt that the death penalty was the appropriate punishment you would vote to impose it?" was not a misstatement of the law and did not violate defendant's due process rights. Any prejudice to defendant from this single question was ameliorated by the trial court's instructions prior to the *voir dire* and prior to the sentencing determination.

Am Jur 2d, Jury §§ 205, 208, 210.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

4. Jury § 226 (NCI4th)— capital trial—excusal of veniremen for cause—no blanket denial of rehabilitation

The trial court's excusal for cause of eleven prospective jurors without allowing defendant the opportunity to rehabilitate those jurors did not constitute an improper "blanket ruling" against rehabilitation where the trial court personally questioned the eleven jurors at issue, and there is no evidence in the record that the trial court automatically rejected defendant's requests to rehabilitate those jurors. The fact that the trial court disallows all of defendant's requests for rehabilitation does not, in the absence of other evidence, amount to a *de facto*, blanket ruling against all rehabilitation.

Am Jur 2d, Jury §§ 185, 228.

5. Evidence and Witnesses § 1694 (NCI4th)— photographs of murder victims—crime scene and autopsy—not excessive

The trial court did not abuse its discretion in the admission of color photographs of the bodies of two murder victims at the crime scene and during the autopsy where each photograph was different from the others and was used to illustrate an S.B.I. agent's testimony about the crime scene or the medical exam-

iner's testimony or to support the medical examiner's opinions about the wounds and the causes of the deaths.

Am Jur 2d, Homicide §§ 417, 418.

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

6. Evidence and Witnesses § 876 (NCI4th)— statement by murder victim—hearsay—state of mind exception

A murder victim's statement to a neighbor several hours before the murder that she had to return to her home because she saw defendant coming and her pocketbook was in the house was admissible under the state of mind exception to the hearsay rule where the victim's state of mind regarding her intention not to give defendant the money he wanted was relevant to the issue of defendant's motive for the murder. N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Evidence § 667.

7. Evidence and Witnesses § 2261 (NCI4th)— S.B.I. agent—expert testimony—victim standing and door closed

The trial court did not abuse its discretion in permitting an S.B.I. agent to give expert opinion testimony in a prosecution for two murders that the male victim was standing when first hit with a blunt-force instrument and that the door to the house was closed at the time he was accosted, although the S.B.I. agent was not an expert in blood-spatter evidence, where the witness had extensive training and experience in forensic crime-scene collection and processing; she had a bachelor's degree in criminology and a master's degree in criminal justice; she had testified as a crime-scene specialist in over seventy-five cases; and her opinions were not based solely on blood-spatter evidence but were deduced from a combination of blood spatters, the location of the victim's glasses, the relationship between the body and the door, and the location of wounds on the victim's head. N.C.G.S. § 8C-1, Rule 702.

Am Jur 2d, Expert and Opinion Evidence §§ 55-59.

Admissibility, in criminal Prosecution, of expert opinion evidence as to "blood splatter" interpretation. 9 ALR5th 369.

8. Criminal Law § 103 (NCI4th Rev.)— discovery—statements by defendant—substance of planned testimony revealed—testimony admissible

Where the prosecutor informed defense counsel pursuant to a discovery request that a witness planned to testify that defendant had called a murder victim a "bitch" and had stated that he "hated" the victim, the trial court did not err by permitting the witness to testify that defendant also stated that he wished the victim was dead since the essence of the witness's testimony was that defendant had a hatred for the victim, and the substance of the planned testimony of the witness was conveyed to defense counsel as required by N.C.G.S. § 15A-903(a)(2). Moreover, the trial court did not abuse its discretion in failing to exclude the evidence as a sanction for any failure by the State to comply with discovery.

Am Jur 2d, Depositions and Discovery §§ 428, 430, 431.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. 7 ALR3d 8.

What is accused's "statement" subject to state court criminal discovery. 57 ALR4th 827.

9. Homicide § 706 (NCI4th)— failure to instruct on voluntary manslaughter—error cured by verdict

The trial court's failure to instruct on voluntary manslaughter was harmless error where the court properly instructed the jury on first-degree and second-degree murder and the jury returned a verdict of guilty of first-degree murder.

Am Jur 2d, Homicide § 530.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.

10. Criminal Law § 1359 (NCI4th Rev.)— capital sentencing—pecuniary gain and robbery aggravating circumstances—same evidence not used

The record established that robbery and pecuniary gain aggravating circumstances were not supported by precisely the same evidence, and the trial court thus properly submitted both circumstances to the jury in this capital sentencing proceeding

for two first-degree murders, where the evidence showed that defendant committed the murders in the course of stealing money from the victims and also in the course of stealing the keys to the victims' car; defendant stole the keys in order to use the car as transportation and not to sell the car and convert it into cash; and the theft of money supports the pecuniary gain aggravating circumstance and the theft of the keys supports the robbery aggravating circumstance.

Am Jur 2d, Criminal Law §§ 598-600.

11. Criminal Law § 451 (NCI4th Rev.)— argument of counsel— no injection of personal opinions

The prosecutor did not inject impermissible personal opinions in his argument to the jury in a capital sentencing proceeding by his argument questioning the truth of defendant's claim that the male victim had threatened him with a knife and by his argument that "[w]e would never ask you to convict if we did not believe it was the truth."

Am Jur 2d, Trial § 572.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused—modern state cases. 88 ALR3d 449.

12. Criminal Law § 1371 (NCI4th Rev.)— capital sentencing— heinous, atrocious, or cruel aggravating circumstance— sufficiency of evidence

The trial court properly submitted the especially heinous, atrocious, or cruel aggravating circumstance to the jury in a capital sentencing proceeding for two first-degree murders where the evidence showed that the victims, two diminutive, peaceful persons in their seventies, were beaten to death in their own home by their 260-pound nephew with a blunt-force object; they experienced extreme pain and suffering; each suffered several defensive wounds; the male victim was struck at least fourteen times, the female victim was struck at least ten or eleven times, and many of the blows came after the victims fell to the floor; and the victims were beaten so severely that their bones were crushed, their skulls were fractured exposing brain tissue, and a finger of the female victim was amputated.

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.

13. Criminal Law § 1384 (NCI4th Rev.)— mitigating circumstance—mental or emotional disturbance—peremptory instruction—failure of jury to find—no constitutional violation

Failure of the jury in a capital sentencing proceeding to find the mental or emotional disturbance mitigating circumstance when the trial court had given a peremptory instruction on this mitigating circumstance did not violate defendant's rights to due process and a fair trial. Even when all of the evidence supports a finding that a mitigating circumstance exists and a peremptory instruction is given, the jury could properly fail to find the mitigating circumstance if it does not believe the evidence.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 741.

14. Criminal Law § 1402 (NCI4th Rev.)— death sentences not disproportionate

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate where the jury convicted defendant under the theory of malice, premeditation, and deliberation; the murders were found by the jury to be especially heinous, atrocious, or cruel; the jury found three additional aggravating circumstances; the victims, two elderly persons, were beaten to death by a thirty-four-year-old family member in their own home in the course of a robbery; the victims suffered numerous defensive wounds and likely experienced great pain before death; defendant did not seek medical help for the victims but fled the state in an attempt to elude law enforcement; and defendant showed no remorse for the victims.

Am Jur 2d, Criminal Law §§ 628, 629.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by McHugh, J., at the 27 October 1995 Criminal Session of Superior Court, Surry County, upon two jury verdicts finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed by this Court 19 March 1996. Heard in the Supreme Court 17 October 1996.

Michael F. Easley, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, for the State.

Urs R. Gsteiger and Elizabeth Horton for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 15 August 1994 for the first-degree murders of Harold Delaney and Geraldine East Delaney. On 17 January 1995, the defendant also was charged in one three-count indictment with first-degree burglary, larceny and possession; in a second three-count indictment with larceny, receiving and possession; and in a third indictment with robbery with a dangerous weapon. The defendant was tried capitally, and the jury found the defendant guilty of the first-degree murders of both Harold Delaney and Geraldine East Delaney on the basis of malice, premeditation and deliberation. The defendant also was convicted of first-degree burglary, felonious larceny and robbery with a dangerous weapon. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that the defendant be sentenced to death for each of the murders. Judge McHugh sentenced defendant to life imprisonment for first-degree burglary, forty years for robbery with a dangerous weapon and arrested judgment for the felonious larceny conviction. Judge McHugh then sentenced the defendant to death for each of the murder convictions. For the reasons stated herein, we conclude that the defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

At trial, the State presented evidence tending to show that on 2 August 1994, the victims, Dr. Harold Delaney and his wife, Mrs. Geraldine East Delaney, were visiting Pilot Mountain, North Carolina, from their home in Maryland. Dr. Delaney was seventy-five years old and was in semiretirement after a distinguished chemistry career in which he had worked on the Manhattan Project and had served in numerous prominent academic positions and presidential appointments. Mrs. Delaney was seventy-one years old and a retired teacher. The Delaneys were the defendant's aunt and uncle. They were staying in the home of Mrs. Delaney's mother, Mrs. Sophia East, who is also the grandmother of the defendant. The Delaneys bought the house for Mrs. East before she was forced to go to a nursing home. The Delaneys stayed at the house whenever they visited Mrs. East and the rest of their family, many of whom lived in close proximity to the house.

On the afternoon of 2 August 1994, at approximately 5:00 p.m., Mrs. Delaney was visiting Ms. Ada Lovell while Dr. Delaney napped. Ms. Lovell lives across the street from the house in which the Delaneys were staying, which Ms. Lovell described as being within "spitting distance." The two women were talking when Ms. Lovell's grandson announced that the defendant had pulled up in the driveway of the Delaneys' house. Mrs. Delaney suddenly proclaimed, "Oh, I've got to go. Harold is asleep, and my pocketbook is up there." Mrs. Delaney quickly departed. She intercepted the defendant before he could go in the house, and the two engaged in some sort of conversation in front of the house. This was the last time Ms. Lovell saw Geraldine Delaney alive.

The State presented further evidence tending to show that during the evening of 2 August 1994, the defendant went to a store and then to the house of an acquaintance at approximately 8:00 p.m. There, defendant drank some wine and listened to the radio. Later, the defendant got a ride home, but he asked the driver to drop him off in front of his grandmother's house—the house where the Delaneys were staying. It was then approximately 10:30 p.m.

On 4 August 1994, the defendant went to the apartment of his former girlfriend, Deborah Hartman, in Winston-Salem. The defendant was in obvious distress. He was crying, was acting agitated and was pacing continuously. Defendant told Ms. Hartman that he had to either leave the country, go to jail or commit suicide. He also said that he was in serious trouble and that he needed $169 for a bus ticket to El Paso, Texas. Upon repeated questioning by Ms. Hartman, the defendant eventually told her that he and his uncle, Dr. Delaney, had gotten into an argument, that Dr. Delaney had threatened him with a knife and that he had "snapped" and lost control because he was high on drugs at the time. Defendant said that he had hit his aunt and uncle with what he thought was a baseball bat and that both were dead. When asked what the argument was about, the defendant stated, "About him being him and me being me." Ms. Hartman was afraid the defendant might just be trying to scam money from her for drugs, so she took defendant to the teller machine and withdrew $60 for him. Ms. Hartman then dropped the defendant off in the parking lot of the apartments and watched him depart. Defendant drove off in a Buick Park Avenue, which Ms. Hartman identified at trial as belonging to the Delaneys.

Ms. Hartman, in distress by this time herself, made a phone call to the Pilot Mountain police and, without giving her name, reported

that something might have happened to the Delaneys. When the officers arrived, they found the badly beaten body of Dr. Delaney just inside the door of the house and the similarly beaten body of Mrs. Delaney lying in the hall. A search of the house revealed Mrs. Delaney's pocketbook in the kitchen with a wallet lying next to it. No folding money was found in the wallet or the rest of the house, despite the fact that the Delaneys had withdrawn several hundred dollars from their Maryland bank account shortly before their deaths. Many of the drawers in the cabinets and in the furniture of the house were ajar. No knives or other weapons besides normal kitchen utensils were found anywhere in the house.

Evidence gathered from the crime scene and from autopsies conducted on the bodies established that the Delaneys were killed by multiple blows to the head with a blunt-force instrument. In the opinions of the experts who testified, both Dr. and Mrs. Delaney were in standing positions when they were first struck. Blood spatter patterns established that they were also struck numerous times after they fell to the floor. Mrs. Delaney suffered ten to eleven separate wounds. She had lacerations all over her head and face, bones in her face were broken, and her skull had been fractured with such force that her brain was exposed. Mrs. Delaney's ribs were also broken, and there was bleeding in the heart cavity. As many as four of her wounds were defensive in nature, including one so severe that it amputated one of the fingers of her right hand. Dr. Delaney was struck at least fourteen separate times. He also suffered numerous lacerations and broken bones, including a fractured skull. Although Dr. Delaney suffered at least four blows to the arms that were indicative of defensive wounds, the majority of Dr. Delaney's wounds were to the back of the head and the upper back area. This indicated that Dr. Delaney's assailant had struck him from behind. These injuries caused the Delaneys significant pain and suffering prior to their deaths.

The defendant testified at trial and stated that on 2 August 1994, he bought over $300 worth of crack cocaine, which he used between 2:00 p.m. and that evening. He also drank some wine. Defendant claimed that all he could remember about the killings was that he was visiting his uncle, Dr. Delaney, and that he suddenly felt "threatened." As a result, defendant grabbed the handle of some object, and then everything went blank. Defendant testified that the next thing he remembered was driving in a car and feeling that he had done something terrible. The defendant then said he called home. After talking

with his mother, the defendant turned himself in to the police in El Paso, Texas.

The Delaneys' car was found in Beaumont, Texas. An investigation by the North Carolina State Bureau of Investigation revealed the presence of the defendant's fingerprints on the Delaneys' car. Defendant's fingerprints were also on several items in the car, including a page in a road atlas which contained a map of the United States.

The defense claimed the defendant suffered from psychological deficits and substance abuse problems. Defendant's psychiatrist, Dr. John Warren, described the defendant as a crack cocaine abuser who suffered from chronic depression. Dr. Warren also stated that, at the time the Delaneys were killed, defendant was intoxicated with cocaine and was suffering from an unstable personality and neuropsychological deficits. Dr. Warren's opinion was that defendant's mental condition prevented him from forming, or greatly impaired his ability to form, the specific intent to kill.

Several witnesses for the State, including some from defendant's family, testified that they had never known the defendant to act as though he was on drugs or to "lose control." Several witnesses also testified that the defendant did not appear to be intoxicated from drugs or alcohol on the day of the murders, and that he was extremely coherent and polite even up until the time he was dropped off in front of the Delaneys' house. Evidence was presented, however, that the defendant experienced extreme animosity toward the Delaneys. The defendant felt that the Delaneys were pretentious and that they looked down on him for having done nothing with his life. Two witnesses testified that the defendant had wished death on at least Mrs. Delaney during two recent visits. In June of 1994, during the visit just before the fateful August visit, defendant stated about Mrs. Delaney, "That bitch is back. I hate that bitch. I wish she was dead."

PRETRIAL ISSUES

[1] In his first assignment of error regarding pretrial issues, defendant argues that the 9 October 1995 order directing Dr. Warren to prepare a written report of his findings for the State was improper. Defendant's contentions are twofold: first, that there is no requirement in N.C.G.S. § 15A-905 that a party prepare a report for the op-

position, and second, that Dr. Warren's findings are privileged psychologist-client communications under N.C.G.S. § 8-53. We find defendant's arguments unpersuasive.

N.C.G.S. § 15A-905(b) authorizes the court to order the defendant "to permit the State to inspect . . . results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case . . . which the defendant intends to introduce in evidence at the trial . . . when the results or reports relate to his testimony." N.C.G.S. § 15A-905(b) (1988). Pursuant to the statute, the State moved for the defendant to produce a written report of Dr. Warren's psychological examination. The defendant admitted during the motion hearing that Dr. Warren had delivered an oral report of the examination results to defense counsel. There is nothing in N.C.G.S. § 15A-905(b) that limits the trial court to production of existing written reports. In this case, Dr. Warren possessed the "results" of his examination. The fact that they had not been reduced to a written report is irrelevant, and the trial court acted properly in ordering production of those results in the form of a written report to the State. It would be unacceptable to allow the defense to keep secret critical evidence solely because that evidence was never placed in written form, and N.C.G.S. § 15A-905(b) properly empowers the trial court to prevent such a result.

[2] Regarding defendant's claim of psychologist-client privilege, defendant has failed to meet the standard for protection of the communication in question. Under N.C.G.S. § 8-53.3, the information must have been "acquired in the practice of psychology," and the information must be "necessary to enable him or her to practice psychology." N.C.G.S. § 8-53.3 (Supp. 1996). In *State v. Taylor*, 304 N.C. 249, 271, 283 S.E.2d 761, 776 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983), this Court held that no physician-patient privilege is created between a physician and a criminal defendant who is examined in order to determine whether the defendant is able to stand trial. This is analogous to the situation in this case where the psychologist was appointed by the trial court at the request of defense counsel for the purpose of evaluating the defendant's mental status, as opposed to treating him. Moreover, the trial court is always at liberty to compel disclosure of privileged communications if it "is necessary to a proper administration of justice." N.C.G.S. § 8-53.3. Such is the situation in this case. Had the trial court not forced disclosure of Dr. Warren's examination results, the defense would have gained an unfair advantage by keeping relevant and critical evidence from

the State. Thus, we conclude this assignment of error is without merit.

In his next assignment of error, defendant contends that the trial court allowed the State, on *voir dire*, to make repeated misstatements to the jury about North Carolina's death penalty law in violation of defendant's rights to due process and trial by jury. Defendant argues that because the trial court gave prospective jurors preliminary instructions regarding the capital sentencing procedure on the first day but did not repeat those instructions for individuals called later in the week, the district attorney's questioning amounted to improper misstatements of the capital sentencing procedure. We disagree.

[3] During *voir dire*, each prospective juror was asked the following question by the district attorney: "And after having made that decision, if the people of the State of North Carolina prove to you beyond a reasonable doubt that the death penalty was the appropriate punishment you would vote to impose it?" We do not find the district attorney's question to be a misstatement of the law. In *State v. Williams*, 339 N.C. 1, 22, 452 S.E.2d 245, 258 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995), this Court approved the following question by the State: "So you are telling me that if you were convinced beyond a reasonable doubt that [the death penalty] was the proper punishment, that you . . . could do your duty and do that very thing?" The question in *Williams* is almost identical to the question posed to jurors in the instant case. As a result, we hold the question did not violate defendant's due process rights.

Even assuming that the question was not a perfect recitation of the jurors' obligations under this aspect of the capital sentencing determination, this portion of the State's examination of jurors cannot be analyzed in a vacuum. First, the record shows that the trial court gave substantially the same preliminary instructions to prospective jurors at the opening of court on each of the two days of jury selection. These instructions explained, *inter alia*, the circumstances of the case and the jurors' duties under the capital sentencing proceeding if the case should reach the sentencing phase. Second, the trial court gave extensive, correct instructions to the actual jury on its duties during the jury charge prior to jury deliberations in the capital sentencing phase. Any prejudice that might have accrued in favor of the State from this single question was ameliorated by the trial court's instructions, both prior to *voir dire* and prior to sentenc-

ing determination, with which the defendant finds no fault. This assignment of error is overruled.

[4] Next, defendant assigns error to the trial court's excusal for cause of several prospective jurors without allowing the defense the opportunity to rehabilitate these jurors. Defendant contends that this action was improper in that it amounted to a "blanket ruling" against rehabilitation, pursuant to *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993), and was in derogation of his rights to due process and trial by jury. We decline to find such violations.

A defendant has no right to attempt to rehabilitate jurors, and the trial court is not required to allow a defendant to rehabilitate jurors challenged for cause. *State v. Burr*, 341 N.C. 263, 281-82, 461 S.E.2d 602, 611 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 526 (1996). The trial court retains discretion as to the extent and manner of questioning, and its decisions will not be overturned absent a showing of abuse of discretion. *State v. Wilson*, 313 N.C. 516, 526, 330 S.E.2d 450, 458 (1985). There is no evidence in the record that the trial court did not consider each juror separately or that the trial court ruled out the possibility of rehabilitation. As a matter of fact, the trial court personally questioned each of the eleven jurors at issue. The record establishes that all of these jurors expressed an inability to follow the law, although their answers may not have been as unequivocal as other jurors. There is no evidence in the record that the trial court automatically rejected defendant's requests to rehabilitate these jurors. The fact that a trial court happens to disallow all of defense counsel's requests for rehabilitation does not, in the absence of other evidence, amount to a *de facto*, blanket ruling against all rehabilitation attempts. *See Brogden*, 334 N.C. 39, 430 S.E.2d 905 (trial court's misapprehension of law led to expressed and erroneous preclusion of all rehabilitation efforts). This assignment of error is therefore overruled.

GUILT/INNOCENCE PHASE

[5] In his first assignment of error regarding the guilt/innocence phase of his trial, defendant contends that the trial court abused its discretion by admitting several color photographs of the victims' bodies at the crime scene and during the autopsy. Defendant asserts that the pictures were needlessly cumulative and gruesome, resulting in the arousal of the jury's passions against the defendant and thereby violating his rights to due process and trial by jury. We find defendant's argument to be without merit.

The trial court must weigh the probative value of the photographs against the danger of unfair prejudice to the defendant in deciding whether to admit photographic evidence. *State v. Gregory*, 340 N.C. 365, 387, 459 S.E.2d 638, 650 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996). The decision regarding the admission of photographs of crime victims lies within the sound discretion of the trial court. *Id.* "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). In this case, all of the photographs were different from one another and were all used appropriately for evidentiary purposes during the trial. Of the exhibits to which defendant assigns error, exhibits 13-16, 18, and 23-28 were all used by State Bureau of Investigation Agent Pamela Tulley to illustrate her testimony about the scene of the crime. The only other exhibits questioned, numbers 50-58, were used by the medical examiner to illustrate his testimony and to support his opinions about the wounds and the causes of death. We therefore find no abuse of discretion in the trial court's admission of these photographs into evidence, and accordingly, this assignment of error is overruled.

[6] Next, defendant assigns as error the admission of testimony from Ms. Ada Lovell that Geraldine Delaney said she had to leave because she saw the defendant coming and her pocketbook was in the house. Defendant argues that this statement was irrelevant hearsay under Rule 803(3) of the North Carolina Rules of Evidence because it was made several hours before the murders, and there was no showing that the statement related to an alleged confrontation before the murders. We disagree.

In this case, the State presented evidence that Geraldine Delaney was murdered between Tuesday, 2 August 1994, and Thursday, 4 August 1994. Ms. Lovell testified that on the afternoon of 2 August 1994 at approximately 5:00 p.m., Mrs. Delaney was visiting Ms. Lovell's house. When Mrs. Delaney was told defendant was approaching, she said to Ms. Lovell, "Oh, I've got to go. Harold is asleep, and my pocketbook is up there," and rushed back to her house. Prior to ruling on the admissibility of this statement, the trial court conducted a *voir dire* at which the proposed testimony was proffered. The trial court ruled the testimony admissible under N.C.G.S. § 8C-1, Rule

803(3) as a statement of the victim's then existing state of mind or emotional condition.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1992). However, under N.C.G.S. § 8C-1, Rule 803(3), the state of mind exception to the hearsay rule, " '[e]vidence tending to show a presently existing state of mind is admissible if the state of mind sought to be proved is relevant and the prejudicial effect of the evidence does not outweigh its probative value.' " *State v. Miller*, 344 N.C. 658, 675, 477 S.E.2d 915, 925 (1996) (quoting *State v. Locklear*, 320 N.C. 754, 760, 360 S.E.2d 682, 685 (1987)).

When intent is directly in issue, a declarant's statements "relative to his then existing intention are admitted without question." 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 218, at 92 (4th ed. 1993); *see State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197 (pre-Rules case, murder victim's statement that he would testify against defendant properly admitted as evidence of defendant's motive), *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). In the present case, the statements attributed to Mrs. Delaney were relevant to prove two material facts: first, that she feared defendant would steal from her, and second, that she had no intention of giving money to the defendant. Because the victim's state of mind regarding her intention not to give defendant the money he wanted was relevant to the issue of defendant's motive for murder, the testimony in question was admissible under the state of mind exception. The fact that the statement was made some time before the estimated time of the murders is irrelevant. In *State v. Taylor*, 332 N.C. 372, 420 S.E.2d 414 (1992), this Court observed that, "Rule 803(3) does not contain a requirement that the declarant's statement must be closely related in time to the future act intended." 332 N.C. at 386, 420 S.E.2d at 422-23. Accordingly, defendant's assignment of error is overruled.

[7] In his next assignment of error, defendant argues that the trial court's admission of Agent Tulley's opinion testimony regarding the crime scene amounted to an abuse of discretion. Defendant's argument centers on two opinions rendered by Agent Tulley: that Dr. Delaney was standing when first hit and that the door to the house was closed at the time he was accosted. Defendant contends that these opinions were rendered without proper foundation by a witness not qualified as an expert because Agent Tulley was not an expert in

blood-spatter evidence. We find defendant's argument to be without merit.

The admissibility of expert testimony is governed by Rule 702 of the North Carolina Rules of Evidence, which 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). The trial court has broad discretion in the determination and admission of expert testimony. In *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), this Court stated:

> "It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." *State v. Evangelista*, 319 N.C. 152, 164, 353 S.E.2d 375, 384 (1987). "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' " *Id.* at 164, 353 S.E.2d at 384 (quoting *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978)). Further, "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *Bullard*, 312 N.C. at 140, 322 S.E.2d at 376.

Goode, 341 N.C. at 529, 461 S.E.2d at 640-41 (citations omitted).

The record shows that Agent Tulley had extensive training and experience in crime-scene collection and processing. She earned a bachelor's degree in criminology, during which she took a crime-lab class, and a master's degree in criminal justice. She also had numerous hours of training in crime-scene collection and processing at the State Bureau of Investigation (SBI). She specializes in forensic crime-scene collection and processing at the SBI, and she has testified as a crime-scene specialist in well over seventy-five cases. This education and experience clearly put her in a "better position to have an opinion on the subject than is the trier of fact." *Id.* at 529, 461 S.E.2d at 640. Moreover, Agent Tulley's opinions were not based solely on blood-spatter evidence. The record shows her opinions were deduced from a combination of the blood spatters, the location of Dr. Delaney's glasses, the relationship between the body and the door, and the location of the wounds on Dr. Delaney's head. These were all

matters within Agent Tulley's experience and knowledge base. As a result, it was reasonable for the trial court to find that Agent Tulley's education, training and experience placed her in a position to assist the jury in understanding the crime-scene evidence. Thus, the trial court's admission of this testimony was not an abuse of discretion, and defendant's assignment of error is overruled.

[8] The defendant next assigns error to the trial court's admission of Ms. Cora Cobb's testimony regarding the defendant. Ms. Cobb, the defendant's aunt, testified at trial that defendant twice told her that he wished Mrs. Delaney were dead by stating, "That bitch is back. I hate that bitch. I wish she was dead," or words to that effect. After objection by defense counsel, the district attorney admitted that these exact words were never disclosed to the defense and that the defense did not know about the phrase containing the death wish. The trial court admitted the statement notwithstanding, finding that the "substance" of the statement had been revealed to the defense. We agree with the trial court.

Defendant argues that the district attorney's failure to disclose the sentence, "I wish she was dead," was a violation of the State's discovery obligations under N.C.G.S. § 15A-903. Section 15A-903(a)(2) provides in relevant part:

> (a) Statement of Defendant.—Upon motion of a defendant, the court must order the prosecutor:
>
> . . . .
>
> (2) To divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State, the existence of which is known to the prosecutor or becomes known to him prior to or during the course of trial . . . .

N.C.G.S. § 15A-903(a)(2) (1988). The express language of the statute mandates only that the district attorney provide defense counsel with the "substance" of the defendant's statement. We stated in *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985), that " 'substance' means: 'Essence; the material or essential part of a thing, as distinguished from "form." That which is essential.' " *Id.* at 280, 337 S.E.2d at 515 (quoting *Black's Law Dictionary* 1280 (5th ed. 1979)). In this case, the record shows that the district attorney told the defense that Ms.

Cobb planned to testify that the defendant had called the victim a "bitch" and that he had said he "hated Geraldine Delaney." The essence of Ms. Cobb's testimony was that defendant had an intense dislike—a hatred—for Mrs. Delaney. Whether that dislike was expressed by saying he "hated" her, that she was a "bitch," or that he "wished she was dead," the defense was still conveyed the substance of her planned testimony. As this Court stated in *State v. Pridgen*, 313 N.C. 80, 326 S.E.2d 618 (1985):

> We believe that it would be unreasonable, if not impossible, for a prosecutor to anticipate the exact testimony of a witness. Additional details omitted under the stress or other circumstances of an initial interview may be recalled when the witness is later interviewed in preparation for trial. Moreover no witness can be expected to repeat verbatim on the stand what he or she has previously stated during interviews. Where, as in the present case, trial testimony is *substantially similar* to what in substance was provided during discovery, and variations are attributable to the addition or elaboration of detail or merely changes in vocabulary or syntax, the testimony is admissible, and in full compliance with our discovery rules.

Id. at 91, 326 S.E.2d at 625.

Moreover, whether a party is issued sanctions for failure to comply with discovery rules is in the discretion of the trial court. *State v. Tucker*, 329 N.C. 709, 717, 407 S.E.2d 805, 810 (1991). In *Tucker*, we discussed the principles underlying discovery rules:

> The purpose of these procedures is to protect the defendant from unfair surprise. *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, [498] U.S. [1092], 112 L. Ed. 2d 1062 (1991); *State v. Alston*, 307 N.C. 321, 331, 298 S.E.2d 631, 639 (1983). Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court. *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988). "[The] discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its noncompliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986).

Tucker, 329 N.C. at 716-17, 407 S.E.2d at 809-10. The record shows that the trial court held an extensive hearing on the statement in question. A preview of the evidence on *voir dire* was given in which

both parties examined the witness, and the trial court heard legal arguments from both sides. Thereafter, the trial court made findings of fact and conclusions of law supporting its decision. No showing of bad faith on the part of the State was made. Because the record shows that the trial court thoroughly considered the admissibility of the statement at issue and because there is competent evidence in the record to support the trial court's exercise of discretion, we are bound by the trial court's finding, and we find no abuse of discretion. *State v. Mills*, 332 N.C. 392, 405, 420 S.E.2d 114, 120 (1992). Thus, defendant's assignment of error on this issue is overruled.

[9] In his next assignment of error, defendant asserts that the trial court erred by failing to instruct the jury on voluntary manslaughter. Defendant contends that the testimony of Ms. Deborah Hartman raised the issue of voluntary manslaughter and that, relying on *State v. Mustafa*, 113 N.C. App. 240, 245, 437 S.E.2d 906, 908-09, *cert. denied*, 336 N.C. 613, 447 S.E.2d 409 (1994), the trial court must charge on a lesser-included offense whenever there is some evidence that might convince a rational trier of fact to convict of that lesser offense. We find defendant's contention unpersuasive.

It is well-settled law in this state that when a jury is properly instructed on both first-degree and second-degree murder and returns a verdict of guilty of first-degree murder, the failure to instruct on voluntary manslaughter is harmless error. *State v. Lyons*, 340 N.C. 646, 663-64, 459 S.E.2d 770, 780 (1995). This is precisely what happened in the present case. The fact that Ms. Hartman's testimony may have raised the possibility of voluntary manslaughter is thus irrelevant to our analysis of this issue. As a result, defendant's assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[10] In his first assignment of error regarding his capital sentencing proceeding, defendant asserts that it was improper for the trial court to submit both robbery and pecuniary gain as aggravating circumstances. Citing *State v. Quesinberry*, 319 N.C. 228, 240, 354 S.E.2d 446, 453 (1987), defendant argues that these two aggravating circumstances are redundant when a premeditated murder is committed during a robbery. We find the circumstances of this case do not merit the application urged by defendant.

It is established law in North Carolina that it is error to submit two aggravating circumstances when the evidence to support each is

precisely the same. *State v. Gibbs*, 335 N.C. 1, 58-59, 436 S.E.2d 321, 354 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994); *State v. Jennings*, 333 N.C. 579, 627-28, 430 S.E.2d 188, 213-14, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Conversely, where the aggravating circumstances are supported by separate evidence, it is not error to submit both to the jury, even though the evidence supporting each may overlap. *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993); *State v. Jones*, 327 N.C. 439, 452, 396 S.E.2d 309, 316 (1990).

To prove a robbery, the State need only establish that the defendant feloniously took money or goods of any value from the person of another against that person's will by violence or by putting that person in fear. *State v. Daniels*, 337 N.C. 243, 267, 446 S.E.2d 298, 313 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). The desire for pecuniary gain is not an essential element of robbery, and not all robberies are committed for pecuniary gain. *State v. Richardson*, 342 N.C. 772, 467 S.E.2d 685, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 160 (1996).

In this case, the evidence shows that the defendant murdered the victims while engaged in two robberies. The defendant committed the murders not only in the course of stealing money from the victims, but also in the course of stealing the keys to the victims' car. While there is evidence of a pecuniary gain motive in the theft of the money, there is no evidence that the motive for the theft of the car keys was pecuniary gain. The evidence shows the defendant stole the keys in order to use the car as transportation either to visit his girlfriend or to evade law enforcement, not in order to sell the car and convert it into cash. The theft of the money supports the pecuniary gain aggravating circumstance, and the theft of the keys supports the robbery aggravating circumstance. Because the record establishes that the aggravating circumstances in question were not supported by "precisely the same evidence," *Gibbs*, 335 N.C. at 58-59, 436 S.E.2d at 354, the trial court did not err by submitting both to the jury. As a result, defendant's assignment of error is overruled.

[11] Defendant's next assignment of error involves the prosecutors' arguments to the jury. Defendant contends that the prosecutors injected impermissible personal opinion and argued facts not in evidence, in violation of defendant's rights under statutory and constitutional law. The most objectionable argument, according to the defendant, was the vouching by the prosecutors for the truth of

their case. We do not agree with defendant's contentions in this regard.

In *State v. Worthy*, 341 N.C. 707, 462 S.E.2d 482 (1995), this Court summarized the law regulating closing arguments:

> It is well settled that arguments of counsel rest within the control and discretion of the presiding trial judge. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992); *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). In the argument of hotly contested cases, counsel is granted wide latitude. *Williams*, 317 N.C. at 481, 346 S.E.2d at 410. While it is not proper for counsel to "travel outside the record" and inject his or her personal beliefs or other facts not contained within the record into jury arguments, or place before the jury incompetent or prejudicial matters, counsel may properly argue all the facts in evidence as well as any reasonable inferences drawn therefrom. *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975).
>
> > Additionally, as this Court has previously pointed out, "for an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial error.' " In order to reach the level of "prejudicial error" in this regard, it now is well established that the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process."
>
> *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 40 (citations omitted), *cert. denied*, — U.S. —, 130 L. Ed. 2d 547 (1994). Moreover, "prosecutorial statements are not placed in an isolated vacuum on appeal." *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), *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), *cert. denied*, — U.S. —, 130 L. Ed. 2d 650 (1995).

Worthy, 341 N.C. at 709-10, 462 S.E.2d at 483-84. Also, alleged error in the prosecution's arguments must be evaluated in the context of the defendant's arguments. *State v. Gladden*, 315 N.C. 398, 423, 340 S.E.2d 673, 689, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Finally, where a party does not object to a jury argument, the allegedly improper argument must be so prejudicial and grossly improper as to interfere with defendant's right to a fair trial in order

for the trial court to be found erroneous for failure to intervene *ex mero motu*. *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995).

When measured by these standards, a thorough examination of the record establishes that the prosecutors' statements in this case do not rise to such a level as to constitute an interference with defendant's right to a fair trial. One of the arguments to which defendant assigns error was the questioning of the defendant's claim that Dr. Delaney threatened him with a knife. The prosecution argued:

> [Dr. Delaney was] [m]uch different than the defendant. His son described him as a man of peace. Mr. Harold Delaney, 5'8 1/2", 168 pounds according to the autopsy. A man 5'8 1/2". A man of peace. Do you really believe that this man [the defendant] was threatened? And if he was threatened was he threatened with this knife? This man threatened with this knife? Is that the truth?
>
> Mr. Collins in his closing arguments told you that he wanted a verdict that spoke the truth. So do we. We would never ask you to convict if we did not believe it was the truth. And we believe the same way, we ask you to go back to the jury room and bring back a verdict that does speak the truth.

The defendant contends that this constitutes impermissible injection of personal opinion by the prosecutor. However, when viewed in the context of the arguments of both sides, it is apparent that the prosecutor's objective with this argument was to admonish the jury to do exactly what the defense had already asked—to return a verdict that spoke the truth—and that the prosecution would never ask the jury to do otherwise. Moreover, the defense repeatedly questioned the prosecution's integrity and the truthfulness of its witnesses during the defendant's closing arguments. Therefore, it cannot be said that the prosecution's defense of its case and its witnesses was grossly improper within the context of these facts. As a result, the prosecution's arguments were not so grossly improper as to have required the trial court to intervene *ex mero motu* or to have deprived the defendant of a fair trial. This assignment of error is overruled.

[12] In his next assignment of error, defendant contests the trial court's submission of the heinous, atrocious, or cruel aggravating circumstance to the jury. Defendant cites *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), for the proposition that "[b]y using the word 'especially' the legislature indicated that there must be evidence that

the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection." 298 N.C. at 25, 257 S.E.2d at 585. Defendant then asserts that the heinous, atrocious, or cruel aggravating circumstance was improper in this case because the evidence only showed that the victims died as a result of one to four blows to the head and that this does not rise to the level established by precedent for submission. We disagree.

The standard for submission of aggravating circumstances under N.C.G.S. § 15A-2000 is as follows:

> It is well settled that the trial court must consider the evidence in the light most favorable to the State when determining the sufficiency of the evidence to support this aggravating circumstance. The State is entitled to every reasonable inference to be drawn from the evidence; contradictions and discrepancies are for the jury to resolve; and all evidence admitted that is favorable to the State is to be considered.

State v. Robinson, 342 N.C. 74, 85-86, 463 S.E.2d 218, 225 (1995) (citations omitted), *cert. denied*, — U.S. —, 134 L. Ed. 2d 793 (1996). A murder is properly characterized as especially heinous, atrocious, or cruel when it is a " 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " *Burr*, 341 N.C. at 307, 461 S.E.2d at 626 (quoting *Goodman*, 298 N.C. at 25, 257 S.E.2d at 585). The fact that the murder involves a brutal attack which inflicts injuries beyond those necessary to kill the victim evidences an especially heinous, atrocious, or cruel murder. *Burr*, 341 N.C. at 307, 461 S.E.2d at 626. Also, murders that are physically agonizing or otherwise dehumanizing to the victims are appropriately considered especially heinous, atrocious, or cruel. *State v. Lynch*, 340 N.C. 435, 473, 459 S.E.2d 679, 698 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 558 (1996). Other factors also go into deciding whether a murder is especially heinous, atrocious, or cruel, such as the brutality of the assault, *State v. Huffstetler*, 312 N.C. 92, 115-16, 322 S.E.2d 110, 125 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985), or the advanced age of the victims, *Williams*, 339 N.C. at 52, 452 S.E.2d at 275.

In this case, the evidence showed that the Delaneys—two diminutive, peaceful persons in their seventies—were beaten to death in their own home by their 260-pound nephew with a blunt-force object. Each of them suffered several wounds in their futile attempts to defend themselves. In the course of their struggle, they were cut and

beaten so as to cause extreme pain and suffering. The autopsy showed that the esteemed Dr. Delaney was struck at least fourteen separate times, and his "tiny" wife was struck at least ten or eleven separate times, many of the blows coming after they were on the ground. The Delaneys were beaten by the defendant so severely and so mercilessly that their bones were crushed, their skulls were fractured exposing brain tissue and Mrs. Delaney's finger was completely amputated. Afterward, the defendant rifled through their belongings, stole their money and fled the state in their car. Based on this evidence, it is beyond intelligent debate that the trial court was correct in allowing the jury to consider whether these murders were especially heinous, atrocious, or cruel. Thus, defendant's assignment of error to the contrary is overruled.

[13] Defendant next asserts that the jury's failure to find in mitigation that defendant was under the influence of a mental or emotional disturbance was erroneous and was a violation of his rights to due process and a fair trial. Defendant argues that the jury was required to consider this mitigating circumstance since the trial court decided a peremptory instruction was justified and since there was no evidence that contradicted a finding of the circumstance. We conclude there was no error in either the trial court's submission of this circumstance or the jury's consideration of and failure to find it.

In *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 100 (1996), this Court discussed the relative duties of the trial court and jury regarding mitigating circumstances:

> In those cases where the evidence is truly uncontradicted, the defendant is, *at most*, entitled to a peremptory instruction when he requests it. *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). A peremptory instruction tells the jury to answer the inquiry in the manner indicated by the trial court *if it finds* that the fact exists as all the evidence tends to show. *Id.* at 75, 257 S.E.2d at 617. . . . [E]ven where all of the evidence supports a finding that the mitigating circumstance exists and a peremptory instruction is given, *the jury may nonetheless reject the evidence and not find the fact at issue if it does not believe the evidence. Id.*
>
> The jury's failure to find this statutory mitigating circumstance does not indicate that the jury was prevented from or failed to consider it. To the contrary, this mitigating circumstance

> was submitted, thus, the jury was required to consider it. The jury simply declined to find that the evidence supported this mitigating circumstance.

Alston, 341 N.C. at 256, 461 S.E.2d at 719-20 (emphasis added).

In the present case, the trial court gave the following peremptory instruction in his charge on the murder of Dr. Delaney:

> I instruct you, ladies and gentlemen, that all of the evidence tends to show that this murder was committed while the defendant was under the influence of mental or emotional disturbance. And therefore, as to this circumstance I charge that if one or more of you find the facts to be as all the evidence tends to show you would so indicate by having your foreman write "Yes" in the space provided after this mitigating circumstance on the Issues and Recommendation form. However, if none of you find this circumstance to exist, even though there is no evidence to the contrary, then you would so indicate by having your foreman write "No" in that space.

The trial court gave an identical instruction on this mitigating circumstance in its charge on the murder of Mrs. Delaney. However, the jury did not find that defendant committed the crimes while he was under the influence of mental or emotional distress, as it was entitled to do under these instructions and under the law. It is impossible to determine the extent of the jury's consideration of this mitigating circumstance. However, such an inquiry is beyond our authority and beyond a proper consideration of this issue. The only relevant inquiry is whether the trial court issued a peremptory instruction if requested. That occurred. Consequently, the jury's conclusion that it should not find this mitigating circumstance does not constitute reversible error, and defendant's assignment of error is overruled.

PRESERVATION ISSUES

Defendant assigns as error, for the sake of preservation, the following: denial of defendant's motion for individual *voir dire* and sequestration of the jury during *voir dire*; denial of defendant's alternative motion for small group *voir dire* and sequestration for the remainder of the jury pool; denial of defendant's motion to declare the death penalty unconstitutional; the constitutional challenge to the especially heinous, atrocious, or cruel aggravating circumstance as standardless; the constitutional challenge to the course of conduct aggravating circumstance as standardless; the use of the word "may"

in sentencing Issue Three; and the general challenges to N.C.G.S. § 15A-2000. The defendant concedes this Court has consistently rejected these claims of error, and he fails to otherwise argue or brief these assignments of error. Nevertheless, we have thoroughly reviewed the record and these issues in light thereof, and we find no compelling reason to depart from our prior rulings on these issues. Accordingly, defendant's assignments of error here are overruled.

PROPORTIONALITY REVIEW

Having found no error in either the guilt/innocence phase of defendant's trial or the capital sentencing proceeding, it is now our duty to determine (1) whether the evidence supports the aggravating circumstances found by the jury; (2) whether passion, prejudice or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (Supp. 1996).

In the present case, the defendant was convicted of first-degree murder upon the theory of malice, premeditation, and deliberation. The jury found the aggravating circumstances that the murder was committed by the defendant while the defendant was engaged in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and that the murder was part of a course of conduct in which the defendant engaged and the course of conduct included the commission by the defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). We conclude that the evidence supports the aggravating circumstances found by the jury. We further conclude, based on our thorough review of the record, transcript and briefs, that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

[14] The final statutory duty of this Court is to conduct a proportionality review. One purpose of proportionality review is to guard against the "capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). Another "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988).

In conducting proportionality review, we compare this case to others in the pool, defined in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995), as being those that "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). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. at 198, 443 S.E.2d at 47.

The case *sub judice* has several distinguishing characteristics: The jury convicted the defendant of two counts of first-degree murder under the theory of malice, premeditation, and deliberation; the murders were found by the jury to be especially heinous, atrocious, or cruel; the jury found three additional aggravating circumstances; the victims were two elderly persons; the victims were beaten to death by a family member in their own home in the course of a robbery; and the victims suffered numerous defensive wounds and likely experienced great pain before death. These characteristics distinguish this case from those in which we have held the death sentence 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. *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). Both *Stokes* and *Bondurant* are distinguishable from this case.

In *Stokes*, the seventeen-year-old defendant, along with four accomplices, robbed the victim and beat him to death. This Court found the sentence of death disproportionate because of the defendant's young age and because the defendant received the death penalty while an older accomplice received only a life sentence. *Stokes*, 319 N.C. at 21, 352 S.E.2d at 664. By contrast, the defendant's age is not a mitigating circumstance in the present case. Here, the thirty-four-year-old defendant, without the aid of an accomplice, beat the two victims to death.

In *Bondurant*, the defendant shot the victim while they were riding together in a car. This Court found the death penalty disproportionate because the defendant immediately exhibited remorse and

concern for the victim's life by directing the driver to go to the hospital. The defendant went into the hospital to secure medical help for the victim, voluntarily spoke to police and admitted shooting the victim. *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. In the present case, the defendant showed no remorse for the victims and testified he could not remember killing the Delaneys, even though he told his girlfriend on 4 August 1994 that the Delaneys were dead. Additionally, the defendant did not seek medical help for the victims, and he fled the state in an attempt to elude law enforcement. Thus, we find no significant similarity between this case and *Stokes* or *Bondurant*.

As noted above, four aggravating circumstances were found by the jury. Of the cases in which this Court has found a sentence of death disproportionate, the jury found the existence of more than one aggravating circumstance in only two cases, *Bondurant* and *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985). *Bondurant*, as discussed above, is clearly distinguishable. In *Young*, this Court focused on the jury's failure to find the existence of the especially heinous, atrocious, or cruel aggravating circumstance. The present case is distinguishable from *Young* because, here, the jury found the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. For all of the foregoing reasons, we conclude that the cases in which this Court has found the death penalty disproportionate are distinguishable from the instant case.

In performing proportionality review, it is also appropriate for us to compare the case before us to other cases in which we have found the death sentence to be proportionate. *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895 (1994). Although we review all of the cases in the pool when engaging in our statutory duty of proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* Here, it suffices to say that we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or to those in which juries have consistently returned recommendations of life imprisonment. This case especially resembles *State v. Chandler*, 342 N.C. 742, 467 S.E.2d 636, *cert. denied*, — U.S. —, 136 L. Ed. 2d 133 (1996). In that case, an elderly victim was beaten to death in her home. The beating to death of multiple elderly victims places defendant in the pool of multiple murderers that this Court consistently has found to merit the death penalty. *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995),

cert. denied, —— U.S. ——, 133 L. Ed. 2d 879 (1996); *State v. Rose*, 339 N.C. 172, 451 S.E.2d 211 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 818 (1995).

Based on the nature of this crime and the defendant, and particularly the distinguishing features noted above, we conclude as a matter of law that the sentence of death is neither excessive nor disproportionate. We conclude that the defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. PATRICK LANE MOODY

No. 64A96

(Filed 7 March 1997)

1. Criminal Law § 1340 (NCI4th Rev.)— capital sentencing—letters from victim to wife—rebuttal of mitigating evidence

The trial court did not err in a capital sentencing proceeding by overruling defendant's objection to the introduction of three letters from the murder victim to his estranged wife expressing his love for his wife and his anguish that she had left him on the ground that any probative value of the letters would be outweighed by the danger of unfair prejudice where the letters were introduced to corroborate testimony that defendant loved his wife and did not abuse her, thus rebutting defendant's theory of mitigation that defendant believed that the victim's wife was being abused by the victim. Moreover, the admission of the letters was not plain error because the jury probably would not have reached a different result if the letters had not been admitted.

Am Jur 2d, Criminal Law §§ 598 et seq.

2. Criminal Law § 453 (NCI4th Rev.)— capital sentencing—letters from victim to wife—closing argument—not victim impact statement—no gross impropriety

The prosecutor's closing argument in a capital sentencing proceeding with regard to letters written by the victim to his

estranged wife did not improperly treat the content of the letters as victim-impact evidence and was not so grossly improper as to require the court to intervene *ex mero motu*.

Am Jur 2d, Criminal Law § 598.

3. Criminal Law § 1335 (NCI4th Rev.)— capital sentencing—sexual relationship with victim's wife—motive

The trial court did not err in a capital sentencing proceeding by failing to edit defendant's statement to an S.B.I. agent to exclude references to defendant's sexual relationship with the victim's wife because this evidence was relevant to defendant's motive to kill the victim and was admissible under N.C.G.S. § 15A-2000(a)(3).

Am Jur 2d, Criminal law §§ 598 et seq.

4. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—closing argument—poem about death—no gross impropriety

The prosecutor's reading of a poem about death to the jury during his closing argument in a capital sentencing proceeding did not suggest that a higher authority was calling for the death sentence in this case and was not so grossly improper as to require the trial court to intervene *ex mero motu*.

Am Jur 2d, Trial §§ 632-639.

5. Criminal Law § 1324 (NCI4th Rev.)— death penalty statute—constitutionality

The North Carolina death penalty statute is constitutional.

Am Jur 2d, Trial §§ 1441 et seq.

6. Criminal Law § 1387 (NCI4th Rev.)— mitigating circumstance—domination by another—instructions

The trial court's instruction on the statutory mitigating circumstance of domination by another was not erroneous because one or more of the alternatives set forth in the general legal definition of domination in the first portion of the instruction may not have applied directly to the facts of this case. In any event, the instruction in this case was not erroneous where the second portion of the instruction was tailored to defendant's evidence on domination and allowed the jury to determine whether that evi-

dence amounted to domination as defined by the general definition. N.C.G.S. § 15A-2000(f)(5).

Am Jur 2d, Criminal Law § 598.

7. Criminal Law § 1375 (NCI4th Rev.)— capital sentencing—mitigating circumstances—incorrect statement on Issues and Recommendation as to Punishment form—correction by supplemental instructions—no plain error

Although a statement on the Issues and Recommendation as to Punishment form given to jurors in a capital sentencing proceeding that "yes" should be written beside a mitigating circumstance if one or more jurors find that circumstance by a preponderance of the evidence "and that it has mitigating value" was incorrect for statutory mitigating circumstances since statutory circumstances, if found, have mitigating value, this statement did not constitute plain error where this mistake was brought to the court's attention before the jury began its deliberations; the court explained the mistake to the jury and gave supplemental instructions on the distinction between statutory and nonstatutory mitigating circumstances; the court also instructed the jury to delete the offending phrase either by marking through the phrase on the form or by mentally omitting it; and after the jury returned its verdict, the court polled the jurors as to whether they understood the instructions on mitigating circumstances and the jurors indicated that they did. The instructions given were in accordance with the law, and it is presumed that the jurors were able to follow the instructions as they were given.

Am Jur 2d, Criminal Law §§ 609 et seq.

8. Criminal Law § 1354 (NCI4th Rev.)— capital sentencing—aggravating and mitigating circumstances—recording of each juror's vote not required

The trial court did not err in denying defendant's motion to have each juror in a capital sentencing proceeding record his or her vote on each aggravating and mitigating circumstance on the Issues and Recommendation as to Punishment form. The failure to record each juror's vote did not hamper meaningful appellate review of trial error or the Supreme Court's proportionality review since the jury's finding of an aggravating circumstance must be unanimous, and since a "yes" answer to a mitigating circumstance simply means that one or more jurors found the

mitigating circumstance to exist, and whether the mitigating circumstance was found by one juror or by twelve jurors makes no difference to the Supreme Court's finding on appellate review of trial error.

Am Jur 2d, Criminal Law §§ 598 et seq.

9. Evidence and Witnesses § 1346 (NCI4th)— confessions—mental capacity to waive rights

The evidence at a suppression hearing supported the trial court's findings that, although defendant is of subnormal intelligence, he had the mental capacity to waive his constitutional rights against self-incrimination and to counsel prior to making two confessions to law enforcement officers and that his confessions were made freely, voluntarily, and understandingly.

Am Jur 2d Criminal Law §§ 598 et seq.

10. Evidence and Witnesses § 1354 (NCI4th)— inculpatory statement—not verbatim transcript—suppression not required

An S.B.I. agent's notes of inculpatory statements made by defendant were not required to be suppressed because they were not a verbatim transcript which included the agent's questions where the agent merely read the notes and there was no attempt to introduce the notes as defendant's written statement.

Am Jur 2d, Criminal Law §§ 598 et seq.

11. Evidence and Witnesses § 1113, 966 (NCI4th)— notes of defendant's inculpatory statements—admissions of party opponent—past recorded recollection

An S.B.I. agent could properly read from a narrative report prepared from his notes of inculpatory statements made by defendant even though the notes were not acknowledged or adopted by defendant since defendant's statements were admissible as admissions of a party opponent. Moreover, the S.B.I. agent's reading from the narrative report prepared from his notes was admissible under the doctrine of past recorded recollection set forth in Rule of Evidence 803(5) where the agent testified that the report refreshed his recollection of the interview with defendant. N.C.G.S. § 8C-1, Rule 803(5).

Am Jur 2d, Evidence §§ 1258-1275.

12. Criminal Law § 732 (NCI4th Rev.)— weight of confession—guilty plea—instruction not required

The trial court did not err by failing to give the pattern jury instruction on the weight to be given a defendant's confession where defendant pleaded guilty to first-degree murder and there was thus no question as to his guilt of the crime charged.

Am Jur 2d, Evidence §§ 708-753.

13. Criminal Law § 258 (NCI4th Rev.)— illness of defendant—recess—informing jury of reason for delay

When defendant became ill during the trial and the court ordered a temporary recess to obtain medical treatment for defendant, the trial court did not err in informing the jury of the reason for the delay.

Am Jur 2d, Criminal Law § 904.

Necessity and content of instructions to jury respecting reasons for or inferences from accused's absence from state criminal trial. 31 ALR4th 676.

14. Jury § 108 (NCI4th)— jury selection—denial of individual voir dire—yes or no answers—no abuse of discretion

The fact that prospective jurors in a capital trial answered "yes" or "no" to counsel's questions during jury selection is insufficient to show an abuse of discretion on the part of the trial court in denying defendant's motion for individual *voir dire*.

Am Jur 2d, Jury §§ 193 et seq.

15. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—mitigating circumstances—uncontradicted evidence—peremptory instruction

When submitting to the jury in a capital sentencing proceeding uncontradicted evidence supporting a mitigating circumstance, the appropriate device is a peremptory instruction rather than a directed verdict.

Am Jur 2d, Trial § 1487.

16. Criminal Law § 690 (NCI4th Rev.)— nonstatutory mitigating circumstances—pattern peremptory instruction inappropriate

The pattern jury peremptory instruction set forth in N.C.P.I.—Crim. 150.11 is for statutory mitigating circumstances

and should not be given for nonstatutory mitigating circumstances because it does not reflect the distinction between statutory and nonstatutory mitigating circumstances.

Am Jur 2d, Trial § 1487.

17. Criminal Law § 1355 (NCI4th Rev.)— capital sentencing proceeding—instructions—unanimity for life verdict

The trial court did not err by instructing the jury in a capital sentencing proceeding in language requiring the jury to be unanimous in order to return a life verdict.

Am Jur 2d, Criminal Law §§ 598 et seq.

18. Criminal Law § 1402 (NCI4th Rev.)— death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant pleaded guilty to first-degree murder; the jury found as aggravating circumstances that defendant had previously been convicted of a violent felony and that defendant committed the murder for pecuniary gain; defendant conspired with the victim's wife over a period of several weeks to kill the victim; defendant lured the victim to a field on the pretense of being interested in purchasing the victim's automobile and then shot the victim in the back of the head; defendant had previously been convicted of attempted murder; and by killing the victim, defendant stood to gain a portion of the insurance proceeds on the victim's life as a result of his relationship with the victim's wife. The fact that defendant's coparticipant in the murder (the victim's wife) did not receive a death sentence does not render defendant's sentence of death disproportionate. Furthermore, the prosecutor's decision to prosecute defendant, and not the coparticipant, capitally does not render defendant's death sentence unconstitutional where there was no showing that this decision was based on an unjustifiable standard such as race, religion, or other arbitrary classification.

Am Jur 2d, Criminal Law §§ 609 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Greeson, J., at the 10 July 1995 Criminal Session of Superior Court, Davidson County. Heard in the Supreme Court 12 December 1996.

Michael F. Easley, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State.

William F. Massengale and Marilyn G. Ozer for defendant-appellant.

FRYE, Justice.

Defendant, Patrick Lane Moody, was indicted on 9 January 1995 for the 16 September 1994 first-degree murder of Donnie Ray Robbins. On 14 July 1995, during the State's presentation of evidence, defendant changed his plea to guilty of first-degree murder. Following the entry and acceptance of the guilty plea, the trial court held a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, and the jury recommended a sentence of death. The jury found as aggravating circumstances that defendant had been previously convicted of a felony involving the use of violence and that the murder was committed for pecuniary gain. The jury also found six of the twenty-one statutory and nonstatutory mitigating circumstances submitted to it. On 20 July 1995, the trial judge, in accordance with the jury recommendation, imposed a sentence of death for the first-degree murder conviction.

Defendant makes thirteen arguments on appeal to this Court. We reject each of these arguments and conclude that defendant's capital sentencing proceeding was free of prejudicial error and that the death sentence is not disproportionate.

The State's evidence in the guilt and sentencing phases tended to show the following facts and circumstances. In July 1994, defendant started having an affair with Wanda Robbins (Wanda), the wife of the victim, Donnie Robbins (Donnie). Over the course of their affair, defendant and Wanda discussed various plans to murder Wanda's husband and share the insurance proceeds. On 16 September 1994, defendant went to Loman's Trailer Park in Thomasville, North Carolina, to the home of Donnie and Wanda Robbins. Defendant identified himself as Darryl Thompson and pretended to be interested in buying Donnie's old Chevrolet automobile. He and Donnie went to a field near the trailer park where the automobile was located. Defendant asked Donnie to measure the automobile, purportedly to determine whether it would fit on a "roll-back" truck. As Donnie leaned over the hood of the automobile to measure it, defendant shot him in the back of the head with a .32-caliber semiautomatic pistol he had stolen the previous day from a house near the trailer park.

Defendant and Wanda had agreed to meet at the hospital following the murder. While at the hospital, defendant identified himself as Darryl Thompson to investigating officers and consented to taking a gunshot residue test. Defendant then left the hospital. Early the next morning, defendant was apprehended and taken into custody. Later that morning, following defendant's directions, the police found the murder weapon, the black jacket defendant had been wearing, and other items of evidence. After being arrested, defendant waived his *Miranda* rights and made a statement.

At trial, after the State had begun its case-in-chief and had presented evidence from seven witnesses, defendant withdrew his plea of not guilty and entered a plea of guilty to murder in the first degree. The court found that there was a factual basis for the plea, defendant was competent to stand trial, defendant was satisfied with his attorney, and the plea was made freely and voluntarily. The trial court then accepted the plea.

The State began the presentation of its capital sentencing proceeding evidence following the announcement of defendant's change of plea to the jury. Two residents and the owner of the trailer park testified that Donnie and Wanda argued often and that on at least two occasions these residents had identified mercury in the beer that Donnie was drinking. A life insurance agent also testified that Wanda Robbins had called her at 5:30 a.m. the morning after the murder to complete the paperwork necessary for Wanda's claim for the insurance benefits payable upon Donnie's death. In addition, SBI Special Agent Timothy Thayer testified that he interviewed defendant on 21 September 1994, and Agent Thayer read the transcription of his notes from that interview which described defendant's life during the summer before the murder. At the conclusion of the State's evidence, defendant's prior convictions in Florida for attempted first-degree murder and conspiracy to commit first-degree murder were introduced.

Defendant's evidence at the capital sentencing proceeding tended to show the following facts and circumstances. Defendant was involved with a religious group called "His Laboring Few Bikers' Ministry," which focused on the spiritual needs of bikers at biker rallies. Two members of the ministry took defendant into their home after meeting defendant in Florida and sending him a bus ticket to come to High Point to live with them. Steve Ervin, an ordained minister with the ministry, testified that defendant had become involved

with the ministry but later had become distant upon meeting Wanda Robbins.

Defendant's half-brother and mother testified as to defendant's traumatic and abusive childhood. Dr. Jerry Noble, a psychologist, diagnosed defendant as suffering from an attention deficit hyperactivity disorder, alcohol dependence, a mixed personality disorder, child abuse syndrome, and psychologically caused physical problems. Dr. Noble testified that defendant had borderline intellectual functioning with a full scale IQ of 81.

Defendant testified as the last witness in the sentencing phase of the trial. He affirmed that he shot and killed the victim but denied that he did so in order to get insurance money. On cross-examination, defendant testified that he killed the victim because Wanda threatened to notify the police about his outstanding warrants in Florida.

In his first argument, defendant contends that the trial court erred by failing to suppress a series of inflammatory and irrelevant letters that were published to the jury during the capital sentencing proceeding. Defendant first contends that the trial court erred in overruling his objection to the introduction of the letters on the basis that any probative value of the letters would be substantially outweighed by the danger of unfair prejudice. In addition, defendant argues that the letters were not properly admitted because they are hearsay and were not properly authenticated. Finally, defendant argues that the letters were improperly admitted as victim-impact evidence.

[1] During the capital sentencing proceeding, the State moved to introduce a series of exhibits into evidence, one of which was three letters written by the victim to his wife, who was not living in their home at the time. The letters express the victim's love for his wife and his pain and anguish that she had left him. Defendant objected, arguing that the letters should be excluded under Rule 403 of the North Carolina Rules of Evidence. The trial court overruled his objection, and defendant challenges this ruling as error.

Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1992). "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree." *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). Relevant evidence is properly admissible "unless the judge determines that it must be excluded, for instance, because of the risk of 'unfair prejudice.' " *State v. Mercer*, 317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986). " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1996) (quoting N.C.G.S. § 8C-1, Rule 403 commentary (Supp. 1985)).

In the instant case, the letters were introduced for the purpose of corroborating testimony that the victim loved his wife and did not abuse her, rebutting one of defendant's theories of mitigation, that is, that defendant believed that Wanda was being abused by the victim. While the letters expressed heartfelt emotion on the part of the victim, we find nothing in the instant case to suggest that the jury's decision to recommend a sentence of death was based on any unfair prejudice that may have been created by these letters. "In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). We conclude that the trial court did not abuse its discretion in admitting the three letters.

Defendant also contends that it was error to admit the letters because they are hearsay and were not properly authenticated. Defendant did not object to the admission of the letters on these bases at trial and therefore our review is for plain error. *See State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994). "In order to prevail under a plain error analysis, defendant must establish not only that the trial court committed error, but that 'absent the error, the jury probably would have reached a different result.' " *Id.* (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)). Despite the emotional nature of the letters, we conclude that the jury probably would not have reached a different result if the letters had not been admitted, and thus, we find no plain error.

[2] Finally, defendant contends that the prosecutor's closing argument improperly treated the content of the letters as victim-impact evidence and that the evidence was not permissible under *Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720 (1991), because it caused

the jury to return a verdict of death, not because defendant was a murderer, but because he was an adulterer.

In *Payne v. Tennessee*, the United States Supreme Court held that

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

Id. at 827, 115 L. Ed. 2d at 736. In the instant case, the prosecutor argued as follows:

> We have walked with Donnie. You have walked Donnie through his letters to Wanda. I hope you read each of those letters. I saw it looked like most of you were reading those letters. Donnie took Wanda back. Donnie was trying with those letters to get Wanda back. I think, if you remember, Donnie didn't know why she left. Donnie talks about the Lord in those letters. And that's what you have.

Defendant did not object to the prosecutor's argument.

In reviewing counsel's arguments in the absence of an objection, we have said:

> Control of counsel's argument is largely left to the trial court's discretion. When a defendant does not object to an alleged improper jury argument, the trial judge is not required to intervene *ex mero motu* unless the argument is so grossly improper as to be a denial of due process.

State v. Howell, 335 N.C. 457, 471, 439 S.E.2d 116, 124 (1994) (citations omitted). We have rejected defendants' contentions that similar arguments were so grossly improper as to require the trial court to intervene *ex mero motu*. *See, e.g., State v. Bond*, 345 N.C. 1, 37, 478 S.E.2d 163, 182-83 (1996). We conclude that the prosecutor's argument in reference to the victim's letters written to his wife was not so grossly improper as to require the court to intervene *ex mero motu*. Accordingly, we reject defendant's first argument.

[3] In his second argument, defendant contends that the trial court erred in failing to edit defendant's statement to exclude references to defendant's sexual relationship with the victim's wife. After defend-

ant had pleaded guilty, SBI Agent Thayer was called to testify to defendant's statement given to Agent Thayer after defendant's arrest. Defendant made a pretrial motion to suppress the statement, which the trial court denied. At no time did defendant make a motion *in limine* to edit the statement. Nonetheless, defendant contends that the trial court was aware that the statement dealt with the sexual relationship between defendant and the victim's wife, and thus, the trial court should have, on its own motion, edited the statement to exclude the sexual passages. We disagree.

Absent an objection or motion at trial, our review of this argument on appeal is limited to that for plain error such that the jury probably would have reached a different result had the sexual passages been excluded from the statement. *See State v. Mitchell*, 328 N.C. 705, 403 S.E.2d 287 (1991). Given that the evidence of defendant's affair with the victim's wife was relevant to defendant's motive to kill the victim, defendant's statement was admissible pursuant to N.C.G.S. § 15A-2000(a)(3), which provides that "[e]vidence may be presented as to any matter that the court deems relevant to sentence." However, even assuming *arguendo* that some portion of the statement should have been excluded, we are satisfied that the failure to do so did not affect the jury's recommendation. Therefore, the trial court's admission of the entire statement does not amount to plain error.

[4] In his third argument, defendant contends that the trial court erred in not intervening *ex mero motu* when the prosecutor recited the following poem during closing argument:

> Dance, death! Your deeds are done. A new time has set in and you are summoned by the Maker. One day death itself will dance before the Lord. The wind and the breath of the Lord will call for death, and slowly death will bring all limp life and all brittle forms of death to the judgment seat. God will pronounce death guilty, will sentence death to death and thus sentence to death tears, crying, hunger, lonesomeness and disease. Even now there is enough evidence gathered against death by those who live under the spirit. They build evidence while they work and while they wait for the dance and date of death. The date has been set. God knows the hour.

Defendant contends this poem suggests that a higher authority is calling for the death sentence and that the jurors must heed this judgment.

We reject defendant's third argument on the authority of *State v. Elliott*, 344 N.C. 242, 284-85, 475 S.E.2d 202, 222 (1996) (holding that the reading of this same poem to the jury was not so grossly improper as to require the trial court to intervene *ex mero motu*).

[5] In his fourth argument, defendant contends that the death penalty is unconstitutional, and therefore, his death sentence is unconstitutional. Defendant concedes that this Court has held against his position, *see, e.g., State v. Williams*, 339 N.C. 1, 52-53, 452 S.E.2d 245, 276 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 61 (1995), and advances no compelling reason for us to depart from our prior holdings. Accordingly, we reject defendant's fourth argument.

[6] In his fifth argument, defendant contends that the trial court erred by including inapplicable language in the jury instruction on the mitigating circumstance of domination. Defendant objected to the inclusion of a portion of the pattern jury instruction, and the trial court overruled defendant's objection.

One of the statutory mitigating circumstances is that the "defendant acted under duress or under the domination of another person." N.C.G.S. § 15A-2000(f)(5) (Supp. 1994) (amended 1995). The pattern jury instruction divides this statutory mitigating circumstance into two parts—one on duress and the other on domination—allowing the jury to find two mitigating circumstances. N.C.P.I.—Crim. 150.10 (1995). On the mitigating circumstance of domination, the trial court instructed in part:

> Now, a defendant acts under the domination of another person if he acts at the command or under the control of the other person or in response to the assertion of any authority to which the defendant believes he's bound to submit or which the defendant did not have sufficient will to resist.

Defendant objected to the inclusion of "or in response to the assertion of any authority to which the defendant believes he is bound to submit" and "or which the defendant did not have sufficient will to resist." Defendant contends that the inclusion of these phrases was prejudicial error because that language was inapplicable to the case and may have prevented one or more jurors from considering or giving effect to some of the mitigating evidence. We find no error.

We note first that the trial court's instruction includes the word "or" between the phrases of the instruction. The disjunctive creates alternatives which allow the jury to find that defendant acted under

the domination of another person if *any* of the alternatives listed in the instruction are found. The instruction gave a generalized legal definition of domination, and the fact that one or more of the alternatives may not have applied directly to the facts of the instant case does not render the instruction erroneous.

Moreover, the second paragraph of the instruction on this mitigating circumstance was tailored to defendant's evidence on domination:

> Now, you would find this mitigating circumstance if you find, as all the evidence tends to show, that the defendant was in love with Wanda Robbins and would do anything to stay in her favor, and that Wanda Robbins told the defendant, I want him killed tonight or he might kill me tonight. This is the last chance we got. You either do this and forget about me and the insurance money, and that as a result, the defendant was under the domination of Wanda Robbins when he killed Donnie Robbins.

This instruction directed the jury's attention to the evidence of domination and allowed the jury to determine whether that evidence amounted to domination as defined by the general definition. It therefore was not error.

[7] In his sixth argument, defendant contends that the trial court erred by giving conflicting and confusing instructions as to the mitigating circumstances. We note that defendant did not properly preserve this alleged error by any action taken at trial or by specifically and distinctly arguing plain error. *See State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 526 (1996). Notwithstanding defendant's failure to preserve this issue for appeal, "in the exercise of our discretion under Rule 2 of the Rules of Appellate Procedure and following the precedent of this Court electing to review unpreserved assignments of error in capital cases," *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996), we elect to consider defendant's contention under a plain error analysis.

After the court had orally instructed the jury, each juror was given a copy of the Issues and Recommendation as to Punishment form agreed upon by counsel and the court. Before the jury began its deliberations, defense counsel brought to the attention of the court an erroneous sentence in the form that preceded all of the mitigating circumstances: "In the space provided after each mitigating circumstance, write 'yes' if one or more of you finds that mitigating circum-

stance by a preponderance of the evidence and that it has mitigating value."

The language "and that it has mitigating value" is incorrect for the statutory mitigating circumstances since the statutory mitigating circumstances, if found, have mitigating value. The court explained the error to the jury and gave supplemental instructions on the distinction between statutory and nonstatutory mitigating circumstances. The court also instructed the jury to delete the offending phrase either by marking through the phrase on the form or by mentally omitting it. In addition, after the jury had returned its verdict, the court polled the jurors as to whether they understood the instructions on the mitigating circumstances, and the jurors indicated that they did.

Defendant does not contend that the supplemental instructions given by the court were incorrect; he contends that the conflicting instructions created a reasonable probability that the jurors were confused and did not understand the proper instructions. In *State v. Daniels*, 337 N.C. 243, 275, 446 S.E.2d 298, 318 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995), this Court approved the pattern jury instruction to which the oral instructions given by the trial court in the instant case conformed. In addition, we have stated that "[w]e presume 'that jurors . . . attend closely [to] 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)) (first alteration in original), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). We conclude that the instructions given here were in accordance with the law and that the jury was able to follow the instructions as they were given. In light of the proper instructions given, the supplemental instructions given, and the polling of the jury, the error on the Issues and Recommendation as to Punishment form did not constitute error under the plain error rule.

[8] In his seventh argument, defendant contends that he is entitled to a new capital sentencing proceeding because the trial court erred in denying his motion to have each juror record his or her vote on each aggravating and mitigating circumstance. Defendant requested that the Issues and Recommendation as to Punishment form include twelve lines following each aggravating and mitigating circumstance to record each juror's vote on each circumstance. This request was

denied. Defendant contends that this ruling hampers meaningful appellate review of trial error and this Court's statutory proportionality review. We do not agree.

As to the aggravating circumstances, a "yes" answer is entered on the Issues and Recommendation form only if all twelve jurors unanimously find a circumstance to exist. Thus, only one line is needed to record the jury's unanimous finding as to each aggravating circumstance. As to mitigating circumstances, unanimity is not required, and a "yes" answer simply means that one or more jurors have found a mitigating circumstance to exist. Thus, whether the mitigating circumstance was found by one juror or twelve jurors makes no difference in this Court's finding of prejudice on appellate review of trial error. We have also concluded that individual polling as to how each juror voted on the aggravating and mitigating circumstances is not required for effective proportionality review. *See State v. Lee*, 335 N.C. 244, 291, 439 S.E.2d 547, 572, *cert. denied*, — U.S. —, 130 L. Ed. 2d 162 (1994). Therefore, the trial court did not err in denying defendant's request. Accordingly, we reject this argument.

In his eighth argument, defendant contends that the trial court erred in admitting evidence of defendant's statements made to law enforcement agents. Defendant made two inculpatory statements: On 17 September 1994, defendant dictated a statement to Detective Tilley which defendant then read and signed; and on 21 September 1994, SBI Agent Thayer interviewed defendant and took notes which were not signed by defendant. Prior to trial, defendant moved to suppress the 17 September statement on the basis that he lacked the capacity to waive his constitutional rights against self-incrimination and to counsel, and moved to suppress the 21 September statement on the basis that it was not voluntary and was not written or signed by him. After a hearing, the trial court denied defendant's motions.

[9] As to both of the statements, defendant contends that he has subnormal intelligence and he was incapable of understanding the import of the *Miranda* warnings and therefore made an uninformed decision in waiving his rights. Defendant further contends that the trial court's findings of fact and order denying suppression of the statements are contrary to the evidence. Among the court's findings of fact is the following:

> 16. The defendant is of subnormal intelligence and has problems with reading, spelling, and arithmetic. The defendant[,] however,

> had no problems understanding Officer Tilley and Agent Thayer and he at all times responded coherently to their questions regarding the death of Donnie Ray Robbins and he in all respects appeared to understand and respond to information on a concrete level. Moody has no history of mental illness and at no time exhibited any erratic behavior in the presence of any law enforcement officer which would indicate that he was suffering from any mental impairment that would impair his ability to evaluate his rights or would in any way render him incapable of voluntarily waiving any right in regard to making a statement.

Defendant does not point to specific evidence showing how the trial court's findings are unsupported or contrary to the evidence, and after our review of the transcripts and record, we conclude that the findings of fact are supported by substantial evidence taken at the suppression hearing. The trial court's findings of fact support its conclusion that defendant's constitutional rights were not violated and that the statement was made freely, voluntarily, and understandingly. Accordingly, the trial court did not err in admitting the statements on this basis.

As to the 21 September statement, defendant contends that the statement was not a complete transcript of the interview with Agent Thayer, and therefore, it should have been suppressed. We disagree.

[10] Defendant relies on *State v. Wagner*, 343 N.C. 250, 470 S.E.2d 33 (1996), for his contention that the statement should have been suppressed because it was not a verbatim transcript of the interview including Agent Thayer's questions. *Wagner* addressed the authentication requirements for the admission of a defendant's written confession. At no time was Agent Thayer's record of his interview with defendant characterized as defendant's written confession, nor was the record itself admitted into evidence. Thus, the requirements outlined in *Wagner* do not apply.

[11] Defendant also contends that the statement read by Agent Thayer was not acknowledged or adopted by defendant. However, acknowledgement or adoption was not necessary because "[a] statement made by defendant and offered by the State against him is admissible as an exception to the hearsay rule as a statement of a party-opponent." *State v. Gregory*, 340 N.C. 365, 401, 459 S.E.2d 638, 658 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996). Further, a past recollection that has been memorialized by a witness is covered under another exception to the hearsay rule, and in

accordance with that exception, that record may be used at trial to refresh the past recollection:

> Recorded Recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

N.C.G.S. § 8C-1, Rule 803(5) (1992). At trial, Agent Thayer testified that during the interview he took detailed notes, taking down what defendant said verbatim; that after the interview he dictated these notes into narrative form; and that the notes he read at trial were typed from this dictation. Agent Thayer then read from his report and stated that the report refreshed his recollection of the interview with defendant. This testimony comported with the exceptions to the hearsay rule and, thus, was properly admitted and used at trial.

[12] Defendant's final contention under this argument is that the trial court committed plain error by not giving *ex mero motu* the following pattern jury instruction on the weight to give a defendant's confession:

> There is evidence which tends to show that the defendant confessed 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.

In the instant case, defendant pleaded guilty to first-degree murder, and therefore, there was no question as to his guilt of the crime charged. Thus, the instruction does not apply, and the trial court did not err in not giving the instruction.

[13] In his ninth argument, defendant contends that the trial court erred by informing the jury that defendant had become ill. On the morning of 13 July 1995, defendant became ill with a gastrointestinal disorder that required medical attention. The trial court ordered a temporary recess to obtain treatment for defendant and informed the jury of the reason for the delay. Defense counsel did not object to the

trial court's announcement to the jury but assigns error on the basis that the announcement placed defendant in the position of appearing to be the cause of the delay, thereby prejudicing him. After reviewing the trial court's announcement, we conclude that its explanation of the delay was neutral, and therefore we find no error.

[14] In his tenth argument, defendant contends that the trial court erred in denying his pretrial motion for individual *voir dire*. Defendant notes that this Court has consistently held that the decision whether to allow individual *voir dire* is a matter for the trial court's discretion and that such ruling will not be disturbed absent an abuse of discretion. *State v. Burke*, 342 N.C. 113, 122, 463 S.E.2d 212, 218 (1995). However, defendant contends that the trial court abused its discretion by not intervening when it "observed how poorly the *voir dire* was proceeding." Defendant argues he would have been able to conduct a more effective examination of the panel if he had been allowed to question the jurors individually, and as an example, defendant points to the examination of a prospective juror who responded either "yes" or "no" to all but one question. We do not believe that the fact that prospective jurors answer "yes" or "no" to counsel's questions is sufficient to show an abuse of discretion on the part of the trial court in denying individual *voir dire*. We reject this argument.

[15] In his eleventh argument, defendant contends that the trial court erred in declining to give directed verdict instructions for the four requested statutory mitigating circumstances. Defendant concedes that this Court has held contrary to his position in *State v. Carter*, 342 N.C. 312, 325, 464 S.E.2d 272, 280 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 957 (1996), but asks this Court to reconsider its position.

> We stated in *Carter*:
>
> While the evidentiary standard for a criminal defendant seeking a peremptory instruction may be the functional equivalent of the standard for a civil directed verdict, the two principles are distinct legal entities. In a capital sentencing proceeding, when submitting to the jury uncontradicted evidence supporting a mitigating circumstance, the appropriate device is a peremptory instruction.

Id. In the instant case, the trial court gave peremptory instructions on the four statutory mitigating circumstances at issue. Defendant has

suggested no compelling reason to overrule *Carter*. Accordingly, we reject this argument.

[16] In his twelfth argument, defendant contends that the trial court erred in declining to give his requested instruction for the nonstatutory mitigating circumstances. Defendant requested that the pattern jury peremptory instruction, N.C.P.I.—Crim. 150.11 (1991), be given for the nonstatutory mitigating circumstances, and the trial court denied his request.

First, we note that the pattern jury instruction defendant requested is for statutory mitigating circumstances. In fact, we have held that this pattern instruction should not be given for nonstatutory mitigating circumstances because it does not reflect the distinction between statutory and nonstatutory mitigating circumstances. *State v. Buckner*, 342 N.C. 198, 235, 464 S.E.2d 414, 436 (1995), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 47 (1996). Thus, the trial court correctly refused to give the requested instruction. We reject defendant's argument to the contrary.

[17] In his thirteenth argument, defendant contends that the trial court erred by instructing the jury in language that implied that the jury must be unanimous in order to return a life verdict. Defendant concedes that a majority of this Court has held similar instructions for a unanimous verdict to be correct.[1] *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 879 (1996); *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 482 (1996). As the language used by the trial court in the instant case conforms with the instructions previously approved by this Court, we must reject defendant's final argument.

PROPORTIONALITY REVIEW

[18] We turn now to the duties reserved exclusively for this Court in capital cases. It is our duty in this regard to ascertain: (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration; and (3) whether the death sentence is exces-

1 Despite the trenchant dissents in *McLaughlin* and *McCarver* written by the author of this opinion, the majority of this Court held that the jury must be unanimous in order to answer "no" to Issues One, Three, and Four on the Issues and Recommendation as to Punishment form. This precedent is now binding on the writer by virtue of the doctrine of *stare decisis*.

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

In the instant case, defendant pleaded guilty to first-degree murder. During defendant's capital sentencing proceeding, the jury found the two aggravating circumstances that were submitted: that defendant had been previously convicted of a violent felony, N.C.G.S. § 15A-2000(e)(3), and that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). Of the four statutory mitigating circumstances submitted, including the catchall, the jury found only one: that the murder was committed while defendant was mentally or emotionally disturbed, N.C.G.S. § 15A-2000(f)(2). The jury also found five of the seventeen nonstatutory mitigating circumstances submitted. After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the finding of the two aggravating circumstances found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

In our proportionality review, it is proper to compare the present case to cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895 (1994). We have found the death penalty 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). We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

In support of his argument that his death sentence is disproportionate, defendant submits that Wanda Robbins was equally culpable, and the fact that she did not receive a death sentence demonstrates the disproportionality of his death sentence. We disagree.

We have held that it is not error to refuse to admit evidence that a coparticipant received a life sentence and to refuse to submit this proposed mitigating circumstance to the jury. *State v. Williams*, 305

N.C. 656, 687, 292 S.E.2d 243, 261-62, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982); *see also State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 447 (1981) (evidence of plea bargain and sentencing agreement between the State and a codefendant 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). While these cases address what evidence is proper for the jury to consider, we also conclude that the different disposition of defendant's coparticipant's case does not itself render defendant's death sentence disproportionate.

In addition, we do not find any merit in defendant's assertion that *State v. Vanhoy*, 343 N.C. 476, 471 S.E.2d 404 (1996), dictates a different result. Defendant contends that *Vanhoy* demonstrates how cases in which someone is solicited to commit murder are treated differently in different prosecutorial districts and that therefore his death sentence violates *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346 (1972). "This Court has consistently recognized that a system of capital punishment is not rendered unconstitutional simply because the prosecutor is granted broad discretion." *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 872 (1996). Moreover, "the only limitation on this discretion pertinent to this case is that the decision to prosecute capitally may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* There is nothing in the record in the instant case to show that the decision to prosecute defendant, and not the coparticipant, capitally was based on such an unjustifiable standard.

In conducting our review, it is also proper to compare this case to those where the death sentence was found not disproportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. In *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994), we said, "[o]f the cases in which this Court has found the death penalty disproportionate, none have involved the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance of a prior conviction of a felony involving the threat or use of violence against the person." *Id.* at 351, 439 S.E.2d at 546. This aggravating circumstance was found in the instant case.

The aggravating circumstances found in this case have been present in other cases where this Court has found the sentence of

death proportionate. *See, e.g., State v. Chandler*, 342 N.C. 742, 467 S.E.2d 636 (affirming a death sentence based on the (e)(6) aggravator alone), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 133 (1996); *State v. Jones*, 342 N.C. 457, 466 S.E.2d 696 (affirming a death sentence based on both the (e)(3) and (e)(6) aggravators), *cert. denied*, 135 L. Ed. 2d 1058 (1996); *Carter*, 342 N.C. 312, 464 S.E.2d 272 (affirming a death sentence based on both the (e)(3) and (e)(6) aggravators).

In this case, defendant conspired with the victim's wife over a period of several weeks to kill the victim. Defendant lured the victim out to a field on the pretense of being interested in purchasing the victim's automobile and then shot the victim in the back of the head. Defendant had been previously convicted of an attempted murder, and by killing the victim in the instant case, defendant stood to gain a portion of the insurance proceeds as a result of his relationship with the victim's wife.

After comparing this case to other roughly similar cases as to the crime and the defendant, we conclude that this case has the characteristics of first-degree murders for which we have previously upheld the death penalty as not disproportionate. Accordingly, we conclude that defendant received a capital sentencing proceeding free of prejudicial error and that the sentence of death is not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. BRIAN ELGIN LAWS

No. 35A96

(Filed 7 March 1997)

1. Homicide § 253 (NCI4th)— first-degree murder—malice—premeditation and deliberation—sufficiency of evidence

In this prosecution for first-degree murder in which defendant contended that he killed the victim in self-defense in response to a threatened homosexual assault, the State's evidence was sufficient to support an inference that defendant acted with malice where it tended to show that defendant used at least two knives and a pair of scissors to stab the victim. Furthermore, the State's

evidence was sufficient to support inferences of premeditation and deliberation by defendant where it tended to show that the victim was brutally stabbed approximately eighteen times and was bludgeoned with a ceramic vase; defendant continued to inflict additional stab wounds after the victim was severely disabled and had lost consciousness; when a knife blade broke off inside the victim, defendant made a conscious effort to continue his attack with a pair of scissors; defendant immediately attempted to conceal evidence, stole the victim's jewelry and car, and sold them for cash to buy drugs; defendant did not find the first knife he used in the victim's bedroom but found the knife in a closet and took the knife into the bedroom with the intent to stab the victim; the victim struggled to get to the front door, but defendant further attacked him near the door and pushed the door closed to prevent the victim's escape; and defendant beat the victim with a vase while the victim was face down on the floor rather than while the victim was coming toward him as defendant claimed.

Am Jur 2d, Homicide §§ 263-268.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

2. Evidence and Witnesses § 264 (NCI4th)— murder trial—victim's homosexuality—not pertinent character trait

In a prosecution for first-degree murder in which defendant contended that he killed the victim in self-defense in response to a threatened homosexual assault, evidence offered by defendant that the victim had a reputation for being a homosexual was not evidence of a pertinent character trait within the meaning of Rule of Evidence 404(a)(2) and was properly excluded by the trial court, since an individual's sexual orientation bears no relationship to the likelihood that such individual would threaten a sexual assault. N.C.G.S. § 8C-1, Rule 404(a)(2).

Am Jur 2d, Evidence § 373; Homicide §§ 301, 303, 307.

3. Criminal Law § 478 (NCI4th Rev.)— prosecutor's objections—cross-examination of defense witnesses—no prosecutorial misconduct

The form of the prosecutor's objections and the prosecutor's conduct during cross-examination of defense witnesses did not

amount to prosecutorial misconduct which denied defendant a fair trial.

Am Jur 2d, Trial §§ 497, 499, 500.

4. Evidence and Witnesses §§ 2172, 2293 (NCI4th)— expert testimony—rage reaction—exclusion of personal experience

In a prosecution for first-degree murder in which defendant contended that he killed the victim in self-defense in response to a threatened homosexual assault, the trial court did not err by refusing to permit defendant's expert witness to testify about a "rage reaction" experienced by the witness in his personal life since (1) the witness properly gave his expert opinion that a rage reaction could possibly have caused defendant to kill the victim and explained his opinion by relating the general characteristics exhibited by those who experience rage reaction and by enumerating the facts upon which his opinion was based; (2) the excluded testimony was not admissible as a basis for the witness's expert opinion under Rule of Evidence 703 where the witness testified that the basis for his opinion was his interview with defendant and defendant's testimony in court; and (3) the excluded testimony was irrelevant as defendant did not show how a rage reaction experienced by someone other than defendant makes it more or less probable that defendant experienced a rage reaction. N.C.G.S. § 8C-1, Rule 703.

Am Jur 2d, Expert and Opinion Evidence §§ 37, 38, 182, 360; Homicide § 396.

5. Evidence and Witnesses § 706 (NCI4th)— pretrial statement—exculpatory portions—substantive evidence—limiting instruction not plain error

Assuming *arguendo* that the exculpatory portions of defendant's pretrial statement to the police were substantive evidence, the trial court did not commit plain error by instructing the jury that defendant's pretrial statement could not be considered as substantive evidence where defendant's testimony at trial presented directly to the jury the same evidence that defendant contends was exculpatory in his pretrial statement; the jurors were instructed that they could use defendant's pretrial statement to determine whether to believe defendant's trial testimony; and

defendant thus received the benefit of any strength his pretrial statement could give his testimony at trial.

Am Jur 2d, Homicide § 340; Trial § 1283.

6. Homicide § 612 (NCI4th)— self-defense—instructions—reasonable belief in need to kill

The trial court did not commit plain error by instructing the jury that perfect and imperfect self-defense require the defendant to have a reasonable belief in the need to kill in self-defense.

Am Jur 2d, Homicide § 519.

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 as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Farmer, J., at the 21 August 1995 Criminal Session of Superior Court, Durham County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 9 September 1996.

Michael F. Easley, Attorney General, by Gail E. Weis, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 19 July 1993 for the first-degree murder of Earl Wayne Handsome. The defendant was tried noncapitally, and the jury found defendant guilty of first-degree murder on the theory of premeditation and deliberation. By judgment and commitment dated 29 August 1995, Judge Farmer sentenced the defendant to a term of life imprisonment.

The State's evidence tended to show that Earl Handsome died on 27 June 1993 as a result of multiple stab wounds to his chest and back. Richard Jordan, a friend of the victim's, discovered the body and called 911. Investigator Jerry Wilkerson, a thirty-one year veteran of the Durham Police Department, was assigned to the case. After

interviewing potential witnesses at the scene, Wilkerson discovered that the victim's car was missing. Sometime during the early morning hours of 28 June 1993, Officer Daniel Massenberg of the Durham Police Department spotted the victim's car heading toward downtown Durham. After calling for backup, the car was stopped, and four individuals were removed from the car and taken into custody for questioning. Wilkerson was informed that the individuals found in the victim's car stated that they had rented the car from Brian Laws, the defendant.

Investigator Wilkerson and some uniformed officers went to the defendant's residence and knocked on the door. Defendant answered the door and allowed Wilkerson to enter the apartment. While Wilkerson was talking with the other people in the apartment, the defendant said, "I did it." Wilkerson asked the defendant what he had done, and the defendant responded, "I killed him." When asked who he had killed, the defendant responded, "a man." Wilkerson transported the defendant to police headquarters and informed him of his *Miranda* rights. The defendant waived his *Miranda* rights and confessed to the murder of Earl Handsome. The State subsequently entered defendant's confession into evidence.

The defendant, in his confession, stated that on the night of the murder, he was walking home when the victim drove up and started a conversation. The defendant went to the victim's apartment and drank vodka and smoked marijuana with the victim. The defendant and the victim then watched television together in the victim's bedroom. According to the defendant, the victim made several sexual advances toward him. After trying unsuccessfully to stop the victim's advances, the defendant grabbed a knife that they had been using in the bedroom to chop up the marijuana and stabbed the victim in the neck. The defendant stated that he then ran for the door and tried to open it, but the victim pushed the door closed. The defendant grabbed a ceramic vase and hit the victim twice, knocking the victim to the ground. When the victim started to get back up, the defendant ran to the kitchen, got another knife and started stabbing the victim again. When that knife broke off inside the victim, the defendant got a pair of scissors and continued stabbing the victim. The defendant stated that the first thing that came to his mind after the attack was to get rid of the fingerprints. The defendant attempted to clean his fingerprints off the knives, then took the victim's car keys and left the apartment. Finally, the defendant stated that he sold six pieces of jewelry that he found in the car, rented the victim's car to an acquain-

tance and used the proceeds from the jewelry and car rental to buy drugs.

Dr. Deborah Radisch, an expert in forensic pathology, performed an autopsy on the victim. The autopsy revealed several blunt-force injuries on the scalp and at least eighteen stab wounds to the victim's chest and back. The blunt-force injuries consisted of numerous abrasions and lacerations and a fracture of the bones at the base of the skull. These injuries were severe enough to cause a loss of consciousness for a short period of time. Dr. Radisch determined that the victim died from a loss of blood due to severe damage to his lungs and heart caused by multiple stab wounds to the chest.

Della Owens-McKinnon, an identification technician trained and certified to analyze bloodstain patterns, testified that her examination of the crime scene revealed that most of the bloodstains were found in the bedroom. Owens-McKinnon observed "overcast patterns" on the bedroom wall over the bed. This type of bloodstain pattern occurs when blood is being thrown off the tip of an object as it is being swung back and forth. Owens-McKinnon also identified "back patterns" on the bedroom wall. Owens-McKinnon testified that back spatter occurs as an object is being released or pulled out of the body. The bedroom stains reflected the infliction of a minimum of three or four blows in the area of the bed.

Owens-McKinnon noted "impact patterns" at the entrance to the bedroom which indicated to her that two or three blows were inflicted at that location. Owens-McKinnon also observed a trail of dripping blood and bloody handprints along the hallway leading to large "transfer patterns" and smudges on the front door. Owens-McKinnon testified that she believed these stains occurred as someone was attempting to leave the apartment. Finally, Owens-McKinnon observed impact spatters on the front door which indicated the infliction of a minimum of two to three blows at that location.

Special Agent Peter Deaver, an expert in the field of forensic serology, testified that he was able to remove a small amount of blood from a pair of shorts collected from the defendant's residence. Agent Deaver determined that the blood collected from the defendant's shorts was human blood and that its genetic markers were consistent with the genetic markers for Earl Handsome's blood.

Special Agent John Bendure, an expert in the field of fiber analysis and physical matches, examined a button found near the victim's

body and clothes collected from the defendant's residence. Agent Bendure testified that the button had been forcefully removed and that in his opinion, the button could have come from a pair of shorts collected from the defendant. Agent Bendure noted that the button was the same type of button as the button on the right rear pocket of the shorts, and that the yarn on the button and the attachment thread had the same characteristics and sewing pattern as the button found on the shorts.

Special Agent Joyce Petzka, an expert in the field of fingerprint identification, examined fingerprints collected at the crime scene and known fingerprint samples for the defendant and the victim. Agent Petzka examined the front door, two pieces of sheetrock and a piece of door molding taken from the victim's apartment. Agent Petzka testified that she found four fingerprints belonging to the defendant on one of the pieces of sheetrock, two of the defendant's fingerprints on the door molding and two of the defendant's palm prints on the inside of the front door. In Agent Petzka's opinion, the palm prints were made by using force with the entire hand to push on the door (which in this case would have caused the front door to close).

The defendant testified that he had smoked marijuana, had consumed alcohol and had used cocaine prior to going to the victim's apartment. Once at the victim's apartment, defendant began watching television in the victim's bedroom. The victim entered the bedroom carrying a tray with marijuana, rolling paper and a large knife to cut the marijuana. The defendant and the victim smoked marijuana and watched television together. The defendant stated that the victim made a sexual advance toward him and that he told the victim, "I don't do that," or "I don't like that." The victim then grabbed the defendant's belt as if trying to undo defendant's pants. The defendant tried to push the victim away, but the victim would not let go. The defendant testified that he was afraid he was going to be raped, so he grabbed the knife off the tray and stabbed the victim in order to escape. As in his statement, defendant testified that the victim attempted to prevent him from leaving, so he hit the victim with a vase and continued to stab the victim. On cross-examination, the defendant testified that he could not recall when the victim took his clothes off and that he had no idea why the tray with the marijuana on it was found by detectives neatly put away in a closet.

Finally, Dr. Roy Matthew, an expert in the field of forensic psychiatry, testified on behalf of the defendant. Dr. Matthew stated that

drugs could have had some effect, but did not account for much of what happened. Based on the number of wounds and the defendant's inability to remember many of the details concerning what happened, Dr. Matthew formed the opinion that the defendant experienced a "rage reaction." Dr. Matthew testified that a "rage reaction" is characterized by extreme violence, a loss of control and a failure to realize the amount of force being used.

I.

[1] In his first assignment of error, the defendant contends that the trial court erred by denying his motions to dismiss at the close of the State's evidence and at the close of all the evidence. Specifically, the defendant contends that the State did not present sufficient evidence to prove that the defendant (1) acted with malice, premeditation and deliberation; (2) did not kill the victim in self-defense; and (3) did not kill the victim in the heat of passion.

By presenting evidence, the defendant has waived his objection to the trial court's failure to dismiss at the close of the State's evidence. *State v. Mash*, 328 N.C. 61, 66, 399 S.E.2d 307, 311 (1991). Therefore, only defendant's motion to dismiss at the close of all the evidence is before this Court.

When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). If substantial evidence of each element is presented, the motion for dismissal is properly denied. "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

In ruling on the motion to dismiss, the trial court must view all of the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995). The trial court need not concern itself with the weight of the evidence. In reviewing the sufficiency of the evidence, the question for the trial court is whether there is "any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "[C]ontradictions or discrepancies in the evidence are for

the jury to resolve and do not warrant dismissal." *Olson*, 330 N.C. at 564, 411 S.E.2d at 595. Moreover, the evidence need not rule out every hypothesis of innocence. *State v. Baker*, 338 N.C. 526, 558, 451 S.E.2d 574, 593 (1994). Once the trial court decides a reasonable inference of defendant's guilt may be drawn from the evidence, "it is for the jurors to decide whether the facts satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Murphy*, 342 N.C. 813, 819, 467 S.E.2d 428, 432 (1996).

Murder in the first degree, the crime of which the defendant was convicted, is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 337 (1986). Malice may be presumed from the use of a deadly weapon. *State v. Porter*, 326 N.C. 489, 505, 391 S.E.2d 144, 155 (1990). The defendant's use of at least two knives and a pair of scissors to stab the victim satisfies the malice requirement. Contrary to defendant's position, the State does not lose the benefit of this inference merely because the defendant presented exculpatory evidence in an attempt to negate malice. Exculpatory evidence presented by a defendant is not considered by the trial court when ruling on a motion to dismiss. *State v. Lyons*, 340 N.C. 646, 658, 459 S.E.2d 770, 776 (1995). Therefore, the only remaining element necessary for the State to prove is the existence of premeditation and deliberation.

"A killing is 'premeditated' if the defendant contemplated killing for some period of time, however short, before he acted." *State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993), *judgment vacated on other grounds*, — U.S. —, 128 L. Ed. 2d 42 (1994). A killing is "deliberate" if the defendant formed an intent to kill and carried out that intent in a cool state of blood, "free from any 'violent passion suddenly aroused by some lawful or just cause or legal provocation.' " *Id.* (quoting *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985)). Premeditation and deliberation are mental processes and ordinarily are not 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, 822-23 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Circumstances from which premeditation and deliberation may be inferred include:

> "(1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing,

(3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds."

State v. Keel, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994) (quoting *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 870, 93 L. Ed. 2d 166 (1986)), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 147 (1995).

When viewed in the light most favorable to the State, the evidence shows three of these seven indicators of premeditation and deliberation. The defendant dealt lethal blows to the victim after he had been felled, the killing was done in a brutal manner, and the victim suffered an excessive number of wounds. The evidence tends to show that the victim was brutally stabbed approximately eighteen times and was bludgeoned with a ceramic vase. Even after the victim was severely disabled and had lost consciousness, the defendant continued to inflict additional stab wounds. At one point, a knife blade broke off inside the victim. Instead of being deterred at this point, the defendant made a conscious effort to continue his attack with a pair of scissors. This evidence clearly supports an inference of premeditation and deliberation.

Defendant's actions after the attack are also indicative of premeditation and deliberation. Defendant did not seek help or medical assistance for the victim and did not call the police. Instead, defendant immediately attempted to conceal evidence. *See State v. Weathers*, 339 N.C. 441, 452, 451 S.E.2d 266, 272 (1994) (defendant's efforts to destroy or hide evidence an indication of premeditation and deliberation). After killing the victim, the defendant stole the victim's jewelry and car and exchanged them for cash to buy drugs. This evidence belies any spontaneous action in response to an attempted sexual assault and implies a clear-headed decision to kill for a purpose.

The physical evidence also supports an inference of premeditation and deliberation. According to the defendant's statement, the victim came into the bedroom carrying a tray containing marijuana, rolling paper and a large knife. Defendant claims that this is the knife he originally used to stab the victim. Investigators, however, did not find the tray, marijuana or rolling paper in the bedroom. These items were found neatly put away in a hall closet. The defendant was

unable to explain why these items were not found in the bedroom. This evidence, viewed in the light most favorable to the State, tends to indicate that defendant did not find the first knife he used in the bedroom. Instead, this evidence indicates the defendant searched the house, found the knife in the closet and brought the knife back to the bedroom with the intent to stab the victim.

Defendant further testified that after stabbing the victim in the bedroom, he ran to the front door in an effort to escape, but when he got the door open, the victim pushed it closed and prevented his escape. The evidence, however, indicates that the victim was stabbed a minimum of three or four times in the bedroom. The quantity and severity of the wounds make it very unlikely that the victim was able to chase defendant down the hallway to prevent defendant's escape. However, a trail of dripping blood and a trail of bloody handprints were observed in the hallway. Moreover, blood spatter and defendant's palm prints were found on the inside of the front door. Forensic testing showed that the palm prints were made by defendant while forcibly pushing the door closed. From this evidence, it is reasonable to infer that the victim struggled to get to the front door; that the victim, not the defendant, was trying to escape; that the victim was further attacked near the front door; and that the defendant pushed the door closed to prevent the victim's escape.

Finally, defendant testified that he hit the victim with a ceramic vase to ward off the victim. However, Dr. Radisch testified that the victim suffered six blows to the back of the head and that one or two of the blows were severe enough to cause a loss of consciousness. The victim was found face down with ceramic pieces resting on his back. This evidence, when viewed in the light most favorable to the State, indicates that the victim was beaten while face down on the floor and not while coming after the defendant, and tends to portray the defendant as the aggressor.

Although the State's evidence must ultimately be strong enough to prove beyond a reasonable doubt that the defendant did not act in self-defense or as the result of some violent passion brought about by legally sufficient provocation, the State is entitled to have those questions put before a jury if its own evidence supports reasonable inferences of malice, premeditation and deliberation. In this case, it is clear that the evidence did support such inferences and that the trial court correctly sent the case to the jury. Defendant's first assignment of error is overruled.

II.

[2] In his second assignment of error, the defendant contends that the trial court erred by excluding evidence indicating that the victim had a reputation for being a homosexual.

During the defendant's presentation of evidence, defendant attempted to offer the testimony of Linwood Wilson, a private investigator, to show "the general reputation of the victim in terms of his sexual persuasion." The State objected to the testimony, arguing that it was inadmissible under Rule 404(a)(2) of the North Carolina Rules of Evidence unless it went to the victim's reputation for violence. The trial court agreed with the State but allowed the defendant to make an offer of proof. Wilson testified that in the course of his investigation, he, personally, did not form an opinion as to the victim's sexual orientation. Wilson did, however, testify that several of the victim's acquaintances assumed he was a homosexual because "he was not seen with very many females" and "he always seemed to be with males."

Rule 404 of the North Carolina Rules of Evidence prohibits the admission of evidence of a person's character when offered for the purpose of proving conduct in conformity therewith except in certain limited circumstances. N.C.G.S. § 8C-1, Rule 404(a) (Supp. 1996). Rule 404(a)(2) allows admission of evidence of pertinent character traits of a victim. N.C.G.S. § 8C-1, Rule 404(a)(2). "Pertinent" means " 'relevant in the context of the crime charged.' " *State v. Sexton*, 336 N.C. 321, 359, 444 S.E.2d 879, 901 (quoting *State v. Bogle*, 324 N.C. 190, 198, 376 S.E.2d 745, 749 (1989)), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994). " 'In criminal cases, in order to be admissible as a "pertinent" trait of character, the trait must *bear a special relationship to* or *be involved in* the crime charged.' " *Id.* (quoting *Bogle*, 324 N.C. at 201, 376 S.E.2d at 751). When a defendant argues that he acted in self-defense, the victim's character is admissible for two purposes, to show defendant's fear or apprehension was reasonable or to show the victim was the aggressor. *State v. Watson*, 338 N.C. 168, 187, 449 S.E.2d 694, 706 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 569 (1995). Rule 404(a)(2) is restrictively construed. *Sexton*, 336 N.C. at 360, 444 S.E.2d at 901.

Following these principles, it is clear that the evidence offered by the defendant showing that the victim had a reputation for being a homosexual is not a pertinent character trait within the meaning of Rule 404(a)(2). *See State v. Hodgin*, 210 N.C. 371, 376-77, 186 S.E.

495, 488-89 (1936) (no error in trial court's exclusion of testimony regarding victim's reputation of being homosexual where defendant claimed killing in response to victim's sexual advance). A victim's homosexuality has no more tendency to prove that he would be likely to sexually assault a male than would a victim's heterosexuality show that he would be likely to sexually assault a female. *See State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 236 (1995) (evidence of victim's homosexuality has little tendency to show that the victim was the aggressor where defendant claimed killing in response to victim's homosexual advance). Because an individual's sexual orientation bears no relationship to the likelihood that one would threaten a sexual assault, it therefore can bear no relationship to defendant's claim that he killed in self-defense in response to a threatened sexual assault. Therefore, we hold that the trial court did not err by excluding evidence of the victim's sexual orientation.

III.

[3] In his third assignment of error, the defendant contends that his right to a fair trial was violated as a result of instances of prosecutorial misconduct throughout the trial. The defendant's complaints fall into two categories: (1) the form of the prosecutor's objections, and (2) the prosecutor's conduct during cross-examination of defense witnesses. Specifically, the defendant argues that the prosecutor's objections included disrespectful remarks which improperly corrected and criticized defense counsel before the jury and that the prosecutor, during his cross-examinations, distorted witnesses' answers and routinely asked sarcastic, insulting and impertinent questions designed to badger and humiliate the witnesses. After a thorough review of the record, we find that the prosecutor's conduct, viewed in the context of his role as a zealous advocate for criminal convictions, fell squarely within the permissible parameters of professionalism. We therefore conclude that defendant received in this respect a fair trial and overrule this assignment of error.

IV.

[4] In his fourth assignment of error, the defendant contends that the trial court erred by excluding certain evidence regarding "rage reaction" killings. Specifically, the defendant argues that the trial court should have allowed his expert witness to testify about a rage reaction experienced by the expert witness in his personal life.

During direct examination of defendant's expert, Dr. Roy Matthew, the witness testified regarding his familiarity with rage

reactions and the characteristics of rage reactions. Dr. Matthew then testified that he had personal knowledge of two rage reactions in his professional life and one rage reaction in his personal life. Dr. Matthew was then asked to describe the rage reaction which he experienced in his personal life. The State objected, and the trial court sustained the objection. After the trial court sustained the State's objection, the defendant made no offer of proof. Defense counsel then questioned Dr. Matthew as follows:

> Q. Do you have a medical opinion as to what occurred to Brian on this particular occasion, sir?
>
> A. Yes.
>
> Q. All right. And what is that opinion?
>
> A. I'm basing this on the information I received from Brian and what I heard of his testimony earlier on. It is very possible that he went into a rage reaction.

Dr. Matthew went on to explain all of the facts that led him to believe defendant had experienced a rage reaction.

" 'In 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. Hill*, 331 N.C. 387, 410, 417 S.E.2d 765, 776 (1992) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). Because the defendant failed to make a specific offer of proof and the significance of the excluded evidence is not obvious from the record, this issue has not been properly preserved for appellate review.

Even assuming, *arguendo*, that the defendant's argument is properly before this Court for appellate review, it is clear that the trial court did not err. Defendant was able to fully present his rage reaction defense through the testimony of Dr. Matthew. Dr. Matthew properly gave his expert opinion that a rage reaction could possibly have caused the defendant to kill the victim. Dr. Matthew explained his opinion by relating the general characteristics exhibited by those who experience rage reactions and by enumerating the facts upon which his opinion was based. Defendant argues that Dr. Matthew's personal knowledge of specific instances of a rage reaction should have been admitted as a basis for the witness' expert opinion under

Rule 703 of the North Carolina Rules of Evidence. However, Dr. Matthew specifically testified that the basis for his opinion was his interview with the defendant and the defendant's testimony in court. He never testified that his personal knowledge of other such rage reactions contributed to his opinion. Moreover, the defendant offered the excluded evidence only as an *example* to help the jury's understanding. The trial court was never asked to admit the evidence as a basis for Dr. Matthew's opinion.

The defendant alternatively argues that the evidence should have been admitted because it would have assisted the jury in understanding the concept of rage reaction. However, this evidence is clearly irrelevant, as defendant has not shown how a rage reaction experienced by some individual, other than the defendant, makes it any more or less probable that the defendant experienced a rage reaction. Accordingly, this assignment of error is overruled.

V.

[5] In his fifth assignment of error, the defendant contends that the trial court committed plain error by instructing the jury that defendant's out-of-court pretrial statement to the police could not be considered as substantive evidence. Specifically, defendant argues that the trial court's instruction that "you must not consider such earlier statement as evidence of the truth of what was said at that earlier time" erroneously deprived the defendant of any benefit from the substantive consideration of the exculpatory portions of his statement. Because defendant did not object to this instruction, our review is limited to plain error.

The full instruction of the trial court containing the sentence complained of reads as follows:

> Now, when evidence has been received tending to show that at some earlier time a witness made a statement which may be consistent or may conflict with their testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witnesses' truthfulness in deciding whether you will believe their testimony at this trial.

Assuming arguendo that the exculpatory portions of defendant's statement were substantive evidence, the defendant does not show plain error. Defendant's testimony at trial presented directly to the jury the same evidence that defendant contends was exculpatory in his pretrial statement. Further, the jurors were instructed that they could use defendant's pretrial statement to determine whether to believe the defendant's trial testimony. The defendant thus received the benefit of any strength his pretrial statement could give his testimony at trial. This assignment of error is overruled.

VI.

[6] In his final assignment of error, the defendant contends that the trial court committed plain error by instructing the jury that perfect and imperfect self-defense require the defendant to have a reasonable belief in the need to kill in self-defense. Defendant concedes that this Court has approved instructions identical to those given by the trial court in the present case in *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). We find no compelling reason to reconsider this issue. Accordingly, this assignment of error is overruled.

For the foregoing reasons, we conclude that the defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. DONQUELL RENARD SPELLER

No. 505A95

(Filed 7 March 1997)

1. Constitutional Law § 344.1 (NCI4th Rev.)— capital murder (life sentence)—bench conferences—defendant not present

The trial court did not violate a first-degree murder defendant's state and federal constitutional rights by conducting ten unrecorded bench conferences at which defendant was not personally present where defendant was represented by counsel at each of the conferences. He was in position to observe the context of the conferences and to inquire of his attorneys as to the

nature and substance of each one. Defendant had a firsthand source as to what transpired and defense counsel had the opportunity and obligation to raise for the record any matter to which defendant took exception. Defendant has failed to demonstrate that the bench conferences implicated his constitutional right to be present or that his presence would have substantially affected his opportunity to defend.

Am Jur 2d, Criminal Law § 916.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law. 85 ALR2d 1111.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. 23 ALR4th 955.

2. Criminal Law § 514 (NCI4th Rev.)— first-degree murder—bench conferences—complete record

Unrecorded bench conferences did not violate a first-degree murder defendant's right to a complete recordation of proceedings in a capital case pursuant to N.C.G.S. § 15A-1241, which requires a complete record of "all statements from the bench." "Statements from the bench" does not include routine bench conferences between the trial court and the attorneys.

Am Jur 2d, Trial §§ 236-239.

Failure or refusal of state court judge to have record made of bench conference with counsel in criminal proceeding. 31 ALR5th 704.

3. Criminal Law § 423 (NCI4th Rev.)— first-degree murder—prosecutor's opening remarks—scope exceeded—not grossly improper

Remarks by a prosecutor in her opening statement in a first-degree murder prosecution exceeded the proper limited scope of an opening statement but were not so grossly improper as to merit a new trial where the prosecutor began with a quote from the Bible, invited jurors to put themselves in the place of the victim and project their fears of violent crime onto the victim, commented on the heroics of the victim, emphasizing that he was outnumbered three to one, asked for sympathy for the victims's

"beautiful young widow," and continued her emotional pleas to the jury despite repeated admonitions to stick to the evidence. The trial court did not abuse its discretion in controlling the prosecutor's opening statement because it sustained defense counsel's objections, repeatedly admonished the prosecutor in open court, and twice instructed the jury to disregard the prosecutor's statements. The remarks were not so grossly improper as to deprive defendant of a fair trial despite the trial court's rulings and repeated warnings.

Am Jur 2d, Trial §§ 554-556.

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

4. Extradition § 26 (NCI4th)— first-degree murder in North Carolina—voluntary return to North Carolina—requirement of warrant and rights

The trial court in a first-degree murder prosecution did not lack jurisdiction where, after the robbery and murder, defendant went to a hospital in his hometown of Cheraw, South Carolina to receive treatment for his gunshot wound, defendant was questioned while there by police officers, and he eventually signed a waiver of extradition and was transported back to Hamlet by Hamlet police officers. Although defendant contends that the extradition is not effective because the Governor did not issue a warrant and defendant was not informed of his rights, as is statutorily required, the record establishes that defendant was advised of his rights, including the right to issuance and service of a warrant of extradition and that he voluntarily consented to return. N.C.G.S. § 15A-746 governs the procedure for securing the delivery of an accused from North Carolina to a demanding state rather than returning someone accused here to North Carolina. While N.C.G.S. § 15A-742 provides a procedure for the Governor to demand the return of a person charged with a crime, nothing suggests that this is exclusive and precludes the voluntary return of the accused.

Am Jur 2d, Criminal Law §§ 338-341.

Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit. 34 ALR4th 328.

STATE v. SPELLER

[345 N.C. 600 (1997)]

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Helms (William H.), J., at the 15 May 1995 Criminal Session of Superior Court, Richmond County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment of imprisonment entered upon his conviction for robbery with a firearm was allowed 22 November 1996. Heard in the Supreme Court 12 February 1997.

Michael F. Easley, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by J. Michael Smith, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was tried capitally for the first-degree murder of William Larry Brown, Jr., and for the robbery of Brown with a firearm. The jury found him guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule, and recommended a sentence of life imprisonment. The trial court accordingly sentenced defendant to life imprisonment on the first-degree murder conviction and to forty years' imprisonment for robbery with a firearm, to run consecutive to the sentence for murder.

The State's evidence at trial tended to show that three black males were seen running from the Sandhill Pawn and Jewelry shop in Hamlet, North Carolina, around 4:20 p.m. on 5 April 1993. The men got into a white Ford automobile parked in front of the shop. Brown, the proprietor, came to the door of the shop with a gun and fired it, shattering the windshield of the car. The driver of the car returned fire before fleeing in the direction of Cheraw, South Carolina. Brown's wife and a friend found Brown later, lying on the floor of his shop in a pool of blood. When asked what had happened, Brown replied that he had been shot by three black men. Brown died a few hours later from a gunshot wound to the abdomen.

William Hogan, who worked at a nearby Western Auto Store, testified that he went into the pawn shop after hearing gunshots from within. He saw Brown lying behind the counter with his shirt soaked in blood. Brown appeared to have been beaten. He had a black eye, the side of his face and nose were black, and his face was puffy.

Hogan also noticed that the boxes where Brown ordinarily kept shotguns and pistols intended for sale were empty.

James Poe testified for the State that he was with defendant and another man, Anthony Campbell, at the time of the murder and robbery. Poe stated that he, defendant, and Campbell went into the pawn shop under the pretense of looking for guns. When they reached the counter, Brown was standing there, and defendant put a gun to his head. Brown grabbed the gun, and a brawl ensued. Campbell hit Brown in the face, and defendant threw him to the floor. According to Poe, defendant then said, "you shouldn't have done that," and shot Brown in the stomach while he lay on the floor.

Poe testified that he took four guns from the display case and that he and Campbell left the store and got into the white Ford automobile. Defendant came out of the shop a moment later and got into the driver's seat. Before defendant could get the car started, however, Brown came out of the shop and shot at the car, hitting defendant in the shoulder. Defendant shot back through the car window and then fled in the direction of Cheraw, South Carolina. Defendant was later driven to a hospital in Cheraw to get treatment for his gunshot wound.

Defendant testified on his own behalf that he went to Brown's shop to pawn a stolen gun and that Brown mistakenly thought he was being robbed. Defendant stated that the gun accidently discharged while he and Brown were struggling.

[1] By his first assignment of error, defendant argues that the trial court violated his state and federal constitutional rights by conducting ten unrecorded bench conferences at which defendant was not personally present. Although present in the courtroom and represented by counsel at the conferences, defendant nevertheless contends that his absence from the bench conferences violated his constitutional right to be present at every stage of the proceedings.

Defendant asserts that this issue is controlled by *State v. Exum*, 343 N.C. 291, 470 S.E.2d 333 (1996). In *Exum*, the trial court conducted an in-chambers conference with the attorneys at the conclusion of testimony from the defendant's psychiatric expert. The substance of the conference was not recorded, and defendant was not present. Based on these circumstances, this Court held that "where the defendant has a constitutional right to be present at a critical stage of his trial and the trial court conducts private conferences or discussions in the defendant's absence, but the substance of the

private discussions is not revealed in the record, a new trial is required." *Id.* at 296, 470 S.E.2d at 335. Significantly, however, the trial court had conducted both bench conferences and in-chambers conferences in the defendant's absence, yet this Court addressed only the in-chambers conferences. *Id.* at 293, 470 S.E.2d at 334. Hence, the rule pertaining to bench conferences established in *State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832 (1991), remains intact.

In *Buchanan*, the trial court conducted eighteen bench conferences with defense counsel and counsel for the State. Although present in the courtroom, the defendant was not included in the conferences. After extensive analysis of the federal courts' treatment of such conferences, as well as North Carolina constitutional jurisprudence, this Court concluded that a defendant's constitutional right "to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties." *Id.* at 223, 410 S.E.2d at 845. The burden is on the defendant to show the usefulness of his presence in order to prove a violation of his right to presence. *Id.* at 224, 410 S.E.2d at 845.

Like the defendant in *Buchanan*, defendant here was represented by counsel at each of the conferences. He was in a position to observe the context of the conferences and to inquire of his attorneys as to the nature and substance of each one. Despite his absence, defendant had a firsthand source as to what transpired, and defense counsel had the opportunity and obligation to raise for the record any matter to which defendant took exception. On these facts, defendant has failed to demonstrate that the bench conferences implicated his constitutional right to be present or that his presence would have substantially affected his opportunity to defend. The trial court therefore did not err in conducting the bench conferences with the attorneys out of the hearing of defendant.

[2] Defendant further argues that the unrecorded bench conferences violated his right to a complete recordation of the proceedings in a capital case pursuant to N.C.G.S. § 15A-1241, which provides in pertinent part: "The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench." N.C.G.S. § 15A-1241(1) (1988). We have held that "statements from the bench" do not include routine bench conferences between the trial court and the attorneys. *State v. Cummings*, 332 N.C. 487, 497, 422 S.E.2d 692, 697 (1992). This assignment of error is therefore overruled.

[3] Defendant next contends that the trial court did not properly control the prosecutor during her opening statements to the jury and that her actions severely prejudiced the remainder of defendant's trial. The prosecutor began her opening statement with a quote from the Bible. Thereafter, on several occasions, she invited the jurors to put themselves in the place of the victim and to project their fears of violent crimes onto the victim. She further commented on the heroics of the victim, emphasizing that he was outnumbered three to one, and asked for sympathy for the victim's "beautiful young widow." Despite repeated admonitions from the trial court to "stick to the evidence," the prosecutor continued her emotional pleas to the jury. Defendant contends that it is impossible to calculate the impact of such manifest misconduct and that he is therefore entitled to a new trial.

The State concedes that the prosecutor departed from ordinary and acceptable standards for opening remarks but asserts that the statements were not so grossly improper as to deprive defendant of a fair trial. We agree. The record indicates that defense counsel objected seventeen times during the prosecutor's opening statement. Of the ten objections that were sustained, the trial court admonished the prosecutor on four occasions, instructed the jury to disregard her statements on two occasions, and simply sustained without comment the four other objections. Of the remaining seven objections, two were overruled, three were not passed upon, and on two occasions counsel were instructed to approach the bench for an unrecorded conference. Defendant does not complain about any of the trial court's rulings concerning defense counsel's objections. Rather, he simply contends that the trial court committed prejudicial error by failing to "enforce" its rulings.

The control of opening statements rests in the discretion of the trial court. *State v. Gibbs*, 335 N.C. 1, 40, 436 S.E.2d 321, 343 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). Because the trial court sustained defense counsel's objections, repeatedly admonished the prosecutor in open court, and twice instructed the jury to disregard the prosecutor's statements, we conclude that the trial court did not abuse its discretion in controlling the prosecutor's opening statement.

The State suggests, and we concur, that the real issue is whether the prosecutor's remarks were so grossly improper as to deprive defendant of a fair trial, despite the trial court's rulings and repeated warnings. " '[T]he proper function of an opening statement is to allow

the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it.' " *State v. Paige*, 316 N.C. 630, 648, 343 S.E.2d 848, 859 (1986) (quoting *State v. Elliott*, 69 N.C. App. 89, 93, 316 S.E.2d 632, 636, *disc. rev. denied and appeal dismissed*, 311 N.C. 765, 321 S.E.2d 148 (1984)). "[I]n previewing the evidence, counsel generally should not (1) refer to inadmissible evidence, (2) 'exaggerate or overstate' the evidence, or (3) discuss evidence he expects the other party to introduce." *State v. Jaynes*, 342 N.C. 249, 282, 464 S.E.2d 448, 468 (1995) (quoting *State v. Freeman*, 93 N.C. App. 380, 389, 378 S.E.2d 545, 551 (citations omitted), *disc. rev. denied*, 325 N.C. 229, 381 S.E.2d 787 (1989)), *cert. denied*, —- U.S. —-, 135 L. Ed. 2d 1080 (1996). After careful review of the prosecutor's remarks, we conclude that while they exceeded the proper limited scope of an opening statement, they were not so grossly improper as to violate any of these principles, thereby meriting a new trial. This assignment of error is overruled.

[4] Finally, defendant argues that the trial court lacked jurisdiction and therefore erred in denying defendant's motions to dismiss. He challenges the trial court's jurisdiction on the grounds that the investigating police officers failed to follow the extradition process mandated by the Uniform Criminal Extradition Act.

As noted, defendant went to a hospital in his hometown of Cheraw, South Carolina, to receive treatment for his gunshot wound. While there, defendant was questioned by police officers from Cheraw and from Hamlet, North Carolina. Defendant eventually signed a waiver of extradition and was transported back to North Carolina by the Hamlet police officers. Defendant contends that the Uniform Criminal Extradition Act requires the Governor, when demanding the return of a fugitive from North Carolina, to issue a warrant commanding his agent to receive the person sought and to deliver that person to the appropriate county authority. N.C.G.S. § 15A-742 (1988). Defendant further asserts that pursuant to N.C.G.S. § 15A-746, a waiver of extradition may not be executed until the fugitive is judicially informed of his rights to the issuance and service of a warrant for extradition. Defendant contends that because the Governor did not issue a warrant and defendant was not judicially informed of his rights, his waiver of extradition is legally ineffective, and he must be released from custody.

Defendant's argument fails to recognize that section 15A-746 governs the procedure for securing the delivery of an accused from

North Carolina to a demanding state, not for returning someone accused in North Carolina to this state. Section 15A-746 thus is inapplicable here. While section 15A-742 provides a procedure for the Governor to demand the return of a person charged with a crime in this state, nothing in that statute or the Uniform Criminal Extradition Act as a whole suggests that this procedure is exclusive and precludes the voluntary return of the accused for formal arraignment and trial. The record establishes that defendant was advised of his rights, including the right to issuance and service of a warrant of extradition, and that he voluntarily consented to return to North Carolina. His voluntary return to the state conferred jurisdiction on the Superior Court, Richmond County, as fully and effectively as a Governor's warrant pursuant to section 15A-742 would have. We therefore hold that the Superior Court, Richmond County, properly exercised jurisdiction over this matter.

We conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. PHILLIP WAYNE JULIAN

No. 408A95

(Filed 7 March 1997)

1. Criminal Law § 547 (NCI4th Rev.)— first-degree murder—juror's request to be replaced—denied

The trial court did not abuse its discretion in a capital first-degree murder prosecution (with a life sentence) by not declaring a mistrial and by not individually questioning a juror about her fitness to continue jury service after the juror requested that she be relieved of her jury duties, stating that she was emotionally distraught and physically ill and that she was ". . . not able to handle someone's fate being in her hands." The trial court properly admonished the jurors not to surrender their honest convictions and there is no indication that the court's instructions were not followed. There is no indication that the juror's ability to be

impartial was impaired and defendant has not shown that he did not receive the treatment that the law requires; thus, neither prejudice nor abuse of discretion has been shown.

Am Jur 2d, Trial §§ 1703, 1708, 1713.

2. Evidence and Witnesses § 179 (NCI4th)— murder of estranged spouse—evidence of interracial sexual relations—excluded

The trial court did not err in the prosecution of defendant for the first-degree murder of his estranged wife by excluding testimony regarding rumors concerning the victim's sexual relations with a black man and possible drug use where defendant argued that this testimony was highly probative of state of mind and should have been admitted to help prove diminished capacity because it may have tipped the scales toward second-degree murder. The trial court could, in its discretion, find that this evidence was being offered to unfairly prejudice the State, to confuse the issues, and to mislead the jury by inflaming the jury's passions against the victim by implying that she was involved in an interracial relationship and that she was a drug user. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 331, 333, 373; Homicide §§ 283, 301, 307.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Wood, J., at the 16 April 1995 Criminal Session of Superior Court, Randolph County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 February 1997.

Michael F. Easley, Attorney General, by Gail E. Weis, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Upon proper indictment, Phillip Wayne Julian (defendant), was tried and convicted of murder in the first degree of his estranged wife, Dena Pierce Julian (Pierce). At the capital sentencing proceeding, the jury did not find the existence of the sole aggravating circumstance submitted and thus recommended a sentence of life

imprisonment. On 4 May 1995, Judge William Z. Wood, Jr. entered a judgment imposing a sentence of life imprisonment.

On appeal to this Court, defendant brings forward two assignments of error. After reviewing the record, transcript, and briefs in this case, we conclude that defendant received a fair trial, free of prejudicial error.

The State's evidence presented at trial tended to show the following facts and circumstances. Defendant and Pierce married in June 1989, when Pierce was eighteen years old and defendant was twenty-five years old. During their marriage, defendant repeatedly beat Pierce, and she moved in with her mother on several occasions. After Pierce and defendant separated in February 1993, defendant continued to harass and threaten her even though she had secured a restraining order after moving in with her mother. On 2 June 1993, defendant went to Pierce's mother's home, told their two children to go outside, and repeatedly stabbed Pierce. She died as a result of loss of blood from multiple stab wounds.

Defendant did not testify at trial but presented the testimony of thirteen witnesses during the guilt/innocence phase of the trial. Among these witnesses was Dr. Billy Royal, an expert witness in forensic psychiatry. Dr. Royal testified that he evaluated defendant and made diagnoses of mild mental retardation, alcohol addiction and dependency currently in remission, adjustment disorder with disturbance of emotion and conduct, cocaine addiction in remission, major depression and chronic depression, personality disorder with obsessive paranoid dependent borderline features, anxiety disorder and chronic diabetes. In Dr. Royal's opinion, defendant was not able to rationally contemplate what he was doing and did not understand the consequences of his actions on 2 June 1993.

[1] By an assignment of error, defendant contends that the trial court erred by not declaring a mistrial and by failing to individually question a juror about her fitness to continue jury service after the juror requested that she be relieved of her jury duties. We disagree.

The presiding judge is vested with broad discretion in matters relating to the conduct of the trial. *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 635 (1976). "Upon a defendant's motion, the trial court must declare a mistrial '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.' " *State v. Howell*, 343 N.C. 229, 237, 470 S.E.2d 38, 42 (1996) (quoting N.C.G.S. § 15A-1061 (1988)). "[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." *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1996) (quoting *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982) (alteration in original)).

In *State v. King*, 343 N.C. 29, 468 S.E.2d 232 (1996), we said:

> It is well settled that a motion for a mistrial and the determination of whether defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion. *State v. Williamson*, 333 N.C. 128, 423 S.E.2d 766 (1992). The trial court's decision in this regard is to be afforded great deference since the trial court is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable. *Id.* at 138, 423 S.E.2d at 772.

King, 343 N.C. at 44, 468 S.E.2d at 242. The scope of our review, then, is to determine whether the trial court abused its discretion in denying defendant's motion.

In the instant case, the court reconvened following an overnight recess. After ascertaining that all jurors were present in the courtroom, the trial judge excused the jurors so he could "discuss a matter with the attorneys" and told them not to resume deliberations until they had received the verdict sheet. Outside the presence of the jury, the trial court stated, "I have a note here, gentlemen, from one of [the] jurors." The note from juror Liberatore read as follows:

> I regret to admit that I'm not able to handle someone's fate being in my hands. I could not see this coming or I certainly would have expressed this at the onset of this case. I've been emotionally distraught and physically ill since yesterday afternoon when the moment of decision arrived.
>
> I respectfully request that I be dismissed from my duties and an alternate replace me. My sincere apology to all involved.

Defendant argues that it is possible that some event occurred compromising this juror's impartiality and causing her to write this note. Defendant also argues that the trial court did not take satisfactory steps to ensure that this juror was capable of impartially and fairly participating in further deliberations. Therefore, defendant contends

that the trial court abused its discretion in overruling his motion for a mistrial.

We note that the trial court, after discussing the matter with the attorneys, informed the jurors that it was without authority to "excuse any juror after the deliberations are begun," *see* N.C.G.S. § 15A-1215(a) (1988), and instructed the jurors to "decide the case for [themselves] . . . after an impartial consideration of the evidence with [their] fellow jurors." Following the court's instructions, defense counsel stated that there were no further instructions or requests and purportedly renewed the motion for mistrial. The jury then resumed deliberations and returned a verdict of guilty of first-degree murder. After the clerk read the jury's verdict, the jurors were individually polled, and juror Liberatore showed no uncertainty as to her verdict of guilty.

We conclude that no abuse of discretion attended the trial court's ruling with respect to defendant's motion here. The trial court properly admonished the jurors not to "surrender [their] honest conviction as to the weight or effect of the evidence solely because of the opinion of [their] fellow jurors or for the mere purpose of returning a verdict," and there is no indication either in the record or in defendant's argument that the court's instructions were not followed. There is no indication that juror Liberatore's ability to be impartial was impaired, and defendant has not shown that he did not receive the treatment that the law requires. Thus, neither prejudice nor abuse of discretion has been shown. *See State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). Accordingly, we hold that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

[2] By another assignment of error, defendant contends that the trial court erred by excluding highly probative evidence bearing on his mental state at the time of the offense.

At trial, defendant attempted to introduce testimony by his cousin, Joyce Webster, regarding rumors she had heard at her place of employment about Pierce's sexual relations with a black man and possible drug use. Defendant argues that this testimony was highly probative of his state of mind at the time of the murder and that it should have been admitted to help prove his diminished capacity. Defendant contends this evidence may have "tipped the scales" in favor of a conviction of second-degree murder.

The State, however, contends that the trial court did not err in excluding this evidence of rumor and speculation pursuant to Rule 403 of the North Carolina Rules of Evidence. The State argues that "[d]efendant was able to present evidence of his diminished capacity without resorting to evidence of rumors and appeals to racial prejudice that did not meet the requirements of the rules of evidence."

Rule 403 of the North Carolina Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1992). Relevant evidence is properly admissible unless the judge determines that it must be excluded, for instance, because of "unfair prejudice, confusion of the issues, or misleading the jury." *Id.* " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (quoting N.C.G.S. § 8C-1, Rule 403 commentary (Supp. 1985)). "In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

In the instant case, the trial court, after conducting an extensive *voir dire* of Webster and listening to arguments of counsel, ruled on the admissibility of the evidence by stating, "What we're going to do at this time is exclude it[,] as [its] probative value . . . is substantially outweighed by the danger of unfair prejudice and misleading of the issues and confusion to the jury." The next day, defendant asked the court to reconsider its ruling. When the trial court denied defendant's request, defendant requested more specific findings of fact to support its ruling. The court stated:

> The only unfair prejudice to the State is racial in nature, that it inflames the passions of the jury to prove unfounded allegations that [the victim] was using drugs when there's no evidence whatsoever of that. It's inflaming the passions of the jury in a racial manner to use bigotry and prejudice to secure a verdict in this case rather than the law and the facts.

We conclude that the trial court did not abuse its discretion in excluding Webster's testimony about rumors she had heard at her place of employment regarding the victim. The trial court could find, in its discretion, that this evidence was being offered to unfairly prejudice the State, to confuse the issues, and to mislead the jury by inflaming the jury's passions against the victim by implying that she was involved in an interracial relationship and that she was a drug user. Accordingly, we reject this assignment of error.

For the foregoing reasons, we hold that defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. DANNY DEAN FROGGE

No. 413A95

(Filed 7 March 1997)

Evidence and Witnesses § 3107 (NCI4th)— prior inconsistent statement—inadmissibility for corroboration—prejudice to defendant

In a prosecution of defendant for the first-degree murders of his father and stepmother, a witness's prior inconsistent statement to the police as to what defendant told him about the murders was inadmissible hearsay and improperly admitted under the guise of corroboration. Furthermore, defendant was prejudiced by the erroneous admission of this statement where the witness's trial testimony tended to show that defendant's father had provoked him by hitting him with a metal bar before defendant stabbed him, but his prior statement suggested that defendant started stabbing his father before he was hit with a metal bar, thus weakening defendant's case for a lesser verdict; inconsistencies between the witness's prior statement and his trial testimony as to when defendant took money from his father's wallet went to the heart of the prosecution's case for felony murder; and the witness testified at trial that defendant gave no indication as to why he stabbed his stepmother, but his prior statement provided a motive and *means rea* for first-degree murder by suggesting that he hated his stepmother.

Am Jur 2d, Witnesses §§ 929, 930.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case—modern state cases. 30 ALR4th 414.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing one sentence of death and another of life imprisonment entered by Wood, J., on 13 September 1995 in Superior Court, Forsyth County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 11 February 1997.

Michael F. Easley, Attorney General, by David Roy Blackwell and Ellen B. Scouten, Special Deputy Attorneys General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant.

MITCHELL, Chief Justice.

Defendant Danny Dean Frogge was indicted on 3 July 1995 for the first-degree murders of Robert Edward Frogge and Audrey Yvonne Frogge. He was tried capitally to a jury at the 28 August 1995 Criminal Session of Superior Court, Forsyth County. The jury found defendant guilty of both counts of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. After a capital sentencing proceeding, the jury recommended a sentence of life imprisonment as to the murder of Robert Frogge and a sentence of death as to the murder of Audrey Frogge. The trial court sentenced defendant accordingly.

The State's evidence tended to show *inter alia* that on 4 November 1994, defendant stabbed and killed his father, Robert Frogge, and his invalid stepmother, Audrey Frogge. After his arrest, defendant was incarcerated in the Forsyth County jail, where he met Gregory Tew, another jail inmate. Tew testified that about four months prior to trial, defendant approached Tew and asked Tew to pay him $5,000 in exchange for defendant's full story concerning the murders. Defendant told Tew, who was awaiting trial on rape charges, that Tew could help himself with authorities by recounting defend-

ant's story to them. Tew could not raise that amount. Defendant ultimately reduced the demand by half, but Tew never paid him anything.

Tew also testified that about two months prior to trial, defendant recounted the killings to Tew, and the recounting consisted of the following: Defendant, who lived with his father and stepmother in his father's house, got home from work on 4 November 1995 and began drinking. At some point between 8:00 and 9:00 p.m., his stepmother and father told defendant to get out of the house since he was drinking. Defendant refused, and an argument ensued between defendant and his father in which his father struck him with a metal bar. The blow left a bruise on defendant's side and arm where he blocked it. Defendant then stabbed his father with a butcher knife he obtained from the kitchen. Defendant did not indicate in what room of the house the initial confrontation occurred, but said that it ended in the bedroom, where he stabbed his father in the back as his stepmother watched. From her bed, Audrey Frogge said, "Please don't kill me," and defendant stabbed her in the stomach. Defendant related that he then changed his clothes; disposed of his bloody clothing and the knife in the woods; and drove to a friend's house, where he drank and partied. He returned to the house at around 4:00 or 4:30 a.m. and called the police. Defendant then removed his father's wallet from the back pocket of his father's pants, and, removing some money in order to fake a robbery, defendant laid the wallet and its remaining contents beside his father's body.

According to Tew's testimony, defendant also explained to Tew that he had been drinking the night of the murders and that he had problems with his father while defendant was growing up. When asked on direct examination whether defendant stated why he stabbed his stepmother, Tew stated that he did not. While Audrey Frogge was hospitalized for diabetes, defendant told his father that it would be a mess if she came back into the house. Defendant also told Tew that he remembered stabbing her more times than he stabbed his father. On cross-examination during trial, Tew testified that defendant felt telling Tew the background surrounding the killings would assist defendant in avoiding the death penalty and that Tew's testimony at defendant's trial would assist Tew as well. Tew also testified that no money ever changed hands.

In an assignment of error, defendant argues that the trial court erred by admitting a noncorroborative and inadmissible prior statement which Gregory Tew made to the Winston-Salem police.

Defendant argues that Tew's unsworn statement was not admissible under the prior consistent statement exception to the hearsay rule because it contradicted Tew's trial testimony and contained information grossly prejudicial to defendant. Thus, defendant contends that he was prejudiced by the admission of conflicting evidence under the guise of corroboration and is entitled to a new trial. We agree.

The State called Gregory Tew to testify about statements defendant allegedly made to him while they were incarcerated together in the Forsyth County jail. Later, over defendant's objection, the State called Detective Dennis Scales to read aloud the contents of a statement Tew made to him on the day Tew entered into a plea agreement with the State regarding his statutory rape charge. The statement was offered for corroborative purposes and was received into evidence subject to the court's instruction that the jury not consider the statement as substantive evidence, but only in determining Tew's credibility.

Defendant points to three instances in which Tew's prior statement conflicts with his trial testimony. In the first instance, Tew testified that defendant stated that Robert Frogge, Audrey Frogge, and defendant were arguing when Robert struck defendant with a metal bar. Tew testified that defendant told him that after his father struck him, defendant got a knife from the kitchen and stabbed Robert and then Audrey. Yet in his statement to the police, Tew said that he did not remember whether defendant said he had the knife first or his dad had the bar first. Second, Tew testified that after the murders, defendant went to Kim Hairston's house and partied, after which he returned to the home around 4:30 a.m. According to Tew's testimony, after returning home, defendant removed money from his father's wallet in order to make it look like a robbery. Yet contrary to this testimony, Tew told the police that defendant got the wallet out of his father's pocket and removed money from it *prior* to driving to Kim Hairston's house. Finally, with regard to the killing of Audrey Frogge, Tew testified that defendant did not say why he stabbed his stepmother. Yet in his statement to police, Tew stated that defendant told him he hated his stepmother because she was always "bossing" him around and threatening to throw him out of the house.

Defendant argues that prior contradictory statements do not corroborate a witness' testimony and may not be admitted under such a theory. We agree. The official commentary to Rule 613 of the North Carolina Rules of Evidence states that "foundation requirements for admitting inconsistent statements will be governed by case law."

N.C.G.S. § 8C-1, Rule 613 official commentary (1992). We therefore look to our cases decided after the North Carolina Rules of Evidence were enacted as a guide to determine the propriety of admitting non-corroborative testimony. We have stated that a "witness's prior statements as to facts not referred to in his trial testimony *and not tending to add weight or credibility* to it are not admissible as corroborative evidence." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 574 (1986). Moreover, we also stated in *Ramey* that "the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony." *Id.* In the present case, we conclude that Tew's prior statement contained information manifestly contradictory to his testimony at trial and did not corroborate the testimony. Thus, we hold that it was error for the trial court to admit Tew's statement to the police for the purpose of corroborating Tew's testimony.

Defendant further contends that the inconsistencies between Tew's testimony and his statement to the police were manifestly prejudicial to defendant. We agree with this contention. Tew's testimony tended to show that before defendant stabbed his father, defendant's father had provoked him by hitting him with a metal bar. Based on this evidence, the jury could have found defendant guilty of a lesser charge than first-degree murder for stabbing his father. Tew's prior statement suggested that defendant started stabbing Robert Frogge before he was hit with the metal bar, thus weakening defendant's case for a lesser verdict. Further, as to when defendant took money from his father's wallet, the inconsistencies between Tew's prior statement and his trial testimony went to the heart of the prosecution's case for felony murder. Under the version of facts presented in Tew's testimony, a reasonable person could have concluded that there was no continuous transaction between the stabbings and the taking of the money and, thus, no felony murder. Finally, with regard to the killing of Audrey Frogge, Tew's testimony was that defendant gave no indication as to why he stabbed her. Yet Tew's prior statement, suggesting that defendant hated his stepmother, provided a motive and *mens rea* for first-degree murder. Because the evidence of this statement was hearsay inadmissible for the purposes of corroboration and because the trial court improperly admitted the statement under the guise of corroboration, we conclude that defendant was unfairly prejudiced in this case and is therefore entitled to a new trial.

NEW TRIAL.

STATE OF NORTH CAROLINA v. JEFFREY KARL MEYER

No. 379A95

(Filed 7 March 1997)

Constitutional Law § 342 (NCI4th)— capital sentencing—jury selection—in-chambers conference without defendant—prejudicial error

The trial court violated defendant's nonwaivable right to be present at all stages of his capital trial by conducting an in-chambers conference with the attorneys present but without defendant during jury selection in this capital sentencing proceeding. Furthermore, the State has failed to meet its burden of showing that the error was harmless beyond a reasonable doubt where the conference was not recorded, the substance of the conference was not summarized on the record in open court, and the nature and contents of the discussion cannot otherwise be gleaned from the record.

Am Jur 2d, Criminal Law § 913.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific cases. 33 ALR4th 429.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Smith (Donald L.), J., at the 21 August 1995 Mixed Session of Superior Court, Cumberland County, upon a jury verdict of guilty of two counts of first-degree murder. Heard in the Supreme Court 11 February 1997.

Michael F. Easley, Attorney General, by William N. Farrell, Jr., Senior Deputy Attorney General, and Ellen B. Scouten, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

ORR, Justice.

On 16 May 1988, defendant pled guilty to two counts of first-degree murder. On 3 June 1988, a jury was impaneled in Superior Court, Cumberland County, for a capital sentencing proceeding pur-

suant to N.C.G.S. § 15A-2000. During the presentation of defendant's evidence in this sentencing proceeding, defendant escaped from the Cumberland County Jail. On 14 June 1988, upon motion by defendant's counsel, the trial court declared a mistrial. Defendant was apprehended on 19 June 1988. Following several motions by defendant, the sentencing proceeding was moved to New Hanover County.

On 16 November 1988, upon recommendation of the jury, the trial court imposed two sentences of death. Defendant appealed those sentences of death pursuant to N.C.G.S. § 7A-27(a). On defendant's first appeal, this Court concluded defendant was entitled to a new capital sentencing proceeding under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *State v. Meyer*, 330 N.C. 738, 412 S.E.2d 339 (1992).

Defendant's second capital sentencing proceeding was heard at the 21 August 1995 Mixed Session of Superior Court, Cumberland County. On 31 August 1995, upon recommendation of the jury, defendant was once again sentenced to death for both of the first-degree murder convictions.

Except as necessary for an understanding of the issues, we will not repeat the evidence inasmuch as it is adequately summarized in our prior opinion on the first appeal.

Defendant brings forth several issues for review, but we need focus only on defendant's contention that the trial court violated his constitutional right to be present at all stages of his capital trial. Defendant contends that twice during his capital sentencing proceeding, the trial court failed to ensure defendant's presence as required by the North Carolina Constitution. However, we address specifically only the unrecorded in-chambers conference that took place with the attorneys in defendant's absence.

The defendant in a capital trial must be present at every stage of the proceeding. N.C. Const. art. I, § 23. This constitutional mandate serves to safeguard both the defendant's and society's interests in reliability in the imposition of capital punishment. *State v. Huff*, 325 N.C. 1, 30, 381 S.E.2d 635, 651 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). As this Court has previously stated:

> "The confrontation clause of the Constitution of North Carolina guarantees the right of this defendant to be present at *every* stage of the trial. *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651

(1989); N.C. Const. Art. I, § 23 (1984). This state constitutional protection afforded to the defendant imposes on the trial court the affirmative duty to insure the defendant's presence at every stage of a capital trial. The defendant's right to be present at every stage of the trial 'ought to be kept forever sacred and inviolate.' *State v. Blackwelder*, 61 N.C. 38, 40 (1866)[, *overruled on other grounds by State v. Huff*, 325 N.C. 1, 381 S.E.2d 635]. In fact, the defendant's right to be present at every stage of his capital trial is not waivable. *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989)[, *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)]; *State v. Huff*, 325 N.C. at 31, 381 S.E.2d at 652."

State v. Moss, 332 N.C. 65, 73-74, 418 S.E.2d 213, 218 (1992) (quoting *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990)).

In the present case, on the second day of jury selection, the trial court addressed the first group of seated jurors and gave them general instructions. At the end of this exchange with the jurors, the transcript reflects that the following occurred:

JUROR #2: We need to give you our name and numbers on the side over here?

CLERK: Go to the jury room. I'm going to go to the jury room to get their names and numbers.

COURT: All right. And you can go ahead and send the other jurors —

CLERK: —to break.

COURT: That's right, because I need you to pull them. Let me see counsel in chambers.

(Counsel left the courtroom with the Judge and subsequently returned. Defendant remained in the courtroom.)

COURT: All right. Have the others—let me have the jurors—the other jurors now.

There is no record of what occurred in-chambers between the judge and the attorneys.

This Court has previously held that an in-chambers conference is a "critical stage" of a defendant's capital trial at which he has a constitutional right to be present. *See State v. Buchanan*, 330 N.C. 202,

221, 410 S.E.2d 832, 843 (1991). "Notwithstanding an accused's right to be present, certain violations of this right may be harmless if such appears from the record." *Id.* at 222, 410 S.E.2d at 844. In *State v. Brogden*, 329 N.C. 534, 541-42, 407 S.E.2d 158, 163 (1991), this Court concluded that it was error for the trial court to conduct an in-chambers conference with the attorneys but without defendant.

Based upon the precedent set in *Brogden*, 329 N.C. 534, 407 S.E.2d 158, this Court in *State v. Exum*, 343 N.C. 291, 470 S.E.2d 333 (1996), held that the trial court had violated defendant's nonwaivable right to be present at all stages of his capital trial by conducting an unrecorded in-chambers conference during the trial with the attorneys present but out of the hearing of defendant. In *Exum*, the following exchange occurred immediately after the examination of a defense witness:

> THE COURT: All right. Members of the jury, we're going to take our lunch break now—well, let me confer with the lawyers a minute.
>
> Sheriff, take the jury back in the jury room.
>
> (The jury is absent.)
>
> THE WITNESS: Can I be excused, Judge?
>
> THE COURT: Wait just a moment.
>
> (A discussion off the record in chambers with the Court and all four counsel. The defendant was not present.)
>
> THE COURT: All right. Let's—I think you're excused, Dr. Brown.

Id. at 294, 470 S.E.2d at 335. After noting that the in-chambers conference was a part of the trial from which defendant was excluded, this Court held that

> because the in-chambers conference was not recorded and the nature and content of the private discussion cannot be gleaned from the record, the State failed to meet its burden of showing the error was harmless beyond a reasonable doubt, and we are, therefore, required to order a new trial.

Id. at 295-96, 470 S.E.2d at 335.

Similarly, in the present case, an in-chambers conference occurred between the trial judge and counsel without defendant

being present. Here, the conference took place during jury selection rather than during the presentation of evidence. However, this distinction is irrelevant. As we have already noted, the selection of the jury is a "critical stage" of the trial. Accordingly, defendant's constitutional right to be present at every stage of his capital trial was violated. Once a violation of the right to be present is apparent, the burden shifts to the State to show that it is harmless beyond a reasonable doubt. *Huff*, 325 N.C. at 32-35, 381 S.E.2d at 653-55.

In the present case, as in *Exum*, the in-chambers conference was unrecorded. We have previously held that under similar circumstances where defendant has a constitutional right to be present at a critical stage of his trial and the trial court conducts private conferences or discussions in the defendant's absence, but the substance of the private discussions is not revealed in the record, a new trial is required. *State v. Johnston*, 331 N.C. 680, 417 S.E.2d 228 (1992); *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992); *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991); *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990).

Here, because the in-chambers discussion is not included in the record, we do not know the substance of the in-chambers conference held with the attorneys in defendant's absence. Consequently, we are unable to determine whether the error committed is harmless beyond a reasonable doubt. Because the in-chambers conference was not recorded, and the substance of the conference was not summarized on the record in open court, and the nature and content of the discussion cannot otherwise be gleaned from the record, the State has failed to meet its burden of showing the error was harmless beyond a reasonable doubt. Accordingly, we are required to order a new sentencing proceeding.

For the foregoing reasons, we vacate the sentences of death and remand this case to Superior Court, Cumberland County, for a new capital sentencing proceeding.

DEATH SENTENCES VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

STATE OF NORTH CAROLINA v. TONY RAY McGIRT

No. 198A96

(Filed 7 March 1997)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 122 N.C. App. 237, 468 S.E.2d 833 (1996), affirming a judgment entered by Ellis (B. Craig), J., on 20 April 1995 in Superior Court, Scotland County. On 5 September 1996 this Court retained defendant's notice of appeal as to a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1). Heard in the Supreme Court 12 February 1997.

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

Doran J. Berry and Ronnie M. Mitchell for defendant-appellant.

American Civil Liberties Union of North Carolina Legal Foundation, by Deborah K. Ross, amicus curiae.

PER CURIAM.

Justices Webb, Whichard, Parker and Lake voted to affirm the decision of the Court of Appeals for the reasons stated in the majority opinion by Greene, J. Chief Justice Mitchell and Justices Frye and Orr voted to reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion by Smith, J. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

BROWER v. KILLENS

[345 N.C. 625 (1997)]

STEPHEN MOORE BROWER v. ALEXANDER KILLENS, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES

No. 322PA96

(Filed 7 March 1997)

On discretionary review of a unanimous decision of the Court of Appeals, 122 N.C. App. 685, 472 S.E.2d 33 (1996), affirming an order entered on 22 June 1995 by Albright, J., in Superior Court, Guilford County. Heard in the Supreme Court 14 February 1997.

Smith, Follin & James, L.L.P., by Seth R. Cohen and Charles A. Lloyd, for petitioner-appellee.

Michael F. Easley, Attorney General, by Sondra C. Panico, Associate Attorney General, and Hal F. Askins, Special Deputy Attorney General, for respondent-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. FRANKLIN BALLENGER

No. 352A96

(Filed 7 March 1997)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 123 N.C. App. 179, 472 S.E.2d 572 (1996), reversing an order dismissing the charges against defendant entered by Eagles, J., on 5 May 1995, in Superior Court, Guilford County. Heard in the Supreme Court 11 February 1997.

Michael F. Easley, Attorney General, by Christopher E. Allen, Assistant Attorney General, for the State.

James H. Price, III, P.A., by James H. Price, III, for defendant-appellant.

American Civil Liberties Union of North Carolina Legal Foundation, by Deborah K. Ross, amicus curiae.

PER CURIAM.

AFFIRMED.

STATE v. HINES

[345 N.C. 627 (1997)]

STATE OF NORTH CAROLINA v. EDNA HINES

No. 301PA96

(Filed 7 March 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 545, 471 S.E.2d 109 (1996), finding no error in the judgment entered by Duke, J., at the 3 January 1995 Criminal Session of Superior Court, Hertford County. Heard in the Supreme Court 14 February 1997.

Michael F. Easley, Attorney General, by Sharon C. Wilson, Associate Attorney General, for the State.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon, and Howard C. McGlohon, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

DANIEL G. DODDER AND JO ANN DODDER v. YATES CONSTRUCTION COMPANY, INC.

No. 299PA96

(Filed 7 March 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 577, 475 S.E.2d 257 (1996), affirming an order entered 15 March 1995 by Bridges, J., in Superior Court, Forsyth County. Heard in the Supreme Court 13 December 1996.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Gusti W. Frankel; and Lynda S. Abramovitz, Assistant City Attorney, for appellee City of Winston-Salem.

Bennett & Blancato, LLP, by Richard V. Bennett and William A. Blancato, for defendant-appellant.

PER CURIAM.

AFFIRMED.

HIGGS v. SOUTHEASTERN CLEANING SERVICE

[345 N.C. 629 (1997)]

WALTER T. HIGGS, EMPLOYEE v. SOUTHEASTERN CLEANING SERVICE, EMPLOYER, AND CNA INSURANCE COMPANY, CARRIER

No. 289PA96

(Filed 7 March 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 456, 470 S.E.2d 337 (1996), reversing an opinion and award entered 26 May 1995 by the North Carolina Industrial Commission. Heard in the Supreme Court 13 February 1997.

George W. Lennon for plaintiff-appellant.

Robinson Maready Lawing & Comerford, L.L.P., by Jane C. Jackson and Jolinda J. Steinbacher, for defendant-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

N.C. CENTRAL UNIVERSITY, PETITIONER v. BOYD S. TAYLOR, RESPONDENT

No. 282PA96

(Filed 7 March 1997)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 122 N.C. App. 609, 471 S.E.2d 115 (1996), vacating in part and affirming in part an order entered by Cashwell, J., on 20 April 1995 in Superior Court, Wake County. Heard in the Supreme Court 13 February 1997.

Michael F. Easley, Attorney General, by Thomas O. Lawton III, Associate Attorney General, for petitioner-appellant.

McSurely Dorosin & Osment, by Alan McSurely, Mark Dorosin, and Ashley Osment, for respondent-appellee.

PER CURIAM.

AFFIRMED.

MAHONEY v. RONNIE'S ROAD SERVICE

[345 N.C. 631 (1997)]

JIMMY MAHONEY AND JUDY MAHONEY v. RONNIE'S ROAD SERVICE, INDIAN HEAD INDUSTRIES, INC., MGM BRAKES

No. 171A96

(Filed 7 March 1997)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 122 N.C. App. 150, 468 S.E.2d 279 (1996), affirming an order granting summary judgment in favor of defendants Indian Head Industries and MGM Brakes entered on 19 May 1994 by Stephens (Donald W.), J., in Superior Court, Wake County. Heard in the Supreme Court 12 February 1997.

Twiggs, Abrams, Strickland, & Trehy, P.A., by Douglas B. Abrams; and Gate & Mathers, Ltd., by Martin H. Mathers, for plaintiff-appellants.

Yates, McLamb & Weyher, L.L.P., by Kirk G. Warner and Gwenda L. Laws, for defendant-appellees Indian Head Industries and MGM Brakes.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., Bynum M. Hunter, and John J. Korzen, for North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

AFFIRMED.

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

IN RE RENFER

[345 N.C. 632 (1997)]

IN RE: INQUIRY CONCERNING A JUDGE, NO. 194 SUSAN O. RENFER, RESPONDENT

No. 498A96

(Filed 27 March 1997)

This matter is before the Court upon a recommendation by the Judicial Standards Commission (Commission), filed with the Court on 26 November 1996, that Judge Susan O. Renfer, a Judge of the General Court of Justice, District Court Division, Tenth Judicial District of the State of North Carolina, be removed from office as provided in N.C.G.S. § 7A-376. Heard in the Supreme Court 20 March 1997.

The following facts are based upon the record as tendered by the Judicial Standards Commission and the transcript of the proceedings before it: On 24 May 1995 and 18 June 1995, the Commission, in accordance with its Rule 7, notified respondent that it had ordered a preliminary investigation to determine whether formal proceedings should be instituted against her under the Commission's Rule 8. The notice generally informed respondent of the areas of misconduct to be investigated, that the investigation would remain confidential in accordance with N.C.G.S. § 7A-377 and Commission Rule 4, and that respondent had the right to present for the Commission's consideration any relevant matters which she might choose.

On 14 May 1996, respondent's attorney of record, Edward E. Hollowell, was served with a formal notice of complaint in which the Commission concluded that formal proceedings should be instituted against respondent based on the evidence developed by the preliminary investigation into this inquiry. An answer was filed on 3 June 1996 by Mr. Hollowell in which respondent categorically denied that she had committed any act or made any statement that legally or ethically constitutes willful misconduct in office. According to the record, when the Commission filed the complaint, Mr. Hollowell had informed respondent, but not the Commission, that he would not be able to represent her at the Commission hearing because of the demands of his practice. Mr. Hollowell, however, agreed to assist respondent in finding another attorney to represent her. According to respondent, in late May, Mr. Hollowell contacted a firm to discuss the possibility that it would represent her at the Commission hearing. Mr. Hollowell indicated that the partner he spoke with would be pleased to represent respondent. Respondent spoke with this attorney on 10 July 1996, and he confirmed his willingness to represent her.

On 18 June 1996, respondent was served with a notice of formal hearing which stated that the hearing was scheduled to commence at 9:30 a.m. on Monday, 14 October 1996. Apparently, this date was arrived at through discussions between Mr. Hollowell and the Commission. Respondent contends, however, that in mid-September 1996, the attorney she had retained as counsel with the assistance of Mr. Hollowell informed her that his firm would not be able to continue representation because of a conflict of interest.

In a letter to the Commission dated 17 September 1996, respondent requested a continuance of the hearing, explaining that she needed time to retain counsel. She further noted that several attorneys had agreed to consider representing her, but all needed more time to adequately prepare for the hearing. In an order entered on 25 September 1996 and signed by Judge Sidney S. Eagles, Jr., Chair of the Judicial Standards Commission, the request for a continuance was denied. On 14 October 1996, respondent appeared at the hearing before the Commission and once again moved for a continuance. After hearing from both respondent and counsel for the Commission, William N. Farrell, the Commission denied this motion. Thereafter, the Commission conducted a two-day hearing which respondent attended. However, respondent did not present evidence at the hearing or participate in her defense. At the conclusion of the hearing, respondent made a motion to hold the hearing open for a brief period in order to retain counsel and present evidence on her behalf. This motion was also denied by the Commission.

On 14 November 1996, the Commission issued a decision in which it recommended to this Court that respondent be removed from office. The conduct upon which the Commission based its recommendation included the following: (1) that while presiding over a domestic-relations session of court on 23 May 1995, respondent forcefully grabbed an attorney's clothing and shook her for several seconds; (2) that on 30 March 1995, while presiding over a criminal session of court, respondent refused to hear a case, falsely indicated on the case file that the case had not been reached, and reset the case for a later date; (3) that on 15 February 1995, respondent reduced an award of child support when no written or oral motion for modification of child support had been filed; (4) that on 30 March 1995, while presiding over the trial of *State v. Roger H. Lake, Jr.*, respondent set a punitive $3,000 cash bond when defendant gave notice of appeal; (5) that in a correspondence dated 18 April 1995, respondent accused

a superior court judge of improperly modifying the $3,000 bond which she had set in the *Lake* case; (6) that on 21 September 1995, while presiding over a criminal and infractions session of court, respondent falsely indicated on two case files that defendants had pled guilty; (7) that during proceedings on 28 March 1995, respondent attempted to convince a defendant to plead guilty in the absence of defendant's retained counsel; (8) that during the spring of 1995, six incidents took place in which respondent made inappropriate statements, including statements of a racial and political nature, in and out of court that were unbecoming to the respondent in the performance of her judicial duties and demeaned the integrity and dignity of the proceedings before the respondent and her judicial office.

William N. Farrell, Jr., Special Counsel, for the Judicial Standards Commission.

American Center for Law & Justice, by Jay Alan Sekulow, pro hac vice, Larry Crain, pro hac vice, and John J. Stepanovich, pro hac vice; and Roger Wiles for respondent-appellant.

ORDER OF REMAND.

This order is entered on behalf of a divided court, with Justices Whichard, Parker, Lake, and Orr in the majority and Chief Justice Mitchell and Justices Frye and Webb dissenting.

The Judicial Standards Commission is a statutorily created body comprised of one Court of Appeals judge, one Superior Court judge, and one District Court judge, each appointed by the Chief Justice of the Supreme Court; two members of the State Bar who have actively practiced in the courts of the State for at least ten years, elected by the State Bar Council; and two citizens who are not judges, active or retired, or members of the State Bar, appointed by the Governor. N.C.G.S. § 7A-375 (1995). The Commission's function is to investigate complaints against sitting judges and candidates for judicial office and to recommend to the Supreme Court what, if any, disciplinary action should be taken. The Commission is empowered by N.C.G.S. § 7A-377 to investigate complaints, compel the attendance of witnesses and the production of evidence, conduct a hearing which affords due process of law, and make recommendations to this Court about what disciplinary action, if any, should be taken. N.C.G.S. § 7A-377 (1995). The Commission "functions as an arm of the Court to conduct hearings for the purpose of aiding the Supreme Court

in determining whether a judge is unfit or unsuitable." *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978). However, original jurisdiction to discipline judges lies solely within the Supreme Court by virtue of statutory authority. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). "The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation." N.C.G.S. § 7A-377.

We further note that this Court does not review recommendations from the Commission as it would an appeal from a lower court or state agency. As noted above, in reviewing Commission recommendations, the Supreme Court sits not as an appellate court, but rather as a court of original jurisdiction. *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912. Thus, this Court may make its own findings of fact or may choose to adopt those of the Commission as its own if it finds that they are supported by clear and convincing evidence. *In re Hardy*, 294 N.C. at 98, 240 S.E.2d at 373. "[The Commission's] recommendations are not binding upon the Supreme Court, which will consider the evidence of both sides and exercise its independent judgment as to whether it should censure, remove or decline to do either." *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977).

Respondent contends that she was entitled to a continuance in order to have time to retain counsel to represent her at the Commission hearing. By virtue of the denial of her request for a continuance, respondent argues that she was compelled to attend the hearing without counsel, and she was thus denied the opportunity to effectively participate in the hearing. In a letter to the Commission dated 17 September 1996, respondent requested that the Commission continue her 14 October 1996 hearing for at least forty-five days. Respondent cites the withdrawal of two attorneys previously retained by her as the grounds for her motion. Respondent further notes that she had found several attorneys who had agreed to consider representing her, all of whom required additional time in order to prepare for the hearing. On 25 September 1996, the Commission denied respondent's motion to continue. On 30 September 1996, respondent's initial attorney of record wrote a letter confirming the fact that he had withdrawn as respondent's counsel and urging the Commission to grant respondent's motion. Respondent renewed her motion for a continuance on the date of the hearing, 14 October 1996, and once again the Commission denied it.

It is unnecessary for this Court to determine whether, in fact, respondent's due process interests were violated, as contended, or whether the Judicial Standards Commission abused its discretion in denying respondent's request for a continuance. The majority is unwilling to review a recommendation for removal of a judge under these particular circumstances, where respondent was unrepresented; requested a continuance in order to obtain legal counsel; and having had that request denied, did not participate in a meaningful way in the hearing.

As Justice I. Beverly Lake, Sr., acknowledged in a separate opinion in the disciplinary case of *In re Hardy*, removal of a judge is a matter of the most serious consequences where

> [the judge] is, thereby, not only deprived of the honor, power and emoluments of the office for the remainder of his term, but is also permanently disqualified from holding further judicial office in this State and G.S. 7A-376 expressly provides that he "receives no retirement compensation," regardless of how many years he has served with fidelity and distinction or how much he had paid into the State Retirement Fund pursuant to the provisions of the Retirement Act.

In re Hardy, 294 N.C. at 100-01, 240 S.E.2d at 374 (Lake, J., concurring in part and dissenting in part). Justice Lake added:

> The more serious consequence is that the people, who elected him to be their judge, are deprived of his services for the remainder of his term. It is not a light thing for this Court to assume the power to say to the people of North Carolina, "You have lawfully elected this judge, but we have determined that he cannot serve you."

Id. at 101, 240 S.E.2d at 374-75. Thus, a recommendation of removal requires that this Court ensure respondent was provided an adequate opportunity to participate in the hearing and to defend the charges against her. " 'It is fundamental that both unfairness and the appearance of unfairness should be avoided.' " *Crump v. Board of Educ.*, 326 N.C. 603, 624, 392 S.E.2d 579, 590 (1990) (quoting *American Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966)).

Counsel for the Judicial Standards Commission contends that respondent was dilatory in obtaining counsel and did not move expeditiously in preparing for the hearing which had been set for four

months. Respondent vigorously denies this contention on the grounds that two attorneys retained by her withdrew as counsel and a third made his representation contingent upon a continuance. In the face of an inconclusive record as to the validity of the respective contentions, we decline to review a recommendation for removal at this juncture. The recommendation involves removing a judge from office and precluding that judge from ever again participating in the judiciary. This matter is of such gravity that, absent clear and convincing evidence of dilatory conduct on the part of respondent in securing counsel, it requires a full evidentiary hearing where respondent has adequate opportunity to secure counsel and the opportunity to actively participate in her defense.

Therefore, this case is remanded to the Judicial Standards Commission for the purpose of holding a new hearing. This Court will then review the recommendation of the Commission as to what, if any, disciplinary action should be taken against respondent.

We note from the record and oral argument that respondent is currently represented by counsel. One is in-state counsel of record, and the others were admitted *pro hac vice* by this Court. It has been represented to this Court in respondent's brief that "Judge Renfer now has counsel, so this Court need not order a continuance on remand." Therefore, this Court, pursuant to its original jurisdiction over discipline of judges, further orders that should there be any motions for withdrawal of counsel, they should be made directly to this Court. In his brief for the Judicial Standards Commission, Mr. Farrell denies that the Commission has the power to allow counsel to enter or withdraw from a case before it. He states: "The rules of the Commission do not provide for the entry or withdrawal of counsel in Commission proceedings. Unlike civil and criminal proceedings, the Commission rules do not address withdrawal of counsel." There is no doubt, however, that this Court has such authority.

Therefore, the matter is remanded to the Judicial Standards Commission for further proceedings not inconsistent with this order. Such proceedings shall be conducted and a recommendation, if any, made to this Court as expeditiously as feasible. Chief Justice Mitchell and Justices Frye and Webb dissent from this order on the grounds that this case should not be remanded but that the Commission's recommendation for removal of respondent should be addressed on its merits.

So ordered by the Court in Conference, this the 27th day of March, 1997.

JUSTICE ROBERT F. ORR
For the Court

Chief Justice MITCHELL and Associate Justices FRYE and WEBB dissent.

ALLEN v. EFIRD

No. 437P96

Case below: 123 N.C.App. 701

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

ALT v. JOHN UMSTEAD HOSPITAL

No. 45P97

Case below: 125 N.C.App. 193

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

BISHOP v. MEMORIAL MISSION HOSPITAL

No. 420P96

Case below: 123 N.C.App. 784

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 1997.

BULLARD v. TIME INS. CO.

No. 77P97

Case below: 124 N.C.App. 669

Motion by defendant (Time Ins.) to dismiss petition for writ of certiorari allowed 4 March 1997.

CITY OF CHARLOTTE v. AIRPORT CENTER LTD. PART.

No. 463P96

Case below: N.C.App. 228

Petition by defendant (Airport Center) for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

DEPT. OF TRANSPORTATION v. ISOM

No. 407P96

Case below: 123 N.C.App. 356

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 1997.

EMPLOYMENT SECURITY COMM. v. PEACE

No. 261PA96

Case below: 122 N.C.App. 313

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 6 March 1997 for the purpose of remanding to N.C. Court of Appeals for reconsideration in light of this Court's decision in *Soles v. City of Raleigh.*

FISHER v. GAYDON

No. 510P96

Case below: 124 N.C.App. 442

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

FLETCHER v. FLETCHER

No. 430P96

Case below: 123 N.C.App. 744

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

FOSTER v. HARRELL

No. 52P97

Case below: 124 N.C.App. 785

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

FREDERICK v. DUPLIN MEDICAL ASSN.

No. 46P97

Case below: 125 N.C.App. 214

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

HAND v. CONNECTICUT INDEMNITY CO.

No. 50P97

Case below: 124 N.C.App. 774

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

HARTFORD UNDERWRITERS INS. CO. v. BECKS

No.401P96

Case below: 123 N.C.App. 489

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 1997.

HOLT v. SARA LEE CORP.

No. 31PA97

Case below: 124 N.C.App. 666

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 March 1997.

IN RE BRAKE

No. 29PA97

Case below: 125 N.C.App. 211

Petition by petitioner (Guardian Ad Litem) for discretionary review pursuant to G.S. 7A-31 allowed 6 March 1997. Petition by petitioner (Vance Co.) for discretionary review pursuant to G.S. 7A-31 allowed 6 March 1997.

IN RE SPRINGMOOR, INC.

No. 79P97

Case below: 125 N.C.App. 184

Motion by appellant (Wake County) for temporary stay allowed 24 February 1997.

KRAUSS v. WAYNE COUNTY DSS

No. 25PA97

Case below: 124 N.C.App. 785

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 March 1997.

LAMOREAUX v. ASPLUNDH TREE CO.

No. 49P97

Case below: 125 N.C.App. 211

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

McCARVER v. PRESBYTERIAN HOSPITAL

No. 476P96

Case below: 124 N.C.App. 230

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

METROPOLITAN PROPERTY AND CASUALTY
INS. CO. v. CAVINESS

No. 32P97

Case below: 124 N.C.App. 760

Petition by plaintiff for discretionary review pursuant to G.S.. 7A-31 denied 6 March 1997.

N.C. DEPT. OF TRANSPORTATION v. HODGE

No. 559PA96

Case below: 124 N.C.App. 515

Petition by respondent (Glenn Hodge, Jr.) for discretionary review pursuant to G.S. 7A-31 allowed 7 March 1997.

O'CONNOR v. O'CONNOR

No. 481P96

Case below: 124 N.C.App. 230

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

POWELL v. N.C. DEPT. OF TRANSPORTATION

No. 552PA96

Case below: 124 N.C.App. 542

Petition by respondent (N.C. Dept. of Transportation) for discretionary review pursuant to G.S. 7A-31 allowed 6 March 1997.

QUICK v. N.C. DIVISION OF MOTOR VEHICLES

No. 68P97

Case below: 125 N.C.App. 123

Motion by petitioner (Quick) for temporary stay denied 19 February 1997. Petition by petitioner (Quick) for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

SCHWAB v. KILLENS

No. 436P96

Case below: 123 N.C.App. 788

Petition by petitioner (Julie Marie Schwab) for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

STATE v. ALLEN

No. 70A86-4

Case below: Halifax County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Halifax County denied 7 February 1997.

STATE v. ALSTON

No. 416A92-2

Case below: Warren County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Warren County denied 6 March 1997.

STATE v. BASDEN

No. 159A93-2

Case below: Duplin County Superior Court

Motion by Attorney General to dismiss petition for writ of certiorari due to untimely filing denied 6 March 1997. Petition by defendant for writ of certiorari to review the order of the Superior Court, Duplin County denied 6 March 1997.

STATE v. GREEN

No. 519A96

Case below: 124 N.C.App. 269

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question denied and notice of appeal retained 6 March 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

STATE v. HARRIS

No. 345A92-2

Case below: Onslow County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Onslow County denied 6 March 1997.

STATE v. McCRAE

No. 545P96

Case below: 124 N.C.App. 664

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

STATE v. MONSERRATE

No. 55P97

Case below: 125 N.C.App. 22

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

STATE v. MOSELEY

No. 385A92-2

Case below: Forsyth County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Forsyth County denied 6 March 1997.

STATE v. WAMBACH

No. 373P96

Case below: 122 N.C.App. 580

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 1997.

TIMES-NEWS PUBLISHING CO. v. STATE OF N.C.

No. 483P96

Case below: 124 N.C.App. 175

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 March 1997. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1997.

TINCH v. VIDEO INDUSTRIAL SERVICES

No. 528PA96

Case below: 124 N.C.App. 391

Petition by plaintiff (Frederick Tinch) for discretionary review pursuant to G.S. 7A-31 allowed 6 March 1997. Petition by defendant (Hendon Engineering Associates) for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 March 1997.

TOWN OF KILL DEVIL HILLS v. SMITH

No. 438P96

Case below: 123 N.C.App. 790

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 March 1997.

TRULL v. CENTRAL CAROLINA BANK

No. 524A96

Case below: 124 N.C.App. 486

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 6 March 1997.

VEREEN v. HOLDEN

No. 159PA96

Case below: 121 N.C.App. 779

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 6 March 1997. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 6 March 1997 for purpose of remanding to N.C. Court of Appeals for reconsideration in light of this Court's decision in *Soles v. City of Raleigh.*

STATE OF NORTH CAROLINA v. ALLEN LORENZO GAINES AND BRYAN CORNELIUS HARRIS

No. 486A94

(Filed 11 April 1997)

1. Evidence and Witnesses § 1240 (NCI4th)— inculpatory statements to police—noncustodial

The trial court did not err in a capital prosecution for first-degree murder which resulted in a life sentence by denying defendants' motion to suppress statements and physical evidence allegedly obtained as a result of custodial interrogation where the trial court based its conclusions as to defendant Harris on findings that Harris was repeatedly told that he was not under arrest and that he was free to leave at any time, that he signed a written statement that he was not under arrest and was giving a statement voluntarily, and that he had previous experience with the criminal justice system. The trial court's conclusions as to defendant Gaines were based in part on findings that Gaines was told several times that he was not under arrest, that he was repeatedly told that he was free to leave at any time, that he was told that any statement he made would be voluntary, and that he had previous experience with the criminal justice system. The findings were supported by competent evidence and the conclusions that defendants did not undergo custodial interrogation for *Miranda* purposes were correct.

Am Jur 2d, Criminal Law §§ 788 et seq.

What constitutes "custodial interrogation" within the rules of *Miranda v. Arizona* requiring that the suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

2. Searches and Seizures § 8 (NCI4th)— inculpatory statement—defendant's presence at police station—not an unconstitutional seizure

Defendant Harris was not improperly seized in a first-degree murder case (and motions to suppress statements and physical evidence obtained as a result were not erroneously denied) where Harris was repeatedly told that he was not under arrest and that he was free to leave at any time, he signed a written statement that he was not under arrest and was giving a state-

ment voluntarily, and he had had previous experience with the criminal justice system.

Am Jur 2d, Searches and Seizures § 1.

3. Evidence and Witnesses § 1218 (NCI4th)— murder—inculpatory statement—knowing, voluntary, intelligent

The statements of defendant Gaines were not erroneously admitted in a capital first-degree murder prosecution which resulted in a life sentence where defendant contended that the statements were involuntary, unknowing, and unintelligent. Defendant was never taken into custody, he voluntarily agreed to accompany police officers to the police station, he was never searched, handcuffed, restrained, or threatened by police officers, he was left unattended at various times, he was provided with food, drink, and access to rest room facilities, and he was familiar with the criminal justice system. Looking at the totality of the circumstances, the trial judge correctly concluded that defendant's statements were made voluntarily.

Am Jur 2d, Evidence §§ 719 et seq.

4. Evidence and Witnesses § 191 (NCI4th)— murder—victim's suffering—testimony of surgeon—not prejudicial

There was no prejudicial error in a capital murder prosecution (which resulted in a life sentence) in the admission of testimony from the surgeon who treated the victim that the pain from his wounds "must have been excessive." The State's evidence showed that the victim was shot in the chest with a shotgun and the surgeon testified without objection that the victim had an extensive wound on the upper abdomen and was bleeding profusely from that wound, that there were major injuries in the lower portion of the right lung, and that there were extensive injuries in the upper abdomen.

Am Jur 2d, Evidence § 1446.

5. Evidence and Witnesses § 1501 (NCI4th)— murder of police officer—bloody uniform and equipment—admissible

The trial court did not err in a prosecution for the murder of a police officer by admitting the victim's bloody shirt, pants, belt, radio, radio holder, and handcuff case, or commit plain error by admitting the victim's nameplate and his badge, even though

defendant offered to stipulate that the victim was wearing the full clothing and equipment of a police officer. The admitted items were relevant for the purpose of enabling the jury to understand the testimony of the witnesses and in order to show matters which were corroborative of the State's case and, given the facts and the testimony, the court did not abuse its discretion under N.C.G.S. § 8C-1, Rule 403 by admitting them. N.C.G.S. § 8C-1, Rule 401; N.C.G.S. § 8C-1, Rule 402.

Am Jur 2d, Homicide § 413.

6. Evidence and Witnesses § 1688 (NCI4th)— murder of police officer—photograph taken before murder—admissible

Defendant did not show error, much less plain error, in a prosecution for the murder of a police officer in the admission of a photograph of the officer taken while he was alive where the photograph was used for illustrative purposes during the testimony of the victim's wife.

Am Jur 2d, Evidence §§ 971, 972.

7. Jury § 260 (NCI4th)— first-degree murder—jury selection—peremptory challenges—*Batson* challenge—no racial discrimination

The trial court did not err during jury selection in a prosecution for the murder of a police officer by allowing the prosecutor's peremptory challenges to black prospective jurors. The State set forth reasons for the challenges of six of the seven venire members at issue so that the sole issue as to those six is the court's finding on intentional discrimination. The State articulated its reasons for the challenges and, with one exception, defendants proffered no evidence to show that the prosecutor's reasons were a pretext. Since the trial court's findings as to race neutrality and purposeful discrimination depend in large measure on the judge's evaluation of credibility, those findings should be given great deference. As to the seventh excused venireperson, the trial court found that there were sufficient race-neutral reasons for excusing him, assuming that a *prima facie* case of racial discrimination existed, and the court's findings are given great deference.

Am Jur 2d, Jury §§ 25 et seq.

8. Jury § 257.1 (NCI4th)*— murder—jury selection—gender discrimination—prima facie case

The trial court did not err during jury selection for a murder trial by denying defendants' motions to prohibit the State from peremptorily challenging prospective jurors on the basis of gender and to allow defendants to make an evidentiary record to show the prosecutor's gender-based peremptory challenges. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, holding that the State may not intentionally discriminate on the basis of gender in exercising peremptory challenges, is applicable to this case, which was pending on direct review when *J.E.B.* was decided. *Batson* type considerations are relevant, and a review of the record does not disclose a *prima facie* case of purposeful discrimination in that fewer male jurors were called into the jury box for *voir dire* than females; the State attempted to excuse more men than women and, in fact, excused an equal number; the State did not use all of its peremptory challenges; the pattern of jury selection disclosed a relatively even pattern of early strikes; defendants have not advanced any logical reason to conclude that the State had a motive to eliminate women from their jury; and, of twelve jurors and three alternates selected, eight were male and seven female.

Am Jur 2d, Jury § 156.

9. Evidence and Witnesses § 929 (NCI4th)— murder of police officer—statements of officer—excited utterances

The trial court did not err in a prosecution for the murder of a police officer by allowing three witnesses to testify that the victim said, immediately after the shooting, that he believed he was going to die, that he was having trouble breathing, and that he wanted them to tell his wife that he loved her. These statements were excited utterances and thus are not excluded by the hearsay rule. The statements are relevant in that they were admitted within the context of the testimony of responding officers and paramedics and each served to describe the circumstances and events surrounding and immediately following the shooting. They are not so inflammatory as to be unfairly prejudicial. N.C.G.S. § 8C-1, Rule 803(2); N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence § 659; Homicide § 330.

10. Evidence and Witnesses § 1092 (NCI4th)— murder—prearrest silence—use to impeach defendant—no plain error

There was no plain error in a prosecution for the murder of a police officer where defendant Gaines contended that his rights were violated by the use of his prearrest silence for impeachment purposes during his cross-examination, but did not object at trial. The record reveals that defendant never invoked or relied upon his right to remain silent and the use of his prearrest silence did not violate his Fifth Amendment rights. The fact that the Fifth Amendment is not violated by the use of prearrest silence to impeach defendant's credibility does not mean that admission was proper under common law rules, but, assuming error, defendant has not shown that the error was so fundamental as to constitute a miscarriage of justice.

Am Jur 2d, Evidence §§ 802 et seq.; Homicide § 339.

11. Criminal Law § 432 (NCI4th Rev.)— first-degree murder—prosecutor's argument—defendant's silence—not grossly improper

The trial court did not err by failing to intervene *ex mero motu* in a first-degree murder prosecution where defendant contended that the prosecutor used his silence to argue that his accident defense was an "after-the-fact fabrication." Defendant did not object at trial and, in view of the wide latitude accorded counsel in closing argument and the substantial evidence against defendant, it cannot be said that the argument was so prejudicial and grossly improper as to interfere with defendant's right to a fair trial.

Am Jur 2d, Trial §§ 557-559.

12. Criminal Law § 473 (NCI4th Rev.)— first-degree murder—closing arguments—prosecutor's comments regarding defense attorney—not grossly improper

The trial court did not err by failing to intervene *ex mero motu* in a first-degree murder prosecution where defendant contended that the prosecutor improperly attacked defense counsel's integrity and credibility during closing arguments by arguing that a vigorous cross-examination had been intended to confuse the jury, that defense counsel was "making stuff up" and could not be believed, and that the physical evidence did not lie even though defense attorneys were trying to show that it did. The

prosecutor is entitled to argue any reasonable inference to be drawn from the evidence and to rebut defense counsel's argument. Defendant did not object at trial and, reviewed in context, the arguments were not grossly improper.

Am Jur 2d, Trial §§ 683 et seq.

13. Homicide § 408 (NCI4th); Criminal Law § 745 (NCI4th Rev.)— first-degree murder—instructions—use of "victim"

The trial court did not err in a first-degree murder prosecution by using the word "victim" throughout its jury instructions; this argument was rejected in *State v. Hill*, 331 N.C. 387.

Am Jur 2d, Homicide §§ 490, 491.

14. Homicide § 374 (NCI4th)— first-degree murder—acting in concert—sufficiency of evidence

The trial court did not err by denying defendant Harris's motion to dismiss a charge of first-degree murder on the grounds of insufficient evidence where defendant contended that the evidence was insufficient to show that he was acting in concert in that he was not present at the scene, did not commit any of the acts, and did not share a common plan. The evidence was conflicting as to Harris's actual presence, but the State presented as evidence the victim's dying identification of his killers and testimony from a witness who saw three black men run from the scene, and defendant presented evidence that he either remained at the car or walked some distance with the shooter but not all the way to the scene. This is sufficient to support a finding that defendant was either actually or constructively present. The evidence was also sufficient to show that defendant shared the plan to shoot the victim in that defendant encouraged and aided the shooter; provided him with a shotgun; accompanied him to the area and either remained at the car or accompanied him as far as the parking lot at the scene; left with the shooter and another man after the killing; and took possession of the murder weapon and hid it.

Am Jur 2d, Homicide § 445.

15. Criminal Law § 45 (NCI4th Rev.)— first-degree murder—aiding and abetting—presence not required

There was sufficient evidence to convict defendant Harris of first-degree murder on the theory of aiding and abetting where

Harris contended that there was insufficient evidence of his presence at the scene. The evidence amply supported the jury's finding that defendant was either actually or constructively present at the scene; moreover, actual or constructive presence is no longer required to prove a crime under an aiding and abetting theory. Cases decided after N.C.G.S. § 14-5.2 became applicable which suggest that actual or constructive presence is necessary to prove a crime under an aiding or abetting theory are no longer authoritative on this issue.

Am Jur 2d, Trial § 1256.

16. Homicide § 368 (NCI4th)— first-degree murder—mere presence rule—evidence sufficient to convict

The trial court did not err in a first-degree murder prosecution by denying defendant Harris's motion to dismiss where Harris contended that the evidence was insufficient to support his conviction under the "friend" exception to the mere presence rule. The evidence demonstrates that Harris encouraged and intended to assist Gaines, that Gaines knew of Harris's support and encouragement, and that Harris was not merely present.

Am Jur 2d, Homicide § 445.

17. Homicide § 366 (NCI4th)— first-degree murder—accomplice—evidence of intent to kill—sufficient

The evidence of defendant Harris's conduct before and after a killing was sufficient to support a finding that Harris acted with premeditation and deliberation where Harris contended that evidence that he provided the weapon and hid it afterward is not substantial evidence of *mens rea* to commit first-degree murder. Proof of premeditation and deliberation is proof of a specific intent to kill and the evidence of defendant's conduct before and after the killing in this case is sufficient to support a finding beyond a reasonable doubt that Harris acted with premeditation and deliberation.

Am Jur 2d, Homicide § 52.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

18. Criminal Law § 807 (NCI4th Rev.)— first-degree murder—instructions on aiding and abetting—presence at scene

There was no plain error in a first-degree murder prosecution where defendant Harris contended that the trial court had erroneously instructed the jury that defendant did not have to be present at the scene in order to be convicted under the theory of aiding and abetting. Under *State v. Bond*, 345 N.C. 1, the trial court was not required to instruct on defendant Harris's presence or lack thereof; moreover, the evidence indicates that defendant was nearby if not actually present when Gaines killed the victim, and the jury therefore probably would not have reached a different verdict but for the instruction.

Am Jur 2d, Homicide §§ 482 et seq.

Supreme Court's views as to prejudicial effect in criminal case of erroneous instructions to jury involving burden of proof or presumptions. 92 L. Ed. 2d 862.

19. Homicide § 368 (NCI4th)— first-degree murder—instructions—aiding and abetting—friend exception

The trial court did not err in a first-degree murder prosecution by instructing the jury on the "friend" exception as part of the instruction on aiding and abetting.

Am Jur 2d, Homicide § 445.

20. Criminal Law § 469 (NCI4th Rev.)— first-degree murder—prosecutor's closing arguments—not grossly improper

The trial court did not err in a first-degree murder prosecution by not intervening *ex mero motu* to prohibit certain prosecutorial arguments which defendant contends were beyond the evidence or misstated the law. Counsel is given wide latitude in the argument of hotly contested cases and may argue all the facts in evidence and any reasonable inferences that can be drawn therefrom. A review of these arguments in context reveals that they were not so grossly improper as to require the trial court to intervene *ex mero motu*.

Am Jur 2d, Trial § 502.

21. Criminal Law § 498 (NCI4th Rev.)— first-degree murder—jury view—denied

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendants' motion for a jury

view on the grounds that the photographs and measurements submitted by the parties were sufficient to enable the jury to reconstruct the scene and circumstances of the crime.

Am Jur 2d, Trial § 934.

Taking and use of trial notes by jury. 14 ALR3d 831.

22. Criminal Law § 758 (NCI4th Rev.)— first-degree murder—instructions—defendant's statement—characterized as confession—not inaccurate

The trial court did not err in a first-degree murder prosecution by instructing the jury that defendant Harris had confessed to some of the acts alleged where Harris contended that his statement was inculpatory but did not amount to a confession. Harris's statement amounts to a confession to acts which constitute his guilt of aiding and abetting or of acting in concert.

Am Jur 2d, Homicide §§ 482 et seq.

23. Criminal Law § 758 (NCI4th Rev.)— first-degree murder—instructions—defendant's statement—characterized as confession—not an expression of opinion

An instruction in a first-degree murder prosecution that defendant had confessed to some of the acts charged did not amount to an improper expression of opinion. This issue was decided in *State v. Cannon*, 341 N.C. 79.

Am Jur 2d, Homicide §§ 482 et seq.

24. Criminal Law § 939 (NCI4th Rev.)— first-degree murder—verdict not inconsistent

There was no error in a first-degree murder prosecution where defendant contended that the jury was inconsistent in that it found him guilty of first-degree murder but found on the Issues and Recommendation as to Punishment form that defendant did not have the specific intent to kill the victim. The verdict in the guilt-innocence phase that defendant was guilty of premeditated and deliberate murder either under the theory of acting in concert or by aiding and abetting is not inconsistent with the jury's later indication that defendant did not himself intend to kill the victim. The verdicts are not reviewed on the grounds of inconsistency since the jury determined that the evidence of *mens rea* was sufficient for the jury to find defendant

guilty beyond a reasonable doubt on either or both theories of accomplice liability.

Am Jur 2d, Coram Nobis & Allied Statutory Remedies § 54.

* New section pending publication of next NCI4th supplement.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by Downs, J., at the 23 August 1993 Mixed Session of Superior Court, Mecklenburg County, upon jury verdicts finding defendants guilty of first-degree murder. Heard in the Supreme Court 13 February 1996.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, and Jill Ledford Cheek, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant Gaines.

Isabel Scott Day, Public Defender, by Julie Ramseur Lewis, for defendant-appellant Harris.

PARKER, Justice.

Defendants were tried jointly and capitally for the first-degree murder of Charlotte Police Officer Eugene Anthony Griffin. The jury found both defendants guilty of first-degree murder and recommended a life sentence for each defendant.

The State's evidence at trial tended to show that in November 1991 the victim, Eugene Anthony Griffin, had a full-time job as a Charlotte police officer and also worked as a security guard for a Red Roof Inn motel in Charlotte, North Carolina. On 21 November 1991 defendants Allen Lorenzo Gaines and Bryan Cornelius Harris, along with Mustafa Coleman, went to the Red Roof Inn to see Anthony Williams. The victim intercepted the three men on the motel stairwell, identified himself as a police officer, and told them that there was not going to be a party and that only one of them could go up to see Williams. When Gaines became argumentative, the victim grabbed Gaines by the jacket collar and told him to leave the property. The three men got into their car, yelled obscenities, and drove away. As the men left the motel, Gaines told Harris and Coleman that he was

going to "get" the victim. Harris said, "do you want the twelve gauge"; and Gaines replied, "yes."

The three men went to the apartment of Sandra Carrington, where Harris retrieved a shotgun. The men then drove back to the motel. Gaines parked the car in the State Farm Insurance parking lot which was located behind the motel, walked through the woods to the back of the motel, put a woman's stocking on over his face, then went into the motel office with the shotgun and shot the victim in the chest. Gaines returned to the car, and the three men drove away. Harris later hid the shotgun under his house.

Immediately after the shooting the victim called for help on his police radio. Kevin Penegar, the night auditor and front desk clerk at the Red Roof Inn, called 911. Officers Beverly Stroup and Fred Allen responded to the victim's emergency call. The victim told Stroup that he had been shot by "the same guys [he] had trouble with earlier." The victim described the suspects, described the vehicle driven by the men, and recited a license-tag number. The victim also said, "Tell [my wife] that I love her." The victim died later that night of a gunshot wound to the chest and abdomen.

Sandy Bolton, a guest at the motel, testified that she heard a gunshot, looked out her window, and saw three men running through the parking lot.

Defendant Gaines testified on his own behalf. He said that after the original altercation with the victim, he left the motel crying because the officer had hurt his feelings. Gaines testified that the three men returned to the motel in order to scare the victim. He stated that he was planning to shoot into the air in the motel parking lot and never intended to shoot the victim. He put a woman's stocking over his face so that the victim would not recognize him. Gaines testified that he walked through the woods to the motel while Harris and Coleman remained near the car. He said that when he stepped in front of the motel lobby door, he saw the victim drawing his gun. Gaines stated that he was trying to get away when the gun went off; he did not remember pulling the trigger.

Defendant Harris presented no evidence.

ISSUES RAISED BY DEFENDANTS GAINES AND HARRIS

Defendants first argue that it was error to deny their motions to suppress evidence of statements and physical evidence. A suppres-

sion hearing was held before Judge Forrest A. Ferrell on defendants' motions on 21 June 1993. The State's evidence at the hearing tended to show the following: Sergeant Richard Sanders was in charge of the investigators working on the murder of the victim. Sanders instructed Investigator Buening, who was the lead investigator in the interviewing process, that any suspect interviews were to be conducted as non-custodial interviews. Suspects were not to be placed under arrest and would be free to leave, and any contact with suspects would be on a voluntary basis.

Specifically as to defendant Gaines, the evidence showed that Officer William Todd Walther located an automobile believed to be involved in the murder parked in front of Gaines' residence. Investigators R.G. Buening and S.P. Maxfield, both dressed in plain clothes, drove to Gaines' residence in an unmarked vehicle. Several other officers were also present. At approximately 2:30 a.m. Buening knocked on the front door of Gaines' residence. Gaines' mother answered the door. Buening identified himself and asked if the officers could come in. Buening, Maxfield, and one uniformed officer went inside. Buening introduced himself to Gaines and told him that a police officer had been shot and wounded at the Red Roof Inn and that the police had information that he and two friends had been involved in a dispute with the officer earlier in the evening. Buening asked Gaines if he would go to the Law Enforcement Center to talk with them about the earlier dispute with the officer. Buening told Gaines he was not under arrest, and Gaines agreed to go. Gaines' mother had no objection to her son accompanying the officers to the Law Enforcement Center.

Buening asked Gaines to sit in the front passenger seat of an unmarked police vehicle. Buening then obtained written consent from Gaines to search his automobile. Buening conducted a "plain-view" search of the vehicle while Gaines sat unattended in the unmarked, unlocked police vehicle. Buening then asked Gaines if he would show him where Harris and Coleman lived; Gaines agreed. At this point Buening went back to the residence to speak with Gaines' mother, again leaving Gaines unattended in the vehicle. Buening asked Gaines' mother if she wanted to accompany her son to the Law Enforcement Center; she declined. On the way to the Law Enforcement Center, Buening again told Gaines he was not under arrest.

At the Law Enforcement Center, Gaines was asked to sit in a large interview room. Gaines was not handcuffed. Sanders testified that

"emotions were high" among police officers at the Law Enforcement Center and that he was concerned about the suspects' safety and about the "interrogative case." Sanders instructed officers not to let anybody other than investigators directly involved in the case interfere in any way. At approximately 4:00 a.m. Sanders assigned Officer D.R. Faulkenberry to sit with Gaines. Faulkenberry sat with Gaines from 4:00 a.m. to 7:00 a.m. Sanders entered the room on two occasions and asked the men if either of them needed anything. During this time Investigator C.E. Boothe introduced himself to Gaines and advised Gaines that he was working on the case.

When Officer Faulkenberry went off duty, Investigator R.D. Roseman sat with Gaines. Roseman introduced himself and told Gaines that he was not under arrest, that he was free to leave at any time, and that any statements he made would be made voluntarily at defendant's request. Gaines told Roseman that "he didn't know why he was there" and that "he wanted to know when he could leave." Roseman testified that he did not answer Gaines' question about when Gaines could leave but left the interview room, conferred with Sanders in the hallway, and told Sanders he felt Gaines was ready to make a statement.

At approximately 7:30 a.m. Sanders asked Investigator D.L. Rock to sit with Gaines. Rock asked defendant if he needed anything to eat, and Gaines said that he was hungry. Shortly thereafter a police officer brought two steak biscuits for Gaines. At approximately 9:30 a.m. Gaines asked Rock if the police officer was dead; Rock replied that he was dead. Gaines asked Rock if he could speak with the other police officer, and he described Investigator Boothe. Boothe testified that he entered the room, told defendant he was not under arrest, told defendant he could leave at any time, and told defendant he did not have to make a statement. Boothe also told Gaines that Harris and Coleman had already given statements. Boothe asked Gaines if he had shot the police officer; Gaines admitted that he had and then gave a statement. Gaines signed a written statement which included language that he had given the statement of his own free will, knowing that he was not under arrest. After Gaines completed his statement, Boothe placed Gaines under arrest and read Gaines his rights; Gaines requested a lawyer.

Specifically as to defendant Harris, the evidence showed that at 3:00 a.m. on 22 November 1991, Investigator Buening knocked on Harris' door. Harris' mother answered the door; Buening identified

himself and said he was looking for Harris. Buening asked if he could come in, and Mrs. Harris agreed. Investigator Maxfield also entered the residence. Buening and Maxfield entered the house, and a uniformed police officer stayed at the door. Mrs. Harris opened the door to her son's bedroom; Harris was on the bed, and Buening introduced himself as a police officer. Buening told Harris that a police officer had been shot and wounded at the Red Roof Inn and that the police had information that earlier in the evening, Harris and two friends had had a dispute with the officer. Buening told Harris that he was not under arrest and asked Harris if he would be willing to go with the officers to the police station to talk about the earlier dispute with the officer. Harris agreed to go with the officers. Harris' mother indicated that she did not have any objections to her son going with the officers.

Harris was asked to sit in the backseat of Officer R.W. Shiflett's marked patrol vehicle. Buening again told Harris that he was not under arrest and that Buening appreciated his cooperation. Harris informed Shiflett that he had asthma and needed his medication. Shiflett went to Harris' residence and obtained the medication from Harris' mother. Harris was taken to the police station by Shiflett; there was no conversation between Shiflett and Harris during the ride. There were no door handles on the inside of the vehicle's back door. Harris was not handcuffed. At the Law Enforcement Center, Harris and Shiflett sat in an interview room. There was no conversation between Shiflett and Harris.

Sergeant Sanders assigned Investigators Boothe and L.D. Walker to talk with Harris. At 4:25 a.m. the two investigators went into the interview room. Both men were dressed in casual clothes, and neither carried weapons. The investigators told Harris it was their understanding that Harris had volunteered to come down and talk. Harris replied that that was correct. The investigators then suggested they move from the small interview room to a larger one. Harris was not handcuffed or restrained. The investigators asked Harris if he wanted anything to eat or drink, or if he needed to go to the bathroom; Harris declined. The investigators told Harris that he was not under arrest, that it was their understanding Harris had come to the Law Enforcement Center voluntarily, that he did not have to make a statement, and that he was free to leave at any time. Harris stated that he had come voluntarily and that he would talk with the investigators.

Harris gave an account of the initial confrontation at the motel. He stated that after the confrontation, the men left and did not return. Investigator Walker told Harris that they knew he had gone back and that they just wanted Harris to tell the truth. Harris then stated that he did go back but that he did not shoot the victim. Harris then gave an account of the killing which implicated Gaines as the shooter. Harris signed a statement which included language that he had come to the Law Enforcement Center voluntarily, that he knew he was not under arrest, and that he had given the statement voluntarily. Harris was provided with soft drinks and breakfast during this time and was allowed to go to the rest room. Harris then accompanied several officers in an unmarked police van and pointed out the location where defendants had parked the automobile the second time they went to the Red Roof Inn, the location of the apartment where Gaines had obtained the shotgun, and the location where Harris alleged Gaines had hidden the shotgun. Harris and the officers then returned to the Law Enforcement Center. Investigator Boothe then advised Walker that Gaines contended that Harris had obtained the shotgun and that Harris had hidden it under his own house. Harris then stated that he had obtained the shotgun from Sandra Carrington and that he had not originally given this information in order to protect Carrington. Harris also stated that the shotgun was hidden under his house. Harris then made a second signed written statement regarding the shotgun that began, "I realize that I am still not under arrest and am giving Officers Walker and Boothe another statement to clarify and correct some parts of my earlier statement." After Harris made the second statement, Investigator Rock took Harris back to his home in an unmarked police vehicle. Harris was arrested later that night.

[1] Both defendants assign error to the trial court's denial of pretrial motions to suppress evidence of statements and physical evidence. Defendants contend that the statements and physical evidence were obtained as a result of custodial interrogation and that defendants were not advised of their juvenile rights or given *Miranda* warnings. *See* N.C.G.S. § 7A-595 (1995); *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966).

This Court has consistently held that the rule of *Miranda* applies only where a defendant is subjected to custodial interrogation. *See, e.g., State v. Phipps*, 331 N.C. 427, 442, 418 S.E.2d 178, 185 (1992). Similarly, N.C.G.S. § 7A-595(d) pertains only to statements obtained from a juvenile defendant as the result of custodial interrogation. Custodial interrogation " 'mean[s] questioning initiated by law

enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *Phipps*, 331 N.C. at 441, 418 S.E.2d at 185 (quoting *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706). To determine whether a person is in custody, the test is whether a reasonable person in the suspect's position would feel free to leave. *State v. Rose*, 335 N.C. 301, 334, 439 S.E.2d 518, 536, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994).

The United States Supreme Court has held that in determining whether a suspect was in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 128 L. Ed. 2d 293 (1994) (*per curiam*). The United States Supreme Court has recognized that any interview of a suspect by a police officer will have coercive aspects to it. *Oregon v. Mathiason*, 429 U.S. 492, 50 L. Ed. 2d 714 (1977) (*per curiam*). However, the United States Supreme Court has also recognized that *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Id.* at 495, 50 L. Ed. 2d at 719.

In the instant case a suppression hearing was held on defendants' motions. Judge Ferrell issued an order on 7 July 1993 setting forth extensive findings of fact and conclusions of law based on evidence presented during the hearing.

As to defendant Harris, Judge Ferrell concluded that Harris' statements to police officers were made voluntarily and were not the result of custodial interrogation. Judge Ferrell also concluded that Harris' agreement to show police officers where he had hidden the shotgun was voluntary.

Judge Ferrell based his conclusions, in part, on his findings that Harris was repeatedly told that he was not under arrest, that Harris was repeatedly told that he was free to leave at any time, and that Harris signed a written statement wherein he stated that he was not under arrest and was giving a statement voluntarily. Judge Ferrell also relied on the fact that Harris had previous experience with the criminal justice system.

Our review of the evidence shows that Judge Ferrell's findings of fact were supported by competent evidence. Further, his conclusion

that under these facts Harris did not undergo custodial interrogation for *Miranda* purposes at the relevant times was correct. *See State v. Lane*, 334 N.C. 148, 431 S.E.2d 7 (1993) (defendant not in custody when he was told he was free to leave on several occasions during the interview; he did not ask to leave, nor did he request an attorney; and he was not placed under arrest but was taken home by the SBI investigators); *Phipps*, 331 N.C. 427, 418 S.E.2d 178 (defendant not in custody when, upon request, he went to the police station on his own several times and answered questions; he was not placed under arrest but was permitted to return home; and he later agreed to take a polygraph test); *State v. Martin*, 294 N.C. 702, 242 S.E.2d 762 (1978) (defendant not in custody when he voluntarily went to the police station and made a statement while he was not under arrest and his freedom was not restricted, and police officers returned him to his home afterwards).

As to defendant Gaines, Judge Ferrell concluded that Gaines' statements to police officers were given voluntarily and were not the result of custodial interrogation. Judge Ferrell based his conclusions, in part, on his findings that Gaines was told several times that he was not under arrest, that he was repeatedly told that he was free to leave at any time, and that he was told that any statement he made would be voluntary. Judge Ferrell also relied on the fact that defendant had previous experience with the criminal justice system.

Our review of the evidence shows that Judge Ferrell's findings of facts as to Gaines were supported by competent evidence. Further, his conclusion that under these facts Gaines did not undergo custodial interrogation for *Miranda* purposes was correct.

[2] In addition to the above argument, defendant Harris contends Judge Ferrell erred in denying his motions to suppress statements and physical evidence when such were obtained as a result of defendant's unconstitutional seizure. This contention also has no merit. "Only when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968). Whether someone has been seized for purposes of the Fourth Amendment depends on whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980); *State v. Johnson*, 317 N.C. 343, 360, 346 S.E.2d 596, 606 (1986).

Defendant argues that, under the circumstances of the instant case, a reasonable person would not have believed he was free to leave. For the reasons stated above, we conclude that defendant Harris was not improperly seized. This assignment of error is overruled.

[3] Defendant Gaines further contends that Judge Ferrell erred in allowing the admission of his pretrial statements when the statements were "involuntary, unknowing, unintelligent, and obtained in violation of the Fifth and Fourteenth Amendments [to] the United States Constitution and Article I, Section 23 of the North Carolina Constitution." In determining whether a defendant's confession is voluntarily made, this Court considers the totality of the circumstances. *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994). In *Hardy* this Court set out factors to be considered in this inquiry:

> whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id. at 222, 451 S.E.2d at 608. Defendant's age and the deprivation of food or sleep may also be considered. *Id.*

Judge Ferrell found in his conclusions of law that defendant voluntarily complied with Buening's request to leave his residence and go with the investigator and that defendant's statements were voluntarily given. These conclusions are supported by the findings of fact which were supported by the evidence in the record. Defendant was never taken into custody; defendant voluntarily agreed to accompany police officers to the police station; defendant was never searched, handcuffed, restrained, or threatened by police officers; defendant was left unattended at various times; and defendant was provided with food, drink, and access to rest room facilities. Furthermore, defendant was familiar with the criminal justice system. Looking at the totality of the circumstances in this case, Judge Ferrell correctly concluded that Gaines' statements were made voluntarily. Thus, this assignment of error is overruled.

[4] Defendants next contend the trial court erroneously allowed Dr. Francis Robicsek, the surgeon who treated the victim, to testify that the pain from the victim's wounds "must have been excessive."

Defendants contend Dr. Robicsek's testimony was not relevant and not admissible under N.C.G.S. § 8C-1, Rules 401 and 402. Defendants argue that the details of the victim's injuries and pain "were intentionally elicited by the prosecutor in an attempt to create sympathy for Griffin and to excite prejudice against defendants" and that any alleged probative value of this evidence was substantially outweighed by the danger of unfair prejudice. *See* N.C.G.S. § 8C-1, Rule 403 (1988).

The State's evidence at trial showed that the victim was shot one time in the chest with a shotgun. Dr. Robicsek testified, without objection, that the victim had an extensive wound on the upper abdomen and was bleeding profusely from that wound, that there were major injuries in the lower portion of the right lung, and that there were extensive injuries in the upper abdomen. In light of this testimony, Dr. Robicsek's statement, that the victim's pain was "excessive," cannot be said to be unfairly prejudicial. This assignment of error is overruled.

[5] Defendants next contend that the trial court erroneously admitted the victim's bloody shirt, pants, belt, radio, radio holder, and handcuff case and that these items were improperly displayed to the jury. Defendants further contend the trial court erroneously admitted a photograph of the victim taken while he was alive as well as the victim's nameplate and badge. Defendants argue that this evidence was irrelevant and inadmissible under Rules 401, 402, and 403 of the North Carolina Rules of Evidence in that defendants offered to stipulate that the victim was wearing the full clothing and equipment of a Charlotte police officer. This evidence, according to defendants, did not have any tendency to make the existence of any consequential fact more or less probable and neither proved any element of the State's case nor rebutted any defense.

Initially, we note that defendant Harris did not object to the admission of the photograph of the victim, the police badge, and the nameplate. Thus, to prevail on this issue Harris must show that the error, if any, amounted to plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983); N.C. R. App. P. 10(c)(4). Plain error is error which is " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d

912 (1988)). In this case the victim's police uniform and its accessories were relevant and admissible under Rules 401 and 402 of the North Carolina Rules of Evidence. "Bloody clothing of a victim that is corroborative of the State's case, is illustrative of the testimony of a witness, or throws any light on the circumstances of the crime is relevant and admissible evidence at trial." *State v. Knight*, 340 N.C. 531, 559, 459 S.E.2d 481, 498 (1995).

In the instant case the victim's wife, Hilda Griffin, testified as to the police uniform and equipment worn by her husband on the night of his murder. Officer Fred Allen testified as to the scene he witnessed at the motel, including the victim's bloody gun and his radio. Jerry Lee Hicks, a crime-scene search technician, testified as to the murder scene as it was left after the victim was taken to the hospital, including his observations of the victim's radio and police gun. Paramedic crew chief Michael Keller testified to his observations, including the fact that the victim's shirt had been ripped open. The admitted items were relevant for the purpose of enabling the jury to understand the testimony of the witnesses and in order to show matters which were corroborative of the State's case.

Pursuant to Rule 403 of the North Carolina Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" to a defendant. N.C.G.S. § 8C-1, Rule 403. The exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is generally left to the discretion of the trial court. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Given the facts and testimony in the instant case, we conclude that the trial court did not abuse its discretion by admitting the victim's police uniform and its accessories into evidence.

[6] The photograph of the victim was also properly admitted. " 'Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words.' " *State v. Holden*, 321 N.C. 125, 140, 362 S.E.2d 513, 524 (1987) (quoting *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984)), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). When determining the admissibility of a photograph, the trial court should consider "[w]hat a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, [and] the scope and clarity of the testimony it accompanies." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

In the present case the photograph was used for illustrative purposes during Hilda Griffin's testimony to describe her husband while alive. The admission of one photograph depicting Officer Griffin while he was alive was not error. *See State v. Bell*, 338 N.C. 363, 450 S.E.2d 710 (1994) (admission of photograph of victim dressed in police uniform taken prior to the murder properly admitted), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 861 (1995). Based on our review of this evidence, we conclude that the trial court did not commit error by admitting this photograph. Defendants having failed to show error, much less plain error, this assignment of error is overruled.

Both defendants request that this Court examine certain sealed police records and that it order a new trial if the records contain relevant and impeaching evidence. Prior to trial defendants moved for the disclosure of information in the Internal Affairs file and personnel file of the victim. After a hearing on 12 April 1993, Superior Court Judge Ferrell ordered the production of these files for his *in camera* inspection. On 7 July 1993 Judge Ferrell issued an order concluding that the files contained no information to which the defendants were entitled. After a careful review of the files, we conclude that they contain no information relevant to any material fact in this case and that the trial court did not err in its ruling.

[7] Defendants next argue that the trial court erred in allowing the prosecutor's peremptory challenges to seven black prospective jurors: George Lineberger, Pamela O'Rear, Mildred Houston, Reginald Alexander, Lisa Marshall, Robert Watkins, and Michael Caldwell. Defendant Gaines filed a pretrial motion requesting that the trial court enter a ruling prohibiting the State from exercising its peremptory challenges so as to excuse any prospective juror solely on account of his race. Defendant Harris later joined in this motion, and the motion was allowed.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution forbid the use of peremptory challenges for a racially discriminatory purpose. *Batson v. Kentucky*, 476 U.S. 79, 86, 90 L. Ed. 2d 69, 80 (1986); *State v. Williams*, 339 N.C. 1, 15, 452 S.E.2d 245, 254 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995).

When an objection is made to the exercise of a peremptory challenge on the ground that the challenge is racially motivated, the defendant must first "make a prima facie showing that the prosecutor

has exercised peremptory challenges on the basis of race." *Hernandez v. New York*, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 405 (1991). If the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror in question. *Id.* at 358-59, 114 L. Ed. 2d at 405. This Court then permits the defendant to introduce evidence that the State's explanations are merely a pretext. *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991). "Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405.

In the instant case the State set forth reasons for the challenges of six of the seven venire members at issue. Therefore, as to these six venire members, the sole issue before this Court is the trial court's finding of fact on the question of intentional discrimination. *See Williams*, 339 N.C. at 17, 452 S.E.2d at 255.

As to Mr. Lineberger, the prosecutor stated he excused this prospective juror on the ground that Lineberger had sons roughly the same age as the defendants. Furthermore, when the prosecutor asked Lineberger whether this fact would have any effect on his ability to render a fair verdict, Lineberger initially did not answer and then said that he did not think so. When asked the question again, Lineberger said he did not believe it would have an effect.

As to Ms. O'Rear, the prosecutor stated that he excused this prospective juror on the grounds that she had lived in the area where the events at issue occurred; that she had studied the elements of crime as well as the penal system, parole, and probation; and "that she might take in her own ideas about . . . those matters other than what the Court would instruct her." The prosecutor further stated that O'Rear had young children and that she might compare her children with the defendants.

As to Ms. Houston, the prosecutor stated that he excused this prospective juror based on the fact that her son, who had an unstable work record, lived with her; and the prosecutor believed Houston might identify the defendants with her son. The prosecutor also stated that Houston seemed to have trouble understanding some of the questions, that she was very soft-spoken, and that she had filled out only six items on the jury questionnaire. Finally, the prosecutor stated that he believed Houston would have difficulty understanding the complex legal issues in the case.

As to Mr. Alexander, the prosecutor stated that he excused this prospective juror on the grounds that Alexander had been arrested for driving while impaired and had an unstable work history.

As to Ms. Marshall, the prosecutor stated that he excused this prospective juror based on the fact that her cousin had been charged with rape, her cousin's age was close to that of defendants, she stated she had been wrongly charged by the police, and she worked with retarded children and would be sympathetic to defendants. The defense sought to show that the reasons stated were a pretext.

As to Mr. Watkins, the prosecutor stated that he excused this prospective juror based on the fact that Watkins indicated he had had a bad experience with a police officer concerning a mistaken identity.

We find no error in the ruling by the trial court on the peremptory challenge of these jurors. The State articulated its reasons for the challenges, and the court found that the reasons articulated by the State were racially neutral and did not show any purposeful discrimination. With the exception of Ms. Marshall, neither defendant proffered any evidence to show that the reasons offered by the prosecutor were merely a pretext. *See State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990) (defense counsel was apparently satisfied by the explanations offered by the State because no effort was made by the defense to demonstrate that the explanations were merely a pretext). Furthermore, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406; *see also Purkett v. Elem*, 514 U.S. 765, ——, 131 L. Ed. 2d 834, 839-40 (1995) (*per curiam*). Since the trial court's findings as to race neutrality and purposeful discrimination will depend in large measure on the trial judge's evaluation of credibility, these findings should be given great deference. *Batson*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21. We conclude that the trial court's findings were supported by the record and hold that the trial court properly overruled defendants' objections to the excusal of these six prospective jurors.

As to Mr. Caldwell, we first note that Gaines was the only defendant to object to his excusal. Upon Gaines' objection the trial court specifically found that there was no *prima facie* showing of racial discrimination. The trial court went on to state that "[p]lenty of cause exists, reasons" for the excusal of this prospective juror. Therefore, the prosecutor did not set forth his reasons for excusing Caldwell.

Assuming *arguendo* that a *prima facie* case of racial discrimination existed, the trial court nonetheless found that there were sufficient race-neutral reasons for excusing this particular venireman. A review of the *voir dire* of Caldwell reveals that he had a history of temporary employment; that he had two sons, ages eighteen and fourteen; and that he had been arrested for driving while impaired. We give the trial court's findings great deference. *Id.* Thus, we hold that the trial court properly overruled defendant's objection to the excusal of prospective juror Caldwell.

[8] Defendants next contend the trial court erroneously denied their motions to prohibit the State from peremptorily challenging prospective jurors on the basis of gender and to allow defendants to make an evidentiary record to show the prosecutor's gender-based peremptory challenges. Defendant Gaines filed a pretrial motion to prohibit the State from peremptorily challenging prospective jurors on the basis of gender. At a pretrial hearing defendant Gaines renewed this motion and moved the trial court, upon objection, to hold a hearing outside the presence of the jury on the gender-discrimination issue so that the appropriate information could be included in the record; the State could offer its neutral justifications, if any; and then the trial court could determine whether an equal protection violation had occurred. Codefendant Harris joined in these motions. The trial court denied the motions.

In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 L. Ed. 2d 89 (1994), the United States Supreme Court held that the State may not, under the Equal Protection Clause, intentionally discriminate on the basis of gender in the exercise of its peremptory challenges. The decision in *J.E.B.* was rendered in 1994, after this case was tried. However, in *Griffith v. Kentucky*, 479 U.S. 314, 93 L. Ed. 2d 649 (1987), the Supreme Court held that *Batson* applies to litigation pending on direct state review when *Batson* was decided. Thus, we conclude that the holding in *J.E.B.* is applicable to this case pending on direct review when *J.E.B.* was decided.

Defendants assert that their constitutional rights were violated by the denial of this motion and that this denial prevented them from making an evidentiary record about challenges of women and from showing that the prosecutor's challenges of women were gender-discriminatory. We find this contention to be without merit.

"As with race-based *Batson* claims, a party alleging gender discrimination must make a *prima facie* showing of intentional dis-

crimination before the party exercising the challenge is required to explain the basis for the strike." *J.E.B.*, 511 U.S. at 144-45, 128 L. Ed. at 106-07. This Court has identified several factors which may be relevant in determining whether a defendant has established a *prima facie* showing of purposeful discrimination under *Batson*. Those factors include defendant's race; the victim's race; the race of key witnesses; questions and statements made by the prosecutor during jury selection which tend to support or refute an inference of discrimination; repeated use of peremptory challenges against venire members of one race such that it tends to establish a pattern or the prosecution's use of a disproportionate number of peremptory challenges to prospective jurors of that race, *State v. Ross*, 338 N.C. 280, 285, 449 S.E.2d 556, 561 (1994); and whether the State used all of its peremptory challenges, *State v. Jackson*, 322 N.C. 251, 255, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). Another factor is the ultimate racial makeup of the jury. *State v. Smith*, 328 N.C. 99, 124, 400 S.E.2d 712, 724 (1991). We conclude that these same type considerations are also relevant in determining whether a defendant has established a *prima facie* showing of purposeful gender discrimination.

Defendants do not identify any specific instance of gender-based discrimination, and our review of this record does not disclose a *prima facie* case of purposeful discrimination. Fewer male jurors were called into the jury box for *voir dire* than females; the State attempted to excuse more men than women and, in fact, excused an equal number of men and women; the State did not use all of its peremptory challenges; the pattern of jury selection disclosed a relatively even pattern of early strikes; defendants have not advanced any logical reason to conclude that the State had a motive to eliminate women from their jury; and of the twelve jurors and three alternates selected to serve on this case, eight were male and seven were female.

In the absence of a *prima facie* showing of purposeful discrimination, defendants cannot show prejudice or error in the trial court's action. This assignment of error is overruled.

[9] Defendants next contend the trial court erroneously allowed three witnesses to testify as to statements allegedly made by the victim immediately after the shooting. Specifically, these witnesses testified that the victim said that he believed he was going to die, that he was having trouble breathing, and that he wanted them to tell his wife that he loved her.

The State's evidence at trial showed that after the victim was shot, Officer Fred Allen arrived at the motel. Officer Allen was joined by Officer Beverly Stroup. Both Stroup and Allen testified that the victim made several statements including the statement, "Tell Hilda that I love her." Paramedic crew chief Michael Keller testified that the victim stated several times that he could not breathe. Keller also testified that the victim repeatedly asked, "Am I going to die?" and stated several times, "I'm going to die." Defendants concede that these statements are arguably admissible under the excited utterance or dying declaration exceptions to the hearsay rule; however, defendants contend the statements are irrelevant, inflammatory, and unfairly prejudicial.

We first conclude that these statements were excited utterances and thus are not excluded by the hearsay rule. *See* N.C.G.S. § 8C-1, Rule 803(2) (1992). We also conclude that these statements are relevant. In criminal cases every circumstance that is calculated to throw any light on the supposed crime is admissible. *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). The victim's statements at issue were admitted within the context of the testimony of responding officers and paramedics. Each of the statements served to describe the circumstances and events surrounding and immediately following the shooting. Further, the statements are not so inflammatory as to be unfairly prejudicial pursuant to N.C.G.S. § 8C-1, Rule 403. This assignment of error is overruled.

ISSUES RAISED BY DEFENDANT GAINES

[10] Defendant Gaines contends that his rights were violated by the use of his prearrest silence for impeachment purposes. On direct examination at trial, Gaines testified that he did not mean to shoot the victim; that he was trying to get away after he stepped in front of the lobby door and saw the victim drawing his gun; that he fell, tripped, or stumbled at about the same time the gun went off; and that the shooting was an accident. In Gaines' pretrial statement to Boothe, he told Boothe that as he went into the motel lobby, he stumbled, and the gun went off one time. On cross-examination the prosecutor asked Gaines a series of questions as to why Gaines did not tell various officers other than Boothe on 22 November 1991 that the shooting was an accident. Gaines contends that his rights were violated by the use of his prearrest silence for impeachment purposes during this cross-examination.

A criminal defendant's exercise of his right to remain silent cannot be used against him to impeach an explanation subsequently offered at trial. *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976). However, the rule prohibiting the cross-examination of a defendant about the exercise of his right to remain silent does not apply to prearrest silence. *Jenkins v. Anderson*, 447 U.S. 231, 65 L. Ed. 2d 86 (1980). In the instant case the use of defendant's prearrest silence does not violate his Fifth Amendment rights. The record reveals that defendant never invoked or relied upon his right to remain silent.

The fact that the Fifth Amendment is not violated by the use of prearrest silence to impeach a defendant's credibility, however, does not mean that admission of this testimony was proper under our common law rules. In *Jenkins* the Court noted that

> [c]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative.

Id. at 239, 65 L. Ed. 2d at 95 (citation omitted).

Defendant Gaines did not object to this examination at trial; therefore, our review is limited to plain error. N.C. R. App. P. 10(c)(4). Assuming *arguendo* that the allowance of this cross-examination was error, defendant has not shown that the error in admitting the evidence was so fundamental as to constitute a miscarriage of justice or that the error was one which probably resulted in the jury reaching a verdict different from what it otherwise would have reached. *Collins*, 334 N.C. at 62, 431 S.E.2d at 193.

[11] Defendant Gaines also contends that the prosecutor's closing argument was improper in that the prosecutor used defendant's silence on 22 November to argue that defendant's accident defense at trial was an "after-the-fact fabrication." First, we note that defendant did not object to this portion of the closing argument. Where there is no objection, "the standard of review to determine whether the trial court should have intervened *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper as to interfere with defendant's right to a fair trial." *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995). In view of the wide latitude

accorded counsel in closing argument and the substantial evidence against defendant, we cannot conclude that the argument at issue meets this test. These assignments of error are overruled.

[12] Defendant Gaines next contends the prosecutor "improperly attacked defense counsels['s] integrity and credibility" during the State's closing argument. Defendant contends the argument violated settled rules of court as well as defendant's state and federal constitutional right to the effective assistance of counsel.

Defendant specifically points to three arguments for which he contends the trial court erred in failing to intervene *ex mero motu*. First, defendant contends the prosecutor emphasized the fact that defense counsel vigorously cross-examined the motel clerk, Kevin Penegar, regarding his testimony that he had seen defendants and Coleman at the motel earlier the night of the shooting when the defense evidence had established the same fact. The prosecutor argued:

> So why cross examine Kevin Penegar like that if they knew that was true? You know why they did that? To confuse you. That's why. To confuse you. That's what they're doing. That's what they're up to.

Defendant next points to a portion of the closing argument where the prosecutor responded to an argument made by the defense, wherein defense counsel had argued that shotgun wadding, which was found three feet from the door, was found in that position because it had bounced off the victim, who was headed toward defendant at the door. In response to the argument, the prosecutor argued that the evidence showed that the wadding was found there because paramedic Keller had taken it out of the victim's chest and put it on the floor. The prosecutor then argued:

> So if you believe that [Keller] removed that wadding from inside the wound, then what Mr. Cooney said to you cannot be true. And when you decide which lawyer you're going to follow, you think about that. Because he s[a]t there and he heard Mr. Keller testify. But now he's making stuff up. Making stuff up. Don't believe it. Don't believe it. It stumbles and it falls.

Finally, defendant takes issue with the prosecutor's argument that "[t]he physical evidence does not lie in this case. Defendant Gaines' lawyers are trying to show you that it lies, but it doesn't."

Prosecutors are given wide latitude in the scope of their argument. *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). In addition, the arguments of counsel are left largely to the control and discretion of the trial judge. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). In the instant case defendant did not object to the above arguments at trial. Thus, "the standard we employ is whether the statements amounted to such gross impropriety as to require the trial judge to act *ex mero motu*." *Oliver*, 309 N.C. at 356, 307 S.E.2d at 324. The prosecutor is entitled to argue any reasonable inference to be drawn from the evidence and to rebut defense counsel's argument. After reviewing the challenged statements in their context, we conclude that they were not grossly improper. This assignment of error is overruled.

[13] Finally, defendant Gaines contends that the trial court erroneously used the word "victim" when referring to Griffin throughout its jury instructions and erroneously instructed the jury that Griffin was "the victim." Defendant contends that these instructions were an improper expression of opinion in violation of N.C.G.S. §§ 15A-1222 and -1232 and the Fourteenth Amendment to the United States Constitution. This Court has addressed and rejected this argument in *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). This assignment of error is without merit.

ISSUES RAISED BY DEFENDANT HARRIS

[14] Defendant Harris contends that the trial court erred in denying his motion to dismiss the charge of first-degree murder on the ground that the evidence was insufficient.

Defendant contends that the evidence was insufficient to show that he and Gaines were acting in concert. Defendant argues that the evidence was insufficient to show that he was present at the scene, that he did any of the acts, or that he shared a common plan with Gaines to kill Griffin. A defendant may be found guilty of committing a crime under the theory of acting in concert if he is present at the scene of the crime acting together with another person with whom he shares a common plan although the other person does all the acts necessary to carry out the crime. *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994). A defendant's presence at the scene may be either actual or constructive. *See Oliver*, 309 N.C. 326, 362, 307 S.E.2d 304, 327. A person is constructively present during the commission of a

crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime. *State v. Willis*, 332 N.C. 151, 175, 420 S.E.2d 158, 169 (1992).

In the instant case the evidence was conflicting as to defendant Harris' actual presence during the crime. The State's evidence of defendant's actual presence included the victim's dying identification of his killers and Sandy Bolton's testimony that immediately after she heard a gunshot, she saw three black men running from the area of the lobby out into the parking lot. Defendant presented evidence that he either remained at the car in the nearby State Farm parking lot or walked some distance with Gaines, although not all the way to the motel lobby. This evidence is sufficient to support a finding that defendant was either actually or constructively present at the time of the killing. The evidence also shows that defendant shared Gaines' plan to shoot the victim. When Gaines suggested that he wanted to "get" the victim, defendant encouraged and aided him. Defendant provided Gaines with a shotgun to commit the killing. Defendant then accompanied Gaines back to the motel, and the men parked in the parking lot of another business behind the motel. At this point defendant either remained at the automobile or accompanied Gaines as far as the motel parking lot. When Gaines returned after shooting the victim, defendant left with Gaines and Coleman. Defendant then took possession of the murder weapon and hid it. This evidence was sufficient to show that defendant and Gaines were acting in concert.

[15] Defendant Harris also contends that the evidence is insufficient to convict him of first-degree murder on the theory of aiding and abetting. The basis for this contention is lack of evidence of defendant's presence at the scene of the crime. As we have already discussed, the evidence amply supported the jury's finding that defendant was either actually or constructively present at the scene of the crime. Moreover, we also note that in *State v. Bond*, 345 N.C. 1, 23-24, 478 S.E.2d 163, 174 (1996), this Court, interpreting N.C.G.S. § 14-5.2, effective 1 July 1981 as to offenses committed after that date, held that actual or constructive presence is no longer required to prove a crime under an aiding and abetting theory. We now hold that to the extent our cases decided after N.C.G.S. § 14-5.2 became applicable suggest that actual or constructive presence is necessary to prove a crime under an aiding and abetting theory, these cases are no longer authoritative on this issue. *E.g.*, *State v. Vanhoy*, 343 N.C. 476, 480, 471 S.E.2d 404, 407 (1996); *State v. Allen*, 339 N.C. 545, 558, 453 S.E.2d 150, 157 (1995); *State v. Hunt*, 323 N.C. 407, 424, 373 S.E.2d

400, 411 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990); State v. Belton, 318 N.C. 141, 150-51, 347 S.E.2d 755, 761 (1986); *State v. Rogers*, 316 N.C. 203, 229, 341 S.E.2d 713, 728 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Amerson*, 316 N.C. 161, 166-67, 340 S.E.2d 98, 101 (1986).

[16] We also reject defendant's contention that the evidence was insufficient to support his conviction under the "friend" exception to the mere presence rule. The evidence demonstrates that defendant encouraged and intended to assist Gaines, that Gaines knew of defendant's support and encouragement, and that defendant was not merely present. *See State v. Scott*, 289 N.C. 712, 722, 224 S.E.2d 185, 190 (1976).

[17] Defendant Harris further contends the evidence was insufficient to show that he had the requisite *mens rea* for the crime under either theory of accomplice liability. Defendant argues that the evidence that he provided the weapon used in the shooting and hid it afterward is not substantial evidence of the *mens rea* to commit first-degree murder. We do not agree.

Proof of premeditation and deliberation is proof of a specific intent to kill. *State v. Thomas*, 332 N.C. 544, 560, 423 S.E.2d 75, 84 (1992).

> 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. 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. Myers, 309 N.C. 78, 84, 305 S.E.2d 506, 510 (1983) (citations omitted). In this case the evidence of defendant's conduct before and after the killing is sufficient to support a finding beyond a reasonable doubt that Harris acted with premeditation and deliberation.[1] This assignment of error is overruled.

1. In *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997), a majority of this Court held that a finding that the accomplice individually possessed the *mens rea* to commit the crime is not necessary to convict a defendant of premeditated and deliberate murder under a theory of acting in concert.

[18] Defendant Harris also contends the trial court erred by erroneously instructing the jury that defendant did not have to be present at the scene of the crime in order to be convicted of a crime under the theory of aiding and abetting. After beginning its deliberations, the jury asked to be instructed on the definitions of acting in concert, aiding and abetting, friends, and scene of the crime. In response to this request, the trial court reinstructed the jury in part as follows:

> Now, as to aiding and abetting. A person may be guilty of the crime charged, in this case, murder in the first degree, or some lesser included offense, if the evidence gives rise to that, although he or they, as the case may be, personally does not or do not do any of the acts necessary to constitute that crime. In aiding and abetting, the State does not have to prove that the defendant who is being sought to be convicted under that theory that that defendant was present at the scene. But the State must prove three things beyond a reasonable doubt. If you find from the evidence, find from the evidence and beyond a reasonable doubt these three things, the aiding and abetting part of it would be satisfied.
>
> Acting in concert differs in that the State, if the State proves from the evidence beyond a reasonable doubt that the one against whom the theory of acting in concert is being asserted was at or, was at the scene of the crime, then acting in concert could be, could be used. Aiding and abetting does not require that proximity or nearness to the scene of the crime.

Defendant did not object to these instructions. He contends that by erroneously instructing the jury that defendant did not have to be present at the scene in order to be convicted of an offense under the theory of aiding and abetting, the trial court directed a verdict as to this element of the offense. Defendant further contends that the erroneous instruction violated his right to a trial by jury under the North Carolina Constitution.

Under *State v. Bond*, 345 N. C. at 24, 478 S.E.2d at 175, the trial court was not required to instruct on defendant Harris' presence or lack thereof.

Furthermore, since defendant did not object to these instructions, any review is limited to plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375. Only in a rare case will an improper instruction justify reversal of a criminal conviction when no objection was made at trial. *Allen*, 339 N.C. at 558, 453 S.E.2d at 157. To find plain error, "the error

in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or [one] which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *Collins*, 334 N.C. at 62, 431 S.E.2d at 193.

In the instant case the evidence indicates that if defendant was not actually present with Gaines when Gaines killed the victim, he was nearby. The record reveals substantial evidence of defendant's constructive presence at the scene of the crime. Therefore, the jury probably would not have reached a different verdict but for the trial court's instruction as to presence. This assignment of error is overruled.

[19] In another assignment of error, defendant Harris contends that the trial court erred in instructing the jury on the "friend" exception as part of the instruction on aiding and abetting. In instructing the jury on aiding and abetting, the trial court stated:

> However, a person is not guilty of a crime merely because he is present at the scene, even though he may silently approve of the crime or secretly intend to assist in its commission. To be guilty, he must aid or actively encourage the person committing the crime, or in some way communicate to this person his intention to assist in the commission of the crime. An exception to that is when the bystander, . . . alleged to be Bryan Harris under the current instructions, is a friend of the perpetrator, Allen Gaines, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as encouragement.

Defendant argues that a person's mere presence at the scene of the crime is not enough to show aiding and abetting.

The trial court's instructions were a correct statement of the law and were supported by the evidence. *See State v. Amerson*, 316 N.C. 161, 166-67, 340 S.E.2d 98, 101 (1986). Accordingly, this assignment of error is overruled.

[20] Defendant next argues that the trial court erred in failing to intervene *ex mero motu* to prohibit certain prosecutorial arguments. He first points to the prosecutor's argument that the victim's "gasp" drew motel clerk Kevin Penegar's attention to the victim's face and argues that there was no evidence that the "gasp" was what drew Penegar's attention to the victim. Second, defendant points to the prosecutor's arguments that after the victim was shot, the victim

looked out the window and saw defendant Harris and Coleman leaving their lookout positions. Defendant argues that there was no evidence to support the inference that the victim saw Harris and Coleman coming out of positions of hiding or that Harris and Coleman were lookouts. Third, defendant points to the prosecutor's argument that Gaines fled with the shotgun stuck up under his coat, hiding the gun, and that Coleman and Harris came out of their "lookout" positions and ran out of the parking lot. Fourth, defendant points to the argument that the three men went to the fence near the La Quinta Inn as quickly as possible to get to their getaway vehicle. Fifth, defendant points to the prosecutor's argument that "something put it into Officer Griffin's mind" that these three men were dangerous, as evidenced by the fact that Griffin got their license-tag number. Sixth, and finally, defendant argues that the prosecutor misstated the law by arguing that when defendant took the gun and hid it, that constituted acting in concert, aiding and abetting, and first-degree murder.

We first note that defense counsel did not object to these six arguments at trial. Counsel is given wide latitude in the argument of hotly contested cases and may argue all the facts in evidence and any reasonable inferences that can be drawn therefrom. *Williams*, 317 N.C. 474, 346 S.E.2d 405. In the absence of any objection at trial to a jury argument, the standard of review to determine if the trial court erred by not intervening *ex mero motu* is whether the prosecutor's argument was so grossly improper that it interfered with defendant's right to a fair trial. *State v. Sexton*, 336 N.C. 321, 362, 444 S.E.2d 879, 902, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). In the instant case a review of the arguments in context reveals that the prosecutor's arguments were not so grossly improper as to require the trial court to intervene *ex mero motu*. This assignment of error is overruled.

[21] Defendant next contends the trial court erred in denying defendant Gaines' motion for a jury view, which defendant Harris joined. This contention is without merit. The decision to grant a motion for a jury view is within the discretion of the trial court. *State v. Simpson*, 327 N.C. 178, 393 S.E.2d 771 (1990). In the instant case the trial court denied the motion on the grounds that the photographs and the measurements submitted by the parties were sufficient to enable the jury to reconstruct the scene and circumstances of the crime. The trial judge did not abuse his discretion by denying the request for a jury view, and this assignment of error is overruled.

[22] Defendant next argues that the trial court erred in instructing the jury that defendant had confessed to some of the acts charged. The trial court instructed the jury, over defendant's objection, as follows:

> [T]here is evidence which tends to show that the Defendant Gaines and/or the Defendant Harris made a statement that purports to confess to some of the acts or the acts charged in these cases. And if you find that the Defendant Gaines and/or the Defendant Harris made a statement or a confession, if you find it to be that, to that extent, or to the extent that some of the acts have been confessed to that they are charged, each and/or both of them are charged with in these cases, then you should consider all the circumstances under which those statements were made in determining whether or not they were truthful confessions as they apply to those two defendants individually and respectively, and the weight that you would give to them.

Defendant contends that, although his statement may have been inculpatory, it did not amount to a confession.

This Court has defined a confession as "an acknowledgement in express words by the accused in a criminal case of his guilt of the crime charged or of some essential part of it." *State v. Fox*, 277 N.C. 1, 25, 175 S.E.2d 561, 576 (1970). Defendant gave two statements to Boothe, the facts of which include the following. On 21 November 1991 defendant was with Gaines and Coleman and went to the Red Roof Inn to visit Anthony Williams. Gaines was driving. The group ascertained Williams' room number and started to locate the room. The victim asked the men where they were going, and when they responded, the victim told them they could not all go to the room. Gaines and the victim began to argue, and the victim grabbed Gaines by the collar, picked him up off the ground, and told him to leave. The victim also told defendant to leave. The three men left the motel and went to the residence of Sandra Carrington. Defendant went into Carrington's residence and retrieved a shotgun which he had previously left at Carrington's apartment. The three men then drove back to a parking lot near the motel and got out of the automobile. Gaines walked to the motel, and defendant and Coleman stood by the automobile. Defendant heard a gunshot, and Gaines came running back to the automobile. The men quickly drove away from the motel and went back to defendant's house. Defendant took the shotgun and put it under his house.

Defendant was found guilty of first-degree murder not as the perpetrator of the shooting, but rather, on the theory that he encouraged, aided, and assisted Gaines in the perpetration of the shooting. Accordingly, any confession by him would necessarily relate to those acts by which he so encouraged Gaines. Defendant's statement amounts to a confession to acts which constitute his guilt of aiding and abetting or of acting in concert with Gaines.

[23] Finally, defendant contends that the instruction amounted to an improper expression of opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and -1232. This issue was previously decided against defendant's position in *State v. Cannon*, 341 N.C. 79, 459 S.E.2d 238 (1995). This assignment of error is overruled.

[24] Defendant also contends he is entitled to a new trial because the jury found him guilty of first-degree murder but "inconsistently" found on the Issues and Recommendation as to Punishment form that he did not have the specific intent to kill the victim.

In *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982), the United States Supreme Court held that before the death penalty may be imposed on a defendant who is found guilty of first-degree murder under the felony-murder rule on the ground that he was an aider and abettor to the underlying felony, the sentencer must first find that the defendant killed, attempted to kill, intended to kill, or contemplated that life would be taken. *Id.* at 801, 73 L. Ed. 2d at 1154.

The *Enmund* rule does not apply to a defendant who has been found guilty of first-degree murder based on premeditation and deliberation. Because defendant was convicted of first-degree murder based on premeditation and deliberation, and not based on the felony-murder rule, Issue One-A is inapplicable. The issue on the form asked the jury whether it found that defendant "himself intended to kill the victim." The jury answered "no" to this question but was not asked to indicate whether it believed defendant intended for the victim to be killed or contemplated that life would be taken. In the guilt-innocence phase, the jury found defendant guilty of premeditated and deliberate murder either under the theory of acting in concert or by aiding and abetting. This verdict is not inconsistent with the jury's later indication that defendant did not himself intend to kill the victim as no evidence suggested that Harris personally intended to inflict the fatal wound himself. Moreover, even if it be assumed that the verdicts were inconsistent, having determined

that the evidence of *mens rea* was sufficient for the jury to find defendant guilty beyond a reasonable doubt on either or both theories of accomplice liability, we do not review the verdicts on the ground of inconsistency. *See State v. Reid*, 335 N.C. 647, 656-61, 440 S.E.2d 776, 781-83 (1994). This assignment of error is overruled.

For the foregoing reasons we conclude that defendants received a fair trial free from prejudicial error.

NO ERROR.

DOROTHY M. FAULKENBURY, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEM DIVISIONS AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); AND STATE OF NORTH CAROLINA, DEFENDANTS

WILLIAM H. WOODARD, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); STATE OF NORTH CAROLINA, DEFENDANTS

BONNIE G. PEELE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEM DIVISIONS AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF

FAULKENBURY v. TEACHERS' AND STATE EMPLOYEES' RET. SYS.

[345 N.C. 683 (1997)]

THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, (IN HIS OFFICIAL CAPACITY); AND STATE OF NORTH CAROLINA, DEFENDANTS

No. 109PA96

(Filed April 11 1997)

1. Retirement § 6 (NCI4th)— disability benefits—change after vesting, before disability—violation of Contract Clause

A contract existed between plaintiffs and the State where plaintiffs were employed for more than five years on 1 July 1982 and their retirement and disability benefits were vested at that time; the method of calculating disability benefits was changed on 1 July 1982; each of the plaintiffs became disabled after 1 July 1982 and received benefits which were reduced from what they would have received if there had been no change in the law; the plaintiffs filed claims including the impairment of contract in violation of Article I, Section 10 of the Constitution of the United States; the claims were certified as class actions; defendants' motions to dismiss were denied; the Court of Appeals ordered that all claims except the claim for impairment of contract be dismissed; and the cases were returned to the superior court, which held that the Contract Clause had been violated. When determining whether there was a violation of the Contract Clause, it must first be determined whether there was a contract, then whether the contract was impaired, then whether the impairment was reasonable and necessary to serve an important public purpose. It has been held in *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 88 N.C. App. 218, *aff'd per curiam*, 323 N.C. 362, that the relation between government employees and the government is contractual and *Griffin v. Board of Comm'rs*, 84 N.C. App. 443, is overruled to the extent that it is inconsistent with *Simpson* and with the Court of Appeals decision in this case. At the time the plaintiffs started working for the state or local government, the statutes provided what the plaintiffs' compensation in the way of retirement benefits would be; plaintiffs accepted these offers when they took the jobs; and this created a contract. The General Assembly did not reserve the right to amend the retirement plans by N.C.G.S. § 128-38 and N.C.G.S. § 135-18.4, which only allow amendments to coordinate the retirement system with the Social Security Act, and the argument

that the General Assembly did not reserve the right to change the retirement benefits because it considered them to be gratuities was refuted by *Bridges v. City of Charlotte*, 221 N.C. 472. Although defendants argue that there is nothing in the statutes that shows that the General Assembly intended to offer the benefits as part of a contract, enacting laws providing benefits to people to be employed by state and local governments who meet certain conditions could reasonably be considered by those persons as offers to guarantee the benefits if the conditions were fulfilled. The plaintiffs fulfilled the condition even though they were not disabled on 1 July 1982; they were promised that they would receive certain benefits if they became disabled if they had worked for five years and they met this condition. Furthermore, equitable distribution has no application in this case, the power to determine the amount of pension payments is not a part of the essential attributes of sovereign power, plaintiffs expected to receive what they were promised at the time of vesting even if they did not know the exact amount, the retirement benefits were an integral part of the contracts whatever the central undertaking, and members of the classes represented by plaintiffs suffered impairments of their contracts when they received the same treatment as the named plaintiffs.

Am Jur 2d, Pensions and Retirement Funds §§ 291-342, 1708, 1711-1737.

2. Retirement § 6 (NCI4th)— state and local employees—retirement disability—change in calculation—impairment of contract

In an action arising from changing the way disability benefits are calculated after plaintiffs became vested in the system but before they became disabled, plaintiffs were entitled to have their rights calculated on 1 July 1982, when the change was made, even though some members of the classes will receive as much or more under the revised plans. The state and local governments on that date offered certain things to plaintiffs, which they accepted by continuing in their employment.

Am Jur 2d, Pensions and Retirement Funds §§ 291-342, 1708, 1711-1737.

3. Retirement § 6 (NCI4th)— state and local employees—disability retirement—change in calculation—no important public purpose

Although defendants argue that the changes in the calculation of disability retirement benefits for state and local government employees were reasonable and necessary to accomplish an important public purpose in that a disability retirement feature should not encourage people to take early retirement and these plans have developed to the point that some members can receive more by taking disability than by continuing to work, the development of a pension plan in unanticipated ways is not an important public purpose which would justify the impairment of a contract. The merits of the two plans are not passed upon.

Am Jur 2d, Pensions and Retirement Funds §§ 291-342, 1708, 1711-1737.

4. Retirement § 6 (NCI4th)— state and local employees—disability retirement—change in calculation—statute of limitations

The trial court did not err in an action arising from a change in the way disability benefits were calculated for state and local government employees by holding that the applicable statutes of limitations are N.C.G.S. § 128-27(i) and N.C.G.S. § 135-5(n). Although defendants say the deficiencies contemplated by those two sections are due to a mathematical error or a mistake in cutting a check and that any wrong was not continuing, the reductions in payments under the new systems were deficiencies which have continued to the present time. N.C.G.S. § 128-27(i) and N.C.G.S. § 135-5(n) apply and allow plaintiffs to pursue claims for underpayments for three years before they commenced actions.

Am Jur 2d, Pensions and Retirement Funds §§ 291-342, 1708, 1711-1737.

5. Retirement § 6 (NCI4th)— state and local employees—disability retirement—change in calculation—recovery of actuarial equivalent

The trial court did not err in an action arising from a change in the way disability benefits were calculated by allowing plaintiffs to recover the actuarial equivalent of the underpayments. Although defendants argue that these sections apply only if there is a change or error in the records, it was the intent of the General

Assembly that, if there had been an underpayment of a pension compensation, it would be paid at the actuarial value.

Am Jur 2d, Pensions and Retirement Funds §§ 291-342, 1708, 1711-1737.

6. Retirement § 6 (NCI4th)— state and local employees—disability retirement—change in calculation—interest on underpayments

It was not error to require state and local governments to pay interest on underpayments resulting from a change in the way disability benefits are calculated. Insofar as state and local governments have sovereign immunity, it was waived by N.C.G.S. § 135-1(2) and N.C.G.S. § 128-21(2), which provide that actuarial value includes interest. There is no double recovery.

Am Jur 2d, Pensions and Retirement Funds §§ 291-342, 1708, 1711-1737.

7. Parties § 70 (NCI4th)— state and local employees—change in disability calculation—class action— deficiencies paid into common fund

In an action arising from a change in the way disability compensation was calculated for local and state government employees, the trial court did not err by ordering that defendants pay into a common fund all deficiencies which occurred within three years of the dates the class actions were filed. Although defendants contend that plaintiffs' claims consist of individual benefit payments rather than for group damages, the purpose of the common fund doctrine is to allow the court to award attorney fees to a litigant who has gained an advantage for other persons similarly situated, which the plaintiffs have done in this case.

Am Jur 2d, Parties §§ 43 et seq.

8. Parties § 78 (NCI4th)— state and local employees—change in disability calculation—class certification

The trial court did not err by granting plaintiffs' motion for class certification and by denying defendants' motion for decertification after trial. If the prerequisites are established, whether the matter may proceed as a class action is within the discretion of the trial court. Each of the parties had a claim based on what he or she contends is underpayment of retirement benefits which

predominates over issues affecting only individual class members. Although there are collateral issues, the predominant issue is how much the parties' retirement benefits were reduced by an unconstitutional change in the law.

Am Jur 2d, Parties §§ 50 et seq.

9. Parties § 78 (NCI4th)— state and local employees—change in disability calculation—class certification—future retirees excluded

The trial court did not abuse its discretion in an action arising from a change in the way disability benefits are calculated by refusing to extend class certifications to members of two retirement systems who become disabled in the future. There is no reason to believe that defendants will not follow the law as it is delineated in this opinion and the trial court did not abuse its discretion by refusing to certify a class whose members are unknown at this time.

Am Jur 2d, Parties §§ 50 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31(b) prior to a determination by the Court of Appeals of a judgment entered in plaintiffs' favor by Cashwell, J., on 21 July 1995, in these three cases consolidated for trial in Superior Court, Wake County. Heard in the Supreme Court 12 September 1996.

This case involves three actions challenging the way disability benefits are calculated under the Teachers' and State Employees' Retirement System of North Carolina and the North Carolina Local Governmental Employees' Retirement System. Dorothy Faulkenbury and Bonnie G. Peele alleged that they had been employed as public school teachers for more than five years on 1 July 1982 and that their retirement and disability benefits under the Teachers' and State Employees' Retirement System were vested at that time. William H. Woodard alleged that he had been employed for five years by the City of Greensboro Police Department on 1 July 1982 and that his retirement and disability benefits under the Local Governmental Employees' Retirement System had vested at that time. On 1 July 1982, the method of calculating disability benefits was changed so that the three plaintiffs received less in pension payments than they would have received if they had retired for disability prior to that time. Each of the plaintiffs became disabled after 1 July 1982 and

received benefits which were reduced from what they would have received if there had been no change in the law on 1 July 1982. Ms. Peele also complained of a change in retirement benefits that occurred as a result of a 1988 amendment to the statute. Mr. Woodard died after the commencement of this action. His widow was substituted for him as a plaintiff.

All of the plaintiffs alleged that the actions of the State in reducing their benefits (1) deprived them of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983; (2) deprived them of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983; (3) impaired the obligations of a contract, in violation of Article I, Section 10 of the Constitution of the United States; and (4) deprived them of the fruits of their own labor, due process of law, and the equal protection of the law, in violation of Article I, Sections 1 and 19 of the North Carolina Constitution. The plaintiffs also alleged that the defendants have breached a fiduciary duty owed to plaintiffs and that the plaintiffs are entitled to have a constructive trust imposed on all funds to which they are entitled.

On 28 June 1991, the *Faulkenbury* and *Woodard* claims were certified as class actions. On 2 December 1993, the *Peele* claim was certified as a class action.

The defendants' motions to dismiss all the claims of Faulkenbury and Woodard were denied by the superior court. The Court of Appeals reversed in part and ordered that all claims except the claim for the unconstitutional impairment of a contract be dismissed; there was a dissent in both cases, and this Court affirmed. *Woodard v. N.C. Local Governmental Employees' Retirement Sys.*, 108 N.C. App. 378, 424 S.E.2d 431, *aff'd*, 335 N.C. 161, 435 S.E.2d 770 (1993); *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 108 N.C. App. 357, 424 S.E.2d 420, *aff'd*, 335 N.C. 158, 436 S.E.2d 821 (1993).

The *Faulkenbury* and *Woodard* cases were returned to the superior court and joined with the *Peele* case for trial. The only issue at the trial was whether the change in the calculation of the plaintiffs' disability benefits impaired the obligations of a contract in violation of Article I, Section 10 of the Constitution of the United States. The superior court held that the Contract Clause had been violated.

Womble Carlyle Sandridge & Rice, by G. Eugene Boyce; Susan McFarlane; and Marvin Schiller for plaintiff-appellants and -appellees.

Michael F. Easley, Attorney General, by Edwin M. Speas, Jr., Senior Deputy Attorney General, and Norma S. Harrell, and Tiare Bowe Smiley, Special Deputy Attorneys General, for defendant-appellants and -appellees.

WEBB, Justice.

[1] The principal question raised by this appeal is whether a change in the law, which reduced plaintiffs' disability retirement payments, violates Article I, Section 10 of the Constitution of the United States, which provides in part: "No state shall . . . pass any . . . law impairing the obligations of contracts." U.S. Const. art. I, § 10. In order to resolve this question, we must first determine whether there was a contract. If there was a contract, we must determine whether the contract was impaired. Finally, we must determine whether the impairment was reasonable and necessary to serve an important public purpose. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 52 L. Ed. 2d 92 (1977).

The Court of Appeals held and we affirmed in *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988), a case almost on all fours with this case, that the relation between the employees and the governmental units was contractual. *Simpson* governs this case. At the time the plaintiffs' rights to pensions became vested, the law provided that they would have disability retirement benefits calculated in a certain way. These were rights that they had earned and that may not be taken from them by legislative action.

The defendants argue *Simpson* is wrong and should be overruled. They say this is so because the statutes upon which the plaintiffs rely are not promises, but only state a policy which the General Assembly may change. We believe that a better analysis is that at the time the plaintiffs started working for the state or local government, the statutes provided what the plaintiffs' compensation in the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract.

The defendants next contend that the General Assembly reserved the right to amend the retirement plans for state and local government employees by N.C.G.S. §§ 128-38 and 135-18.4, which provide:

> The General Assembly reserves the right at any time and from time to time, and if deemed necessary or appropriate by said General Assembly in order to coordinate with any changes in the benefit and other provisions of the Social Security Act made after January 1, 1955, to modify or amend in whole or in part any or all of the provisions of the . . . Retirement System.

N.C.G.S. § 128-38 (1995) (local government employees); N.C.G.S. § 135-18.4 (1995) (state government employees).

The two sections only allow amendments to coordinate the retirement system with the Social Security Act. They have no application to this case.

The defendants, citing cases from other states and legal articles, say the General Assembly did not originally reserve the right to change the retirement benefits because at the time the plans were created, the General Assembly considered retirement benefits to be gratuities. We believe this argument is refuted by the first case in this state, *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942), in which the constitutionality of the Teachers' and State Employees' Retirement Act was challenged. We held that pensions for teachers and state employees were delayed salaries. If they were gratuities, we said, they would run afoul of proscription of special emoluments as provided in our state Constitution.

The defendants argue that there is nothing in the statutes that shows the General Assembly intended to offer the benefits as a part of a contract, and without such an intent, there can be no contract. We believe that when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits if those persons fulfilled the conditions. When they did so, the contract was formed. For a discussion on the objective and subjective theories in determining the intent to form a contract, see E. Allan Farnsworth, *Contracts* § 3.6, at 113 (1st ed. 1982).

The defendants contend that the plaintiffs do not have vested rights to disability compensation at the pre-1 July 1982 level because

they were not disabled on that date. They say that the plaintiffs' rights to disability retirement benefits did not vest until the plaintiffs were disabled, at which time the benefits had been reduced. We believe a better analysis is that, pursuant to the plaintiffs' contracts, they were promised that if they worked for five years, they would receive certain benefits if they became disabled. The plaintiffs fulfilled this condition. At that time, the plaintiffs' rights to benefits in case they were disabled became vested. The defendants could not then reduce the benefits.

The defendants argue that *Griffin v. Board of Comm'rs*, 84 N.C. App. 443, 352 S.E.2d 882 (1987), is inconsistent with *Simpson* and the Court of Appeals' opinion in this case. We agree. So far as *Griffin* is inconsistent with this case, it is overruled.

The defendants next argue that *Simpson* has never been considered in equitable distribution cases when determining whether pensions are vested, and pensions are thus marital property. Equitable distribution has no application to this case.

The defendants contend that the power to determine the amount of pension payments is a part of the essential attributes of sovereign power necessary to safeguard the vital interests of the people. These are powers of a state which cannot be "bargained away," say the defendants. A state can normally enter into a financial obligation. *United States Trust Co.*, 431 U.S. at 21, 52 L. Ed. 2d at 109. The promise to pay pensions does not bargain away a power of the state or local government necessary to protect the vital interests of the people.

The defendants next argue that assuming there were contractual relationships in regard to the pension rights of the plaintiffs, there has not been a showing that the plaintiffs' contractual rights have been impaired. The defendants say this is so because the plaintiffs have received what they reasonably expected from the contracts. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 74 L. Ed. 2d 569 (1983). The defendants say the evidence showed that the plaintiffs did not read the handbooks provided them, which explained their pension rights, and made no inquiries about these rights until they retired. For this reason, say the defendants, the plaintiffs had no particular expectations in regard to disability payments except that they would receive what the pension plan provided for them. The plaintiffs expected to receive what they were promised at the time of vesting. They may not have known the exact amount, but

this was their expectation. The contract was substantially impaired when the promised amount was taken from them.

The defendants next argue that the retirement benefits were not the central undertakings of the contracts. They say that the service-retirement benefits were what was bargained for by the plaintiffs, and because the plaintiffs are receiving the equivalent of service-retirement benefits, their rights under the contracts have not been impaired. We disagree. Whatever may have been the central undertaking of the contracts, the retirement benefits were an integral part. The plaintiffs are entitled to have this part enforced.

[2] The defendants next argue that there was no proof that any members of the classes represented by the plaintiffs suffered any impairment of their contracts. We can assume they did so when they received the same treatment as the named plaintiffs.

The defendants next contend that plaintiffs Faulkenbury and Woodard argue that their contract rights arose at the time their rights to pensions were vested. The plaintiffs were vested before 1 July 1982, and, say the defendants, their rights must be determined as of those dates. If this is so, the plaintiffs' rights have not been impaired because they would have received less on the dates of vesting than they would have received on 1 July 1982. Whenever the plaintiffs' pension rights vested, they were entitled to have their rights calculated on 1 July 1982. The state and local governments on that date offered certain things to the plaintiffs, which the plaintiffs accepted by continuing in their employment.

The defendants next contend that when social security payments, cost of living increases, no retirement deductions, and no social security deductions are considered, the plaintiffs are receiving more than any reasonable expectation they had for disability benefits. We disagree. The plaintiffs are entitled to what they bargained for when they accepted employment with the state and local governments. They should not be required to accept a reduction in benefits for other benefits they have received. Nor does it matter that some members of the classes will receive as much or more under the revised plans. They are entitled to receive that for which they bargained.

[3] The defendants next argue that the changes in disability retirement benefits were reasonable and necessary to accomplish an important public purpose. They say that a proper consideration in designing a pension plan is that a disability retirement feature of the

plan should not encourage people to take early retirement. The retirement plans under consideration here, say the defendants, have developed to the point that some members of the plan can receive more by taking disability retirement than by continuing to work. The defendants argue that the correct operation of the plan is an important public purpose, which justifies the impairment of the contract. We do not believe that because the pension plan has developed in some ways that were not anticipated when the contract was made, the state or local government is justified in abrogating it. This is not the important public purpose envisioned which justifies the impairment of a contract.

The defendants make an extensive argument in regard to what they say is the superiority of the new plan over the old. We do not pass on the merits of the two plans. We simply hold that the state and local governments cannot impair their contracts with the plaintiffs.

The defendants assigned error to the superior court's holdings that the plaintiffs had been deprived of the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States; that the plaintiffs' property rights had been violated as guaranteed by Article I, Sections 1 and 19 of the North Carolina Constitution; and that the plaintiffs' rights under Article I, Section 5 of the North Carolina Constitution had been violated. Our holding that the Contract Clause has been violated is sufficient to determine the case. We do not consider these assignments of error.

[4] The defendants next argue that the superior court was in error in holding that the applicable statutes of limitations are found in N.C.G.S. § 128-27(i) and N.C.G.S. § 135-5(n). These two sections contain identical provisions, which provide:

> No action shall be commenced against the State or the Retirement System by any retired member or beneficiary respecting any deficiency in the payment of benefits more than three years after such deficient payment was made, and no action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made.

N.C.G.S. § 128-27(i) (1995) (local government employees); N.C.G.S. § 135-5(n) (1995) (state government employees). The defendants say

the deficiencies contemplated by the two sections are not what we have in this case. They say that a deficiency is a payment which is deficient because of a mathematical error or a mistake in cutting a check. They say that the plaintiffs are not suffering from a continuing wrong. If there was a wrong, say the defendants, it occurred when the plaintiffs retired and were paid less than they would have been paid under the system which had been in effect. This was not a continuing wrong, say the defendants, and the statute of limitations contained at N.C.G.S. § 1-52(5) bars all the plaintiffs who have retired because of disability more than three years before they began an action to challenge the changes in disability retirement.

We do not read this section as do the defendants. We believe that the reductions in payments under the new systems were deficiencies which have continued to the present time. N.C.G.S. § 128-27(i) and N.C.G.S. § 135-5(n) apply in this case, and they allow the plaintiffs to pursue claims for underpayments for three years before they commenced actions.

[5] The defendants next say it was error for the superior court to allow the plaintiffs to recover the actuarial equivalent of the underpayments. The court did this pursuant to N.C.G.S. § 128-32 and N.C.G.S. § 135-10, which have virtually identical provisions as follows:

> Should any change or error in the records result in any member or beneficiary receiving from the Retirement System more or less than he would have been entitled to receive had the records been correct, the Board of Trustees shall correct such error, and as far as practicable, shall adjust the payment in such a manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled shall be paid.

N.C.G.S. § 128-32 (1995) (local government employees); N.C.G.S. § 135-10 (1995) (state government employees). The defendants argue that these sections apply only if there is a change or error in the records and that there is neither in this case. For this reason, say the defendants, the plaintiffs are not entitled to the actuarial equivalents of the underpayments.

We believe these sections show it was the intent of the General Assembly that if there was an underpayment of a pension compensation, it would be paid at the actuarial value. It was not error for the superior court to require such payment.

[6] The defendants next argue that it was error to require them to pay interest on the underpayments. They say that the state and local governments have sovereign immunity which prevents them from being liable for interest. *Attorney General v. Cape Fear Navigation Co.*, 37 N.C. 444 (1843). We disagree. Insofar as the state and local governments have sovereign immunity, it was waived by N.C.G.S. § 135-1(2), which defines actuarial equivalent as "a benefit of equal value when computed upon the basis of such mortality tables as shall be adopted by the Board of Trustees, and regular interest," N.C.G.S. § 135-1(2) (1995), and by N.C.G.S. § 128-21(2), which provides, " 'Actuarial equivalent' shall mean a benefit of equal value when computed at regular interest upon the basis of such mortality tables as shall be adopted by the Board of Trustees," N.C.G.S. § 128-21(2) (1995). These sections plainly say that actuarial value includes interest. The plaintiffs are entitled to the actuarial value of underpayments, which includes interest.

The defendants next argue that the remedy fashioned by the superior court is too broad. In a conclusion of law, the court held that the plaintiffs are entitled to interest and the actuarial equivalent of their underpayments in accordance with N.C.G.S. § 135-10 and N.C.G.S. § 128-32. The court also held that pursuant to N.C.G.S. § 135-5(n) and N.C.G.S. § 128-27(i), the plaintiffs "are entitled to receive past underpayments, the actuarial equivalent thereof and interest."

The defendants say that allowing recompense under all these sections gives the plaintiffs double recovery. They say that the payment of underpayments at their actuarial equivalent will fully compensate the plaintiffs and that the plaintiffs should not be paid interest. We disagree.

In allowing interest, the court was following the definition of actuarial equivalent prescribed by N.C.G.S. § 128-21(2) and N.C.G.S. § 135-1(2). There is no double recovery.

[7] The defendants next argue that it was error for the court to order that the defendants pay into a common fund all past deficiencies in payments of monthly benefits which occurred within three years of the dates the class actions were filed. The common-fund doctrine is based on an exception to the general rule that attorneys' fees may not be awarded to the prevailing party without statutory authority. The doctrine allows a court in its equitable jurisdiction to order attorneys' fees "to a litigant who at his own expense has maintained a success-

ful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him." *Horner v. Chamber of Commerce*, 236 N.C. 96, 97-98, 72 S.E.2d 21, 22 (1952); *see also Raleigh-Durham Airport Auth. v. Howard*, 88 N.C. App. 207, 363 S.E.2d 184 (1987), *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 916 (1988).

The defendants contend this is not a case in which the common-fund doctrine should be applied. They say that the plaintiffs' claims consist of individual benefit payments and are not for group damages in which there can be a lump-sum award. We believe the defendants have misapprehended the common-fund doctrine. Although the words "common fund" are used, the purpose of the doctrine is to allow the court to award attorneys' fees to a litigant who has gained an advantage for other persons similarly situated. The plaintiffs have done so in this case, and the court properly ordered the defendants to pay into the common-fund.

[8] The defendants next argue that it was error for the court to grant the plaintiffs' motion for class certification and to deny the defendants' motion for decertification after the trial. N.C.G.S. § 1A-1, Rule 23(a) provides for class actions. In *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 354 S.E.2d 459 (1987), we held "that a 'class' exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at 280, 354 S.E.2d at 464. Other prerequisites for bringing a class action are that (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class. If the prerequisites for a class action are established, it is within the discretion of the trial court as to whether the matter may proceed as a class action. *Id.* at 282-84, 354 S.E.2d at 465-66.

The court found facts in each case which justified the establishment of a class action. It ordered that a class be established in each

case. The court designated as members of the class all persons who were receiving disability benefits in a lesser amount than they would have received had the law not been changed; persons who retired on service retirement who could have retired on disability retirement at higher rates if the law had not been changed; living beneficiaries of deceased disability retirees who if living would receive less in retirement payments than they would have received if the law had not been changed; all living heirs, beneficiaries, or personal representatives of any estate of one who was receiving less as a disability retiree than he would have received if the law had not been changed and who had not selected a designated survivor beneficiary; and all living heirs, beneficiaries, or personal representatives of the estate of a deceased survivor beneficiary who was receiving benefits pursuant to the election of an option by a deceased disability retiree.

Each of the parties had a claim based on what he or she contends is underpayment of retirement benefits. This claim predominates over issues affecting only individual class members in this case. This establishes a class.

The defendants contend the prerequisites to bringing a class action do not exist in this case. They say there are serious questions concerning the standing and adequacy of the named plaintiffs to represent the class. They say Faulkenbury and Woodard's claims are barred by the statute of limitations, which means they cannot represent their classes. We have held their claims are not barred by the statute of limitations.

The defendants argue that the members of the classes who are not receiving disability retirement, such as the heirs of deceased retirees, have different interests from the named plaintiffs. The interest of the plaintiffs named and unnamed is to recover what they can for what they contend is underpayment of retirement benefits. This is an issue which defines the class.

Finally, the defendants argue that the members of the potential class will receive recoveries in different amounts. For this reason, say the defendants, the class members' claims must be examined to determine what offsetting advantages cancel out disadvantages, what difference in benefits might exist, and whether the change in benefits changes the central understanding of the parties. All these are collateral issues in this case. The predominate issue is how much the parties' retirement benefits were reduced by an unconstitutional change in the law. This issue defines the class.

[9] The plaintiffs appeal from the court's refusal to extend the class certifications to members of the two retirement systems who become disabled in the future. They say that unless they are included, they will receive less when they retire on disability than will the members of the classes certified in this case.

The trial court has broad discretion in determining whether a case should proceed as a class action. *Id.* at 284, 354 S.E.2d at 466. We have no reason to believe the defendants will not follow the law as we have delineated it in this opinion in pension payments to future disability retirees. We cannot hold that the court abused its discretion in refusing to certify a class whose members are unknown at this time.

The judgment of the superior court is affirmed, and the case is remanded to the Superior Court, Wake County, for further proceedings.

AFFIRMED.

ACT-UP TRIANGLE (AIDS COALITION TO UNLEASH POWER TRIANGLE), STEVEN HARRIS, AND JOHN DOE v. COMMISSION FOR HEALTH SERVICES OF THE STATE OF NORTH CAROLINA, DR. JESSE MEREDITH, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE COMMISSION FOR HEALTH SERVICES OF THE STATE OF NORTH CAROLINA, DR. RONALD H. LEVINE, IN HIS OFFICIAL CAPACITY AS STATE HEALTH DIRECTOR AND ASSISTANT SECRETARY OF HEALTH OF THE STATE OF NORTH CAROLINA, MR. JONATHAN HOWES, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES OF THE STATE OF NORTH CAROLINA, AND MS. DEBBY CRAIN, AS DIRECTOR OF THE DIVISION OF PUBLIC AFFAIRS, DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES OF THE STATE OF NORTH CAROLINA

No. 328PA96

(Filed 11 April 1997)

1. Administrative Law and Procedure § 54 (NCI4th); Health § 50 (NCI4th)— anonymous HIV testing—denial of rule-making petition—superior court jurisdiction to review

The superior court had jurisdiction under N.C.G.S. § 150B-20(d) to review the denial of a rule-making petition to extend anonymous HIV testing. The denial of a rule-making petition is a final decision subject to judicial review. Here, the Commission denied plaintiff's rule-making petition; the fact that the Commission voted to enact a temporary rule extending

anonymous testing for two additional years does not change the nature of its decision. *N.C. Chiropractic Assoc. v. N.C. State Bd. of Educ.*, 122 N.C. App. 122, involved the granting rather than the denial of a petition and is not applicable.

Am Jur 2d, Administrative Law §§ 488, 491; Health § 21.

What constitutes agency "action," "order," "decision," "final order," "final decision," or the like, within meaning of federal statutes authorizing judicial review of administrative action—Supreme Court cases. 47 L. Ed. 2d 843.

2. Administrative Law and Procedure § 69 (NCI4th); Health § 50 (NCI4th)— anonymous HIV testing—whole record review of commission

The superior court did not err by affirming the decision of the Commission for Health Services to deny a rule-making petition to extend anonymous HIV testing. The record is replete with exhibits and affidavits on both sides of the issue of anonymous HIV testing and the whole record test does not allow the reviewing court to replace the agency's judgment as between two reasonably conflicting views.

Am Jur 2d, Administrative Law §§ 537-544; Health § 21.

3. Administrative Law and Procedure § 30 (NCI4th); Health § 50 (NCI4th)— anonymous HIV testing—denial of rule-making petition—not a contested case

The decision of the Commission of Health Services to deny a rule-making petition to extend anonymous HIV testing was not the result of unlawful procedure where the decision had been remanded from superior court for additional evidence and plaintiffs contend that they were not given the opportunity to cross-examine witnesses to which they were entitled in a contested case governed by N.C.G.S. § 150B-40, so that procedural due process was violated. The definition of contested case specifically excludes administrative rule-making, N.C.G.S. § 150B-2(2), and the Commission of Health Services is not an agency to which the provisions of N.C.G.S. § 150B-40 apply. Moreover, the remand hearing was conducted in the same manner as other meetings of the Commission. There is nothing in the record to show that the hearing was conducted improperly.

Am Jur 2d, Administrative Law §§ 261, 345, 359, 375.

4. Administrative Law and Procedure § 54 (NCI4th)— anonymous HIV testing—rule-making petition—whether administrative rule violates Constitution—jurisdiction in superior court

The superior court is the proper forum for determining whether an administrative rule violates the Constitution and the jurisdiction of the superior court under N.C.G.S. § 7A-245 was properly invoked where plaintiffs' complaint and petition for judicial review alleges that the administrative rule at issue violates the state and federal Constitutions and prays for injunctive relief.

Am Jur 2d, Administrative Law §§ 227, 228, 552.

5. Constitutional Law § 84 (NCI4th)— anonymous HIV testing—constitutional privacy rights

The elimination of anonymous HIV testing in favor of confidential testing did not violate plaintiffs' constitutional privacy rights. The records to be maintained are to be strictly confidential pursuant to statutory mandate, access is strictly regulated, and violation of the statutory confidentiality provisions can result in civil and criminal penalties. The statutory security provisions are adequate to protect against potential unlawful disclosure which might otherwise render the confidential HIV testing program constitutionally infirm. N.C.G.S. § 130A-143; N.C.G.S. § 130A-18, -25.

Am Jur 2d, Administrative Law §§ 601-604.

Appeal as of right pursuant to N.C.G.S. § 7A-30(1), and on discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 123 N.C. App. 256, 472 S.E.2d 605 (1996), dismissing plaintiffs' appeal from the order entered 9 June 1995 by Cashwell, J., in the Superior Court, Wake County, and remanding for dismissal of the amended complaint and petition for judicial review. Heard in the Supreme Court 14 February 1997.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, for plaintiff-appellants.

Michael F. Easley, Attorney General, by Mabel Y. Bullock, Special Deputy Attorney General, for defendant-appellees.

Hunton & Williams, by Craig A. Bromby, on behalf of American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

FRYE, Justice.

This case involves the adoption of a rule by the Commission for Health Services eliminating anonymous HIV testing by local health departments effective 1 September 1994. In light of the statutes providing for judicial review of agency decisions, we hold that, upon plaintiffs' petition for judicial review, the superior court did not err in affirming the decision of the Commission. Therefore, we must reverse the decision of the Court of Appeals.

The record in this case reflects the following: On 22 April 1994, plaintiffs ACT-UP Triangle (AIDS Coalition to Unleash Power Triangle), Steven Harris, and John Doe filed a "Petition for Amendment of Administrative Rule 15A NCAC 19A .0102(a)(3)" with the Commission for Health Services (Commission). The Commission had promulgated a rule, 15A NCAC 19A .0102(a)(3) (February 1992), that would have discontinued anonymous HIV testing by local health departments effective 1 September 1994. Plaintiffs' proposed amendment would have extended anonymous HIV testing indefinitely by repealing the provision of 15A NCAC 19A .0102(a)(3) that provided for the termination of anonymous HIV testing effective 1 September 1994. The Commission met on 27 April 1994 and rejected plaintiffs' petition. By a letter dated 9 May 1994, plaintiffs were notified that the Commission "denied by unanimous vote" their petition for amendment on 27 April 1994.

On 9 June 1994, plaintiffs filed a complaint and petition for judicial review in Superior Court, Wake County. Plaintiffs asked the court to issue a temporary restraining order, preliminary injunction, and permanent injunction compelling the Commission to continue its program of anonymous HIV testing. Plaintiffs also asked the court to reverse the final agency decision of the Commission and to order the repeal of Rule 15A NCAC 19A .0102(a)(3). In addition, plaintiffs asked the court to order the Department of Environment, Health, and Natural Resources to provide various requested public records. On 8 August 1994, plaintiffs filed a motion seeking to introduce new evidence, including additional statistics and analysis conducted by the Centers for Disease Control and Prevention.

On 31 August 1994, Judge Gordon F. Battle heard plaintiffs' motion to allow the presentation of new evidence and the complaint

and petition for judicial review seeking a preliminary injunction. Judge Battle stayed the final agency decision, enjoined defendants from eliminating anonymous testing, and ordered defendants to maintain the current program of anonymous testing until final judicial review was completed by the court. Judge Battle then remanded the case to the Commission for hearing of plaintiffs' additional evidence and ordered the Commission to reconsider its decision in light of this evidence.

On 4 November 1994, after hearing additional evidence from plaintiffs and defendants, the Commission voted to "reaffirm [its] decision to deny" plaintiffs' petition for amendment of 15A NCAC 19A .0102(a)(3). The Commission then voted to enact a temporary rule extending anonymous testing for two additional years. The temporary rule was to expire on 15 June 1995 without the passage of a permanent rule. On 12 December 1994, Judge Battle granted plaintiffs' motion, as prevailing parties, for attorney's fees and other costs.

On 9 February 1995, the Commission voted against the adoption of the temporary rule as a permanent rule, thus effectively eliminating anonymous HIV testing in accordance with the original Rule 15A NCAC 19A .0102(a)(3). Thereafter, on 9 March 1995, plaintiffs filed a motion to amend their complaint and petition for judicial review in order to allege facts which occurred since the original filing and since the entry of the orders of Judge Battle. Judge Narley L. Cashwell allowed this amendment on 17 May 1995.

On 9 June 1995, Judge Cashwell entered an order denying plaintiffs' petition to delete the provision of 15A NCAC 19A .0102(a)(3) which provided that anonymous HIV testing would be discontinued effective 1 September 1994, and affirmed the decision of the Commission to eliminate anonymous HIV testing. That same day, plaintiffs filed a notice of appeal and made a motion for stay of the order and continuance of the injunction. Judge Cashwell granted the motion, enjoining the elimination of anonymous HIV testing.

The Court of Appeals, in a *per curiam* opinion, held that

> no judicial review is available when an agency exercises its rulemaking power. In the instant case, we do not have the authority to exercise the power of judicial review. Because neither the superior court nor this Court has jurisdiction for the purpose of judicial review of the final agency decision, the appeal is dismissed and the case is remanded to the superior court for

dismissal of the amended complaint and petition for judicial review.

ACT-UP Triangle v. Commission for Health Services, 123 N.C. App. 256, 260, 472 S.E.2d 605, 608 (1996).

On 31 July 1996, this Court allowed plaintiffs' motion for a temporary stay. On 5 September 1996, this Court allowed plaintiffs' petition for writ of supersedeas; denied the Attorney General's motion to dismiss the notice of appeal of a constitutional question filed by plaintiffs, thereby retaining the notice of appeal; and allowed plaintiffs' petition for discretionary review.

[1] The first issue on this appeal is whether the North Carolina courts have jurisdiction under the Administrative Procedure Act (APA) to review the denial of a rule-making petition. The Court of Appeals in the case *sub judice* held that "there is no judicial review of the exercise of an agency's rulemaking power." *Id.* at 258, 472 S.E.2d at 607. After reviewing the proceedings involved in this case, we conclude that the superior court had the authority to review the Commission's final decision.

The procedure for petitioning an administrative agency to adopt a rule is set forth in N.C.G.S. § 150B-20(a). Upon receiving such a petition, the agency must grant or deny the petition within the time limits set forth in N.C.G.S. § 150B-20(b). After granting or denying the petition, the agency must take the action set forth in N.C.G.S. § 150B-20(c) relating to notice and publication of the proposed rule. If the agency denies the petition, judicial review of that decision is available: "Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter." N.C.G.S. § 150B-20(d) (1995). Thus, in the instant case, the issue is whether the Commission denied plaintiffs' rule-making petition such that judicial review was available pursuant to N.C.G.S. § 150B-20(d).

Contrary to the conclusion of the Court of Appeals, we conclude that the Commission denied the plaintiffs' rule-making petition, and therefore, judicial review of the decision to deny the petition was available pursuant to N.C.G.S. § 150B-20(d). On 27 April 1994, the Commission denied plaintiffs' rule-making petition, and in a letter mailed to plaintiffs on 9 May 1994, the Commission stated that "the rulemaking petition was *denied* by unanimous vote of the Commission." (Emphasis added.) On 9 June 1994, plaintiffs filed a complaint and petition for judicial review in Superior Court,

Wake County. Pursuant to N.C.G.S. § 150B-51(b), Judge Battle remanded the case to the Commission for the hearing of additional evidence.

The Commission denied the rule-making petition a second time on 4 November 1994, after the case was remanded for the hearing of additional evidence. The Commission voted six to five to "reaffirm [its] decision to deny the rule making petition submitted by ACT-UP Triangle in April, 1994."

It was upon the Commission's *denial* of their rule-making petition that plaintiffs sought judicial review. The fact that the Commission voted to enact a temporary rule extending anonymous testing for two additional years does not change the nature of its decision with respect to plaintiffs' rule-making petition. The Commission did exercise its rule-making power in adopting the temporary rule, but it was because the Commission declined to exercise its rule-making power with respect to plaintiffs' rule-making petition that judicial review was available to plaintiffs.

The Court of Appeals relied on *N.C. Chiropractic Assoc. v. N.C. State Bd. of Educ.*, 122 N.C. App. 122, 468 S.E.2d 539, *disc. rev. denied*, 343 N.C. 513, 472 S.E.2d 16 (1996), to support its conclusion that judicial review was not available in the instant case. We find that case inapposite.

In that case, the North Carolina Chiropractic Association (NCCA) petitioned the North Carolina State Board of Education (Board) to amend a rule to allow doctors of chiropractic to perform required annual physical examinations of prospective interscholastic athletes. The Board granted the petition and initiated public rule-making procedures. After a public hearing and after receiving comments on the proposed amendment, the Board declined to adopt the amendment.

The NCCA petitioned for judicial review of the Board's decision. On appeal, the Court of Appeals held that if "the agency *grants* a rule-making petition, subsequent procedures for considering and adopting the rule are governed by either G.S. § 150B-21.1 for temporary rules, or § 150B-21.2 for permanent rules." *Id.* at 124, 468 S.E.2d at 540-41 (emphasis added). Since neither of those sections provided for judicial review where the agency followed the required procedures but did not adopt or amend the rule, the Court of Appeals affirmed the decision of the trial court which dismissed the petition for judicial review for lack of jurisdiction. *Id.* at 124, 468 S.E.2d at 541.

In contrast, the Commission for Health Services, in the instant case, did *not* grant plaintiffs' rule-making petition. The Commission denied it. Since the Commission *denied* plaintiffs' rule-making petition, the holding of *N.C. Chiropractic Assoc.* does not apply. We conclude that the superior court had jurisdiction pursuant to N.C.G.S. § 150B-20(d) for judicial review of the Commission's denial of the plaintiffs' rule-making petition, and accordingly, we reverse the Court of Appeals' decision on this issue.

[2] Having determined that jurisdiction existed for the superior court's judicial review, the second issue is whether there is a lack of substantial evidence in the record to support the Commission's denial of the rule-making petition and whether the denial was arbitrary and capricious. After reviewing the whole record, we conclude that there is substantial evidence to support the Commission's denial of plaintiffs' rule-making petition and that the denial was not arbitrary and capricious.

The proper standard for the superior court's judicial review "depends upon the particular issues presented on appeal." *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). When the petitioner "questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test." *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). *See also Associated Mechanical Contractors v. Payne*, 342 N.C. 825, 467 S.E.2d 398 (1996) (concluding that the proper standard of review of agency decisions to determine the sufficiency of the evidence is the "whole record" test). "The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

As to appellate review of a superior court order regarding an agency decision, "the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* at 675, 443 S.E.2d at 118-19. "As distinguished from the 'any competent evidence' test and a *de novo* review, the 'whole record' test 'gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evi-

dence.' " *Bennett v. Hertford County Bd. of Educ.*, 69 N.C. App. 615, 618, 317 S.E.2d 912, 915 (quoting *Overton v. Goldsboro City Bd. of Educ.*, 304 N.C. 312, 322, 283 S.E.2d 495, 501 (1981)), *cert. denied*, 312 N.C. 81, 321 S.E.2d 893 (1984).

In the instant case, the record indicates that the superior court employed the correct standard of review since the order affirming the decision of the Commission stated that the final agency decision of the Commission "was supported upon the whole record." We must now determine whether the scope of this review was exercised properly.

We note first that the record in the instant case is replete with exhibits and affidavits from plaintiffs and defendants on both sides of the issue of anonymous HIV testing. Nonetheless, plaintiffs contend that the Commission's decision to eliminate anonymous HIV testing was not based on substantial evidence and a careful consideration of the evidence in the record, that the decision was politically motivated, and that the cutoff date for anonymous testing was arbitrary.

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). Moreover, in determining whether an agency decision is arbitrary or capricious,

> the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law.
>
> The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment' . . . ." *Comm'r of Ins. v. Rate Bureau*, 300 N.C. at 420, 269 S.E.2d at 573 (citations omitted).

Lewis v. N.C. Dep't of Human Resources, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (citation omitted).

After reviewing the record, we conclude that it contains sufficient substantial evidence to support the Commission's decision to eliminate anonymous testing in favor of confidential testing. "The 'whole record' test does not allow the reviewing court to replace the

[agency]'s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). Thus, the superior court properly employed the whole record test in its judicial review of the Commission's decision to deny plaintiffs' rule-making petition. Accordingly, we conclude that the superior court did not err in affirming the decision of the Commission to deny plaintiffs' rule-making petition.

[3] The next issue on this appeal is whether the decision to eliminate anonymous HIV testing was based upon an unconstitutional procedure. While plaintiffs do not explicitly state the jurisdictional basis for this issue, N.C.G.S. § 150B-51(b)(3) confers jurisdiction on the court to affirm, reverse, or modify an agency's decision if that decision is made upon unlawful procedure. Plaintiffs contend that the remand hearing ordered by Judge Battle on 31 August 1994 was conducted by the Commission as a "contested case" and thus was governed by N.C.G.S. § 150B-40, which provides for the opportunity to cross-examine witnesses. Plaintiffs further contend that they were not given the opportunity to cross-examine witnesses and therefore the Commission's decision as a result of the remand hearing violated procedural due process. We disagree.

We note first that the definition of "contested case" specifically excludes administrative rule-making. N.C.G.S. § 150B-2(2) (1995). Second, N.C.G.S. § 150B-38 lists the agencies to which Article 3A of the Administrative Procedure Act applies, and this list does not include the Commission for Health Services. Thus, the provisions of N.C.G.S. § 150B-40 of Article 3A do not apply to hearings conducted by the Commission.

Moreover, the remand hearing was conducted in the same manner as other meetings of the Commission and was not conducted as a "contested case." Twenty-seven exhibits and twelve speakers were presented by plaintiffs. The floor was then opened to the public; four individuals spoke in favor of the continuation of anonymous testing and four spoke against it. Finally, plaintiffs' counsel was offered an opportunity to present a rebuttal, which he accepted, and thus he was the final speaker before the Commission discussed the action it would take. We find nothing in the record to show that the remand hearing was conducted improperly, and accordingly, we reject plaintiffs' argument that the Commission's decision to reaffirm

its denial of plaintiffs' rule-making petition was the result of unlawful procedure.

[4] The fourth issue is whether the North Carolina courts have the power to review administrative rule-making decisions on constitutional grounds. Plaintiffs contend that N.C.G.S. § 7A-245 confers jurisdiction on the superior court to determine whether 15A NCAC 19A .0102(a)(3), eliminating anonymous HIV testing, is unconstitutional. We agree.

N.C.G.S. § 7A-245 provides in pertinent part:

> (a) The superior court division is the proper division without regard to the amount in controversy, for the trial of civil actions where the principal relief prayed for is
>
> (1) Injunctive relief against the enforcement of any statute, ordinance, or regulation;
>
> (2) Injunctive relief to compel enforcement of any statute, ordinance, or regulation;
>
> (3) Declaratory relief to establish or disestablish the validity of any statute, ordinance, or regulation; or
>
> (4) The enforcement or declaration of any claim of constitutional right.

By this statute, "the General Assembly has specifically provided that civil actions are brought properly in Superior Court when the principal relief prayed [for] is enforcement of a claim of constitutional right or injunctive relief against the enforcement of a statute." *White v. Pate*, 308 N.C. 759, 763, 304 S.E.2d 199, 202 (1983). We have held that the superior court is the proper forum for a claim to enforce an administrative rule and for a declaration that certain contracts were void and unenforceable as against public policy and the Constitution. *State v. Whittle Communications*, 328 N.C. 456, 463, 402 S.E.2d 556, 560 (1991). Thus, it follows that the superior court is the proper forum for determining whether an administrative rule violates the Constitution. *See id.*

In the instant case, the plaintiffs' complaint and petition for judicial review states that "the elimination of anonymous HIV testing infringes upon the liberty rights, privacy rights, and due process rights of [plaintiffs] and all other North Carolina citizens as guaranteed by Article I, § 1, § 19, § 23, § 35, and § 36 of the North Carolina

Constitution and the Fourth Amendment, Fifth Amendment, Ninth Amendment, and Fourteenth Amendment of the United States Constitution." Plaintiffs requested that the court "issue a temporary restraining order, preliminary injunction, and final injunction, compelling the Commission for Health Services to continue its program of anonymous HIV testing in the State of North Carolina." Plaintiffs' complaint and petition for judicial review alleges that the administrative rule at issue violates the state and federal Constitutions and prays for injunctive relief. Accordingly, we conclude that the jurisdiction of the superior court under N.C.G.S. § 7A-245 was properly invoked.

[5] The final issue in this appeal is whether the elimination of anonymous HIV testing is an unconstitutional violation of plaintiffs' privacy rights. Plaintiffs contend that eliminating anonymous HIV testing violates their right to privacy in personal medical information under both the United States and North Carolina Constitutions. We disagree.

Under the United States Constitution, plaintiffs contend that the Supreme Court's decision in *Whalen v. Roe*, 429 U.S. 589, 51 L. Ed. 2d 64 (1977), recognized a constitutional right to privacy in personal medical information. In that case, a New York statute which required physicians to identify patients obtaining certain prescription drugs having potential for abuse was challenged as violating the patients' privacy rights. The Supreme Court noted that the "zone of privacy" cases "involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-600, 51 L. Ed. 2d at 73 (footnotes omitted). After evaluating the security issues regarding the patient-identification requirements of the statute, the Supreme Court upheld the statute, stating that the statute "does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation." *Id.* at 600, 51 L. Ed. 2d at 74.

While relying on *Whalen* for the proposition that the Supreme Court recognized a constitutional right to privacy in personal medical information, plaintiffs contend that the basis for the Court's ruling in *Whalen* can be distinguished from the instant case. Despite plaintiffs' contentions, we are not convinced that the instant case is distinguishable from *Whalen* because of the measures in place to ensure confidentiality. N.C.G.S. § 130A-12 provides that all privileged patient

medical records in the possession of the Department of Health or local health departments are confidential and are not public records. Further, N.C.G.S. § 130A-143 provides that all information and records that identify a person who has AIDS or any other reportable disease or condition shall be held strictly confidential. Violation of these sections is punishable both civilly, N.C.G.S. § 130A-18 (1995), and criminally, N.C.G.S. § 130A-25 (1995).

We find the reasoning of the *Whalen* Court in discussing the disclosure of the patients' identities to the New York Department of Health particularly persuasive:

> Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not significantly different from those that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.

Whalen, 429 U.S. at 602, 51 L. Ed. 2d at 75 (footnote omitted).

In the instant case, the General Assembly has determined that certain listed communicable diseases and conditions must be reported to local health directors in order to facilitate control of these diseases and conditions. N.C.G.S. §§ 130A-135 to -144 (1995). Pursuant to this legislative mandate, the Commission promulgated rules governing the method of reporting communicable diseases. 15A NCAC 19A .0102. While arguments can be and have been made that the previous program of exempting HIV testing from the reporting requirements is the better policy because of the stigma attached to this particular disease, we do not find that the proposed confidential testing program violates plaintiffs' privacy rights in their personal medical information. As the Supreme Court stated in *Whalen*, "[s]tate legislation which has some effect on individual liberty or

privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen*, 429 U.S. at 597, 51 L. Ed. 2d at 72 (footnotes omitted).

Our conclusion does not change under the North Carolina Constitution. In *Treants Enters., Inc. v. Onslow County*, 83 N.C. App. 345, 350 S.E.2d 365 (1986), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987), the Court of Appeals held that a county licensing ordinance which required "companionship services" to keep permanent records of their patrons violated both the federal and state Constitutions. The Court of Appeals noted that "[t]he ordinance's records requirement implicates a valid individual interest in avoiding disclosure of personal matters," *id.* at 359, 350 S.E.2d at 374, and then distinguished the ordinance in that case from the statute at issue in *Whalen*. The Court of Appeals looked to the security provisions that accompanied the statute in *Whalen*, including the fact that "the statute expressly prohibited public disclosure of the information," and concluded that "[t]he Onslow County ordinance contains no comparable security provisions and grants authority to *any* law enforcement officer to inspect the records." *Id.* at 358, 350 S.E.2d at 374.

The distinction drawn between the Onslow County ordinance and the statute at issue in *Whalen* is instructive in the instant case. The records to be maintained in connection with the elimination of anonymous HIV testing are to be held strictly confidential pursuant to statutory mandate. N.C.G.S. § 130A-143. Violation of the statutory confidentiality provisions can result in civil and criminal penalties. N.C.G.S. §§ 130A-18, -25. Access to the records is strictly regulated. N.C.G.S. § 130A-143. We conclude that the statutory security provisions are adequate to protect against potential unlawful disclosure which might otherwise render the confidential HIV testing program constitutionally infirm.

We conclude that the superior court did not err in affirming the Commission's decision to deny plaintiffs' rule-making petition. We further conclude that the elimination of anonymous HIV testing in favor of confidential testing does not violate plaintiffs' constitutional privacy rights. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

STATE v. CROSS

[345 N.C. 713 (1997)]

STATE OF NORTH CAROLINA v. THOMAS FRANKLIN CROSS, JR.

No. 118PA96

(Filed 11 April 1997)

1. Evidence and Witnesses § 1866 (NCI4th); Criminal Law § 637 (NCI4th Rev.)— kidnaping and robbery—fingerprint on car—sufficiency of evidence

The trial court did not err by denying defendant's motion for dismissal in a prosecution arising from a kidnaping and robbery in a motel parking lot, and the Court of Appeals erred by reversing that denial, where a latent fingerprint was found on the edge of a door of the victim's vehicle; the fact that the print was only a partial print, which was cleanly cut off and did not extend over to the rear quarter panel, strongly suggests that the door was open when defendant's finger contacted the vehicle; the evidence was uncontradicted that the only time the rear driver's side door was opened during the victim's stay in Raleigh was when the assailant opened the door and shoved the victim into the backseat; and the agent's testimony that a lot of pressure and twisting was used when the defendant's finger made contact with the vehicle, which suggests that the print was left as defendant pushed the door closed, is consistent with the victim's account of the crime, and does not support an inference that the defendant merely touched the victim's automobile while walking through the parking lot. Viewed in the light most favorable to the State, the evidence was clearly sufficient to establish that the defendant's fingerprint on the victim's vehicle could only have been impressed at the time the crime was committed. Furthermore, although the fingerprint evidence was sufficient standing alone, the Court of Appeals failed to recognize evidence that the assailant abandoned the victim within blocks of where defendant was frequently seen and where defendant was eventually located and arrested, that a pathway existed near that location which led to the back of the apartment defendant was in when he was arrested, that defendant made efforts to change his appearance by shaving his head, that defendant made an effort to evade arrest, and that defendant repeatedly denied his name to police officers. This evidence, combined with the fingerprint evidence, supports a reasonable inference of defendant's guilt and makes it clear that the trial court correctly sent the case to the jury.

Am Jur 2d, Evidence §§ 95, 569, 1482.

Fingerprints, palm prints, or bare footprints as evidence. 28 ALR2d 1115.

2. Criminal Law § 649 (NCI4th Rev.); Constitutional Law § 231 (NCI4th)— denial of motion to dismiss—reversed by Court of Appeals—upheld by Supreme Court—not double jeopardy

The review by the Supreme Court of a Court of Appeals' reversal of a trial court denial of a motion to dismiss in a prosecution arising from a kidnaping and robbery did not constitute double jeopardy. The Court of Appeals remanded for entry of judgment, but, prior to such entry, the Supreme Court granted discretionary review and acquired jurisdiction. There has been no dismissal by any court upon which jeopardy can attach.

Am Jur 2d, Criminal Law §§ 243 et seq.

Justice FRYE concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 121 N.C. App. 788, 467 S.E.2d 911 (1996), finding error and reversing an order denying defendant's motion to dismiss entered by Hight, J., at the 7 March 1994 Criminal Session of Superior Court, Wake County. Heard in the Supreme Court 11 December 1996.

Michael F. Easley, Attorney General, by Teresa L. Harris, Associate Attorney General, for the State-appellant.

W. Hugh Thompson for defendant-appellee.

LAKE, Justice.

The defendant was tried and convicted of first-degree kidnapping, common-law robbery, assault with a deadly weapon inflicting serious injury, and nine counts of obtaining property by false pretense. Judge Hight sentenced defendant to a total of sixty years' imprisonment.

At trial, the State's evidence tended to show that Nancy White, the victim, arrived at the Crabtree Sheraton Hotel in Raleigh, North Carolina, on Friday, 22 October 1993. White parked her automobile in the hotel's left side parking lot. After retrieving her luggage from the

trunk, White locked her car and checked into the hotel. None of the doors, except the driver's door, were opened at that time. White checked out of the hotel on the morning of Sunday, 24 October 1993. During her stay, White did not move her car, place anything in her car or take anything out of her car.

As White loaded her luggage into the trunk of her car, a man passed between her vehicle and an adjacent vehicle. White testified that she "glanced up for a split second and back down again because he was moving fast, he was walking swiftly and just went by." A few seconds later, White glanced down and noticed the shadow of a person approaching from behind. White testified that before she could react, the individual grabbed her arms and said, "get in the car." When White refused, she was thrown face down between the parked automobiles and beaten on her back and on the back of her head. The assailant obtained White's car keys, opened both the front and rear doors on the driver's side of the car, forced White into the backseat and got behind the wheel. The assailant then reached back with his right hand; grabbed White's hair, causing her head to be pulled back "at a very awkward angle"; and threatened to cut White's throat if she did not remain quiet. The assailant began driving.

After some time had passed, the assailant let go of White's hair and told her not to move and not to look at him. The assailant handed White some cards from White's wallet and demanded that she give him a bank card. White surrendered her ATM card and her access code. The assailant made numerous stops for money. Eventually, White heard the car being driven over gravel. The assailant stopped the car, cut the motor off and left. White then drove her automobile until she located a police officer and reported the incident.

A review of White's bank records revealed nine attempted ATM withdrawals from White's account on 24 October 1993. The assailant was able to withdraw one hundred dollars on three separate occasions. His other attempted withdrawals were unsuccessful.

Although White was unable to see her assailant clearly because her glasses had fallen off at some point during the attack, she described him to the best of her ability and assisted the police in the creation of a composite sketch. Defendant was subsequently arrested and fingerprinted. At the time of his arrest, the defendant was found hiding from police in an apartment near the location where the assailant had abandoned White's car. Defendant had also shaved his head and repeatedly denied that his name was Cross.

At trial, White could neither identify nor eliminate the defendant as the person who attacked her. White did state that the defendant fit the general description and appearance of the person who committed the crimes.

Agent Ken Duke of the City/County Bureau of Identification testified that he processed White's vehicle for latent fingerprints across the trunk and along the vehicle doors. He also processed various items left inside the vehicle. Agent Duke was able to locate four latent prints, three on the vehicle and one on White's driver's license. One of the prints found was a partial latent print lifted off the left (driver's side) rear door on the very rear edge of the door.

Agent Joseph Ludas, a latent print examiner with the City/County Bureau of Identification and an expert in the field of fingerprint identification, identified the fingerprint taken from the left rear door of White's vehicle as corresponding to the right index finger of the defendant. Agent Ludas testified that the defendant's finger contacted White's car on the edge of the left rear door in a twisting, turning motion. Agent Ludas also testified that the ridge detail, due to its darkness and width, indicated that the defendant used a lot of pressure when he left the print on the vehicle. The remaining three prints were of "poor quality" and could not be identified.

Prior to the weekend of the attack, White's vehicle had never been in Raleigh. Defendant had never been a guest in her vehicle, and White did not know of any period of time when defendant would have been around her vehicle.

At the close of the State's evidence, defendant moved to dismiss the charges based on the insufficiency of the evidence. The trial court denied the defendant's motion, the jury returned verdicts of guilty, and the defendant appealed. The Court of Appeals reversed the trial court, holding that there was insufficient evidence to show that defendant's fingerprint, which was the only evidence tending to prove defendant committed the crimes charged, could only have been impressed at the time the crimes were committed. We allowed the State's petition for discretionary review.

[1] In its only assignment of error, the State contends that the Court of Appeals erred in reversing the trial court's denial of defendant's motion to dismiss.

When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each

essential element of the offense charged and substantial evidence that the defendant is the perpetrator. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). If substantial evidence of each element is presented, the motion for dismissal is properly denied. "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

In ruling on the motion to dismiss, the trial court must view all of the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995). The trial court need not concern itself with the weight of the evidence. In reviewing the sufficiency of the evidence, the question for the trial court is whether there is "any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). Once the court decides a reasonable inference of defendant's guilt may be drawn from the evidence, "it is for the jurors to decide whether the facts satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Murphy*, 342 N.C. 813, 819, 467 S.E.2d 428, 432 (1996).

Regarding the sufficiency of fingerprint evidence to withstand a motion to dismiss, this Court has stated:

> [T]he rule that testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by *substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed*, is sufficient to withstand motion for nonsuit and carry the case to the jury. The soundness of the rule lies in the fact that such evidence logically tends to show that the accused was present and participated in the commission of the crime.

State v. Miller, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975) (emphasis added). The State argues that the Court of Appeals erroneously applied this standard to the facts of this case in determining that the evidence presented was insufficient to withstand defendant's motion to dismiss. We agree.

Kent Duke, an identification agent with the City/County Bureau of Identification, found a latent fingerprint on the edge of the left rear door of the victim's vehicle. Agent Duke testified that the latent print

was only one finger and was a portion of the finger, "like it had been cut off." This fact prompted Agent Duke to process the rear quarter panel adjacent to the area where the print was found on the rear door. No fingerprints or partial fingerprints were found in the area adjacent to the left rear door. In other words, the rear portion or remainder of this partial print did not extend over to the rear quarter panel of the car. Agent Joseph Ludas, a latent print examiner with the City/County Bureau of Identification, testified, as an expert in the field of fingerprint identification, that the latent fingerprint found on the left rear door of the victim's vehicle matched the right index finger of the defendant.

The fact that the defendant's fingerprint was only a partial print, which was cleanly cut off and did not extend over to the rear quarter panel, strongly suggests that the door was open when the defendant's finger contacted the vehicle. The evidence is uncontradicted that the only time the rear driver's side door was opened during the victim's stay in Raleigh was when the assailant opened the door and shoved the victim into the backseat. Moreover, Agent Ludas testified that a lot of pressure and twisting was used when the defendant's finger made contact with the vehicle. This fact, when viewed in the light most favorable to the State, logically suggests that the print was left as defendant pushed the back door closed. The fingerprint evidence is consistent with the victim's account of the crime and does not support an inference that the defendant merely touched the victim's automobile while walking through the Crabtree Sheraton parking lot. Viewed in the light most favorable to the State, the evidence was clearly sufficient to establish that the defendant's fingerprint on the victim's vehicle could only have been impressed at the time the crime was committed.

Although the fingerprint evidence, standing alone, was sufficient to send this case to the jury, we note that the Court of Appeals completely overlooked additional pieces of corroborating evidence. In its decision, the Court of Appeals stated that the "only evidence tending to prove defendant committed the offenses with which he was charged was the solitary fingerprint located on the left rear door of White's vehicle. No other evidence connecting defendant to the scene of the crime was presented." *State v. Cross*, No. COA94-746, slip op. at 6 (N.C. App. March 5, 1996). The Court of Appeals failed to recognize evidence that the assailant abandoned the victim within blocks of where the defendant was frequently seen and where defendant was eventually located and arrested, that a pathway existed near that

location which led to the back of the apartment defendant was in when he was arrested, that the defendant made efforts to change his appearance by shaving his head, that the defendant made an effort to evade arrest, and that the defendant repeatedly denied to police officers that his name was "Cross." This evidence, combined with the fingerprint evidence, supports a reasonable inference of defendant's guilt and further makes it clear that the trial court correctly sent the case to the jury.

[2] Finally, the defendant contends that review of the decision of the Court of Appeals by this Court violates the defendant's constitutional protection against double jeopardy. Defendant points out that had the trial court granted his motion to dismiss, the case would have terminated and would not have been appealable by the State. Defendant argues that no distinction should be made regarding the appealability of a ruling by the trial court and a ruling of the Court of Appeals that the evidence was insufficient. We disagree.

This Court has held that when a motion to dismiss for insufficiency of the evidence is *granted* by the trial court, and judgment is *entered* in accordance therewith, such judgment shall have the force and effect of a not-guilty verdict. *See State v. Stinson*, 263 N.C. 283, 139 S.E.2d 558 (1965). Contrary to the defendant's position, review by this Court is not precluded since a judgment was never "entered" by the trial court dismissing this action. The Court of Appeals reversed the trial court's ruling and remanded to that court for entry of judgment. Prior to such entry of judgment, however, this Court granted the State's petition for discretionary review, thereby acquiring jurisdiction over this matter. There simply has been no dismissal, by the trial court or any other court, of the charges against defendant upon which jeopardy can attach. This assignment of error is without merit and is therefore overruled.

Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Wake County, for reinstatement of its judgments against the defendant.

REVERSED AND REMANDED.

Justice FRYE concurring.

I find it unnecessary to decide, in this case, whether, as the majority states, "the fingerprint evidence, standing alone, was sufficient to

send this case to the jury." As the opinion points out, other evidence tending to show that defendant was the perpetrator of the crimes charged in this case was introduced at trial. I agree with the majority that the fingerprint evidence, together with the corroborating evidence, was substantial evidence sufficient to take the case to the jury and to sustain the verdicts in this case. Whether the fingerprint evidence, "standing alone," was sufficient, substantial evidence to take the case to the jury against this defendant for first-degree kidnapping, common-law robbery, assault with a deadly weapon inflicting serious injury, and nine counts of obtaining property by false pretenses is a question we need not decide today. Accordingly, I concur in the result reached by the majority of this Court, but not the reasoning.

STATE OF NORTH CAROLINA v. JOE WESLEY HUNT

No. 473A95

(Filed 11 April 1997)

1. Criminal Law § 120 (NCI4th Rev.)— capital murder—State's failure to preserve evidence—motion to dismiss denied—no abuse of discretion

The trial court did not abuse its discretion in a capital first-degree murder prosecution (life sentence) by not granting defendant's motions to dismiss or for a new trial where defendant contended that the State's violation of discovery orders in failing to preserve evidence required the trial court to grant his motions. The exculpatory or impeachment value of the missing evidence is speculative and nothing in the record suggests that any law enforcement officer willfully destroyed the missing evidence.

Am Jur 2d, Depositions and Discovery §§ 426-428.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. 7 ALR3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR 3d 181.

Failure of police to preserve potentially exculpatory evidence as violating criminal defendant's rights under state constitution. 40 ALR5th 113.

2. Constitutional Law § 252 (NCI4th)— capital murder—failure of State to preserve evidence—no violation of due process and fair trial

The State's failure to preserve evidence seized at the home of a capital first-degree murder defendant (life sentence) did not violate his rights to due process and a fair trial under the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution where the trial court's finding that there was no showing of bad faith or willful intent on the part of any law enforcement officer is supported by the record and defendant did not demonstrate that the missing evidence possessed an exculpatory value that was apparent before it was lost.

Am Jur 2d, Criminal Law § 785.

Failure of police to preserve potentially exculpatory evidence as violating criminal defendant's rights under state constitution. 40 ALR5th 113.

Prosecution's failure to preserve potentially exculpatory evidence as violating criminal defendant's due process rights under Federal Constitution—Supreme Court cases. 102 L. Ed. 2d 1041.

3. Criminal Law § 834 (NCI4th Rev.)— capital murder—requested instruction on credibility of police officers—denied

There was no error in a capital first-degree murder prosecution (life sentence) where the trial court refused to give defendant's requested instruction on the credibility of law enforcement officers as witnesses and instead gave the pattern jury instruction on interested witnesses. No evidence suggests that any officer had any interest in the outcome of this case which would cast doubt on his truthfulness or credibility as a witness.

Am Jur 2d, Trial §§ 1406, 1410, 1412.

4. Homicide § 669 (NCI4th)— capital murder—request for instruction on second-degree based on intoxication—denied

The trial court did not err in a capital first-degree murder prosecution by denying defendant's request for an instruction on second-degree murder based on evidence of voluntary intoxication. Even viewed in the light most favorable to defendant, the evidence tended to show only that defendant was intoxicated and was insufficient to show that defendant was utterly incapable of forming a deliberate and premeditated purpose to kill. Witnesses who were with defendant on the day of the killing testified that he did not appear intoxicated, there was no lay or expert testimony with respect to defendant's ability to form an intent to kill or with respect to his mental capabilities at the time of the murder, defendant acted rationally after the killing in disposing of the body, the victim's clothes, the murder weapon, his own clothes, and in cleaning the automobile, and defendant was able to recall how he stabbed the victim and disposed of her body.

Am Jur 2d, Homicide § 517.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Hooks, J., at the 1 May 1995 Criminal Session of Superior Court, Robeson County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 16 October 1996.

Michael F. Easley, Attorney General, by Francis W. Crawley, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant Joe Wesley Hunt was tried capitally on an indictment charging him with the first-degree murder of Linda Scott ("victim"). The jury returned a verdict finding defendant guilty as charged. Following a capital sentencing proceeding, the jury recommended a sentence of life imprisonment; and the trial court entered judgment accordingly. For the reasons discussed herein, we conclude that defendant's trial was free from prejudicial error and uphold his conviction and sentence.

On 18 February 1992 defendant and his nephew, Joseph Galloway, lived in defendant's mobile home. Defendant, Galloway, the victim, and several others gathered at defendant's home on that evening to drink alcohol and use illegal drugs. At some time after 11:00 p.m., defendant and Galloway left to take the victim home.

At defendant's direction Galloway drove to a remote location and parked the car in a field. Galloway and the victim engaged in consensual sexual intercourse while defendant remained inside the car. After Galloway got back in the car, defendant left the car and walked the victim to the edge of the woods. Galloway testified that defendant and the victim talked and wrestled on the ground for ten to fifteen minutes and then returned to the car. At the car defendant stabbed the victim a number of times in the chest with a white-handled butcher knife. The victim fell to the ground, and defendant knelt down and cut her throat. Defendant told the victim "he was going to let her get her heart right with the Lord" and cut her throat a second time. The stab wounds to the victim's chest resulted in her death.

Defendant and Galloway placed the victim's body in the trunk of the car, drove to a nearby river, and threw the victim's body into the water. They also disposed of the victim's clothes and the white-handled knife by tossing these items into the river. After returning to his mobile home, defendant cleaned himself and put his clothes in a plastic bag. Defendant and Galloway subsequently drove to a different location and threw this bag into the river. Defendant told Galloway that he had been in prison with the victim's husband and that he had promised the victim's husband that he would kill her.

Defendant was arrested on 19 February 1992 and confessed to the murder on that day. In his confession defendant stated that he discovered money missing and that the victim admitted taking it. Defendant instructed the victim to get in the car and told her that he was going to kill her. Galloway told defendant that he knew a good place to take the victim and drove defendant and the victim to a field. After Galloway and the victim had sex, the victim informed defendant she would do anything if he would agree not to kill her. Defendant asked her about the money, walked around the car, and cut her throat. At Galloway's suggestion they disposed of the victim's body in the river.

Additional facts will be presented as necessary to address specific issues.

[1] By his first assignment of error, defendant contends that his statutory and constitutional rights were violated by the State's failure to preserve evidence seized at his mobile home on the day of his arrest. Defendant argues that this violation of the trial court's discovery orders required the court to grant his motions to dismiss or his motion for a new trial. We conclude that the State's failure to preserve various articles of evidence did not require the trial court to dismiss the charges against defendant or to grant him a new trial.

Pursuant to a consent search of defendant's mobile home, members of the Robeson County Sheriff's Department seized a number of items of evidence. The evidence included a bag of household garbage, a black-handled knife, a bottle of Canadian Mist, a Lumberton ABC store receipt, and the clothing which Galloway wore on the night of the killing. In November of 1994 the State discovered that these items and a number of other items seized at defendant's home were missing. The listed articles of evidence were never located and were not provided to defendant. In denying defendant's motion to dismiss at the close of the State's evidence, the trial court found (i) that a number of articles of evidence were missing and had not been made available to defendant, (ii) that there was no logical explanation as to where "these articles went or how they were disposed of," and (iii) that there was no showing of bad faith or willful intent on the part of any law enforcement officer or any State's witness with respect to the missing evidence. The court concluded that the State's failure to provide defendant with discovery did not require it to dismiss the murder charge against defendant or to grant defendant a new trial.

> Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court. *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988). "[The] discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its noncompliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986).

State v. Tucker, 329 N.C. 709, 716-17, 407 S.E.2d 805, 810 (1991).

Galloway's testimony and defendant's pretrial statement both tended to show that defendant stabbed the victim to death, that Galloway was present when defendant committed this crime, that Galloway helped defendant put the victim's body in the trunk of the car and toss the body into the river, and that defendant and Galloway

returned to defendant's mobile home after this was accomplished. In light of this evidence, the exculpatory or impeachment value of the missing evidence is speculative. The bag of garbage, the ABC receipt, and the bottle of Canadian Mist would have added little to the testimony which suggested that defendant was intoxicated at the time of the murder. The fact that Galloway helped defendant dispose of the body after the murder makes it unlikely that an examination of Galloway's clothing would have yielded evidence impeaching him or implicating him as the murderer. Similarly, just how the black-handled knife found in defendant's home would have assisted the defense is unclear. The evidence tended to show that the murder weapon had been thrown into the river. A search of the river in the area where the victim's body was found yielded a white-handled knife fitting Galloway's description of the murder weapon.

Nothing in the record suggests that any law enforcement officer willfully destroyed the missing evidence. The trial court found that there was no showing of bad faith or willful intent on the part of any law enforcement officer or any State's witness, and this finding is supported by the record. Under these circumstances we conclude that the trial court did not abuse its discretion by declining to dismiss the charge against defendant or to grant defendant a new trial.

[2] Defendant also argues that the loss or destruction of the articles of evidence seized at defendant's home resulted in a violation of his rights to due process and a fair trial under the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 102 L. Ed. 2d 281, 289 (1988), *quoted in State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994). The trial court's finding that there was no showing of bad faith or willful intent on the part of any law enforcement officer is supported by the record. We also note that defendant has not demonstrated that the missing evidence possessed an exculpatory value that was apparent before it was lost. *See California v. Trombetta*, 467 U.S. 479, 489, 81 L. Ed. 2d 413, 422 (1984). For these reasons we conclude that the State's failure to preserve the articles of evidence seized at defendant's home did not violate his rights to due process and a fair trial. This assignment of error is overruled.

[3] By his next assignment of error, defendant contends that the trial court erred by refusing to give the following instruction on the credibility of law enforcement officers as witnesses:

> You have heard the testimony of law enforcement officials. The fact a witness may be employed by the federal or state or county government as a law enforcement official does not mean his testimony is necessarily deserving of more or less consideration or greater or lesser weight than an ordinary witness.
>
> At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds his testimony may be colored by a personal or professional interest in the outcome of the case.
>
> It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give the testimony whatever weight, if any, you find it deserve[s].

The trial court denied defendant's request for this instruction and instead instructed the jury pursuant to the pattern jury instruction on interested witnesses.

A party to a criminal case is not entitled to an instruction on witness credibility which focuses on law enforcement officers as a class. *State v. Williams*, 333 N.C. 719, 732-33, 430 S.E.2d 888, 895 (1993). The defendant in *Williams* asked the trial court to give an instruction which was virtually identical to the instruction in question and assigned error to the trial court's refusal to do so. We concluded

> that the trial court properly instructed the jury about witness credibility in general, focusing neither on law enforcement officers nor on any other class of witnesses. To have singled out any one class of witnesses might well have prompted the jury to be more critical of its credibility than that of other witnesses.

Id. at 732, 430 S.E.2d at 895.

No evidence in the record suggests that any law enforcement officer had any interest in the outcome of this case which would cast doubt on his truthfulness or credibility as a witness. *See id.* at 732-33, 430 S.E.2d at 895. We hold that the trial court properly refused to give the instruction requested by defendant. This assignment of error is without merit.

[4] In his final assignment of error, defendant contends that the trial court erred by denying his request to instruct the jury on second-degree murder. The test for determining whether an instruction on second-degree murder is required is as follows:

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Defendant argues that evidence of his voluntary intoxication was sufficient to negate the evidence that he formed a specific intent to kill. We conclude that the evidence of defendant's intoxication was not sufficient to negate any of the elements of premeditated and deliberate first-degree murder.

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.

State v. Mash, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988), *quoted in State v. Lambert*, 341 N.C. 36, 44-45, 460 S.E.2d 123, 128 (1995).

Evidence was offered at trial tending to show that defendant drank continuously on the day of the killing, that he shared three half-cases of beer and some liquor with Galloway and four other persons, that he shared a half-case of beer and a fifth of Jim Beam with Galloway and Ralph Sweat, that he smoked marijuana, and that he was "pretty high" or "good and high" late in the evening on the night of the murder. Even viewed in the light most favorable to defendant, this evidence tended to show only that defendant was intoxicated;

and it was insufficient to show that defendant was " 'utterly incapable of forming a deliberate and premeditated purpose to kill.' " *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978)); *cf. State v. Morston*, 336 N.C. 381, 404-05, 445 S.E.2d 1, 14 (1994) (no error in declining to submit second-degree murder where the evidence suggested that the defendant consumed a "considerable amount" of gin less than one hour before the murder, that the defendant had mixed crack cocaine and a pain reliever with his gin, that the defendant's eyes were "big and red," and that the defendant "looked like he was high").

No evidence in this case tended to show that defendant was behaving erratically prior to the killing. To the contrary, witnesses who were with defendant on the day of the killing testified that he did not appear intoxicated. There was no lay or expert testimony with respect to defendant's ability to form an intent to kill or with respect to his mental capabilities at the time of the murder. After killing the victim defendant acted rationally in disposing of the victim's body, the victim's clothes, the murder weapon, and his own clothes and in cleaning the automobile. In a statement made after his arrest, defendant was able to recall how he had stabbed the victim and disposed of her body. We conclude from this record that the evidence was insufficient to show that defendant was so intoxicated that he was incapable of forming the specific intent to kill required for first-degree murder. Accordingly, the evidence of defendant's voluntary intoxication did not require the trial court to instruct the jury on the offense of murder in the second degree. This assignment of error is overruled.

We conclude that defendant received a fair trial free from prejudicial error.

NO ERROR.

STATE v. HUDSON

[345 N.C. 729 (1997)]

STATE OF NORTH CAROLINA v. KEITH ERIC HUDSON

No. 356PA96

(Filed 11 April 1997)

1. Appeal and Error § 157 (NCI4th)— lesser-included offense—failure to request instruction—no assignment of error—reviewed only in discretion of court

There was merit to the State's argument that defendant waived his right to raise on appeal the issue of whether the separate charge of DWI boating should have been submitted to the jury as a lesser-included offense of manslaughter where defendant failed to ask the trial court for a lesser-included offense instruction and did not assign the issue as error. Earlier cases implying that a defendant is entitled to assign error to the failure to give instructions on lesser-included offenses when there was no specific prayer for such instructions or objection to instructions given are no longer authoritative. However, the Supreme Court exercised its discretion to review the Court of Appeals decision so that the law will be consistent and clear.

Am Jur 2d, Appellate Review § 614.

2. Admiralty, Navigation, and Boating § 39 (NCI4th)— DWI boating—not a lesser-included offense of involuntary manslaughter

DWI boating is not a lesser-included offense of involuntary manslaughter and defendant was not entitled to an instruction on DWI boating when the indictments against him charged only that he feloniously killed the victim. The offense of DWI boating on its face contains an essential element that is not an element of involuntary manslaughter in that it requires a finding of either impairment or a blood-alcohol concentration of .10 or higher. Although factual findings supporting this element could be used to support the culpable-negligence element of involuntary manslaughter, the finding of intoxication is not essential to a conviction of involuntary manslaughter. The jury here could have found culpable negligence on other grounds but did not; that merely creates a factual situation in which the elements of the DWI boating offense and the culpable-negligence element of involuntary manslaughter are in apparent identity but does not alter the definitional approach to the determination of lesser-included offenses followed in this jurisdiction.

Am Jur 2d, Trial §§ 1427-1434.

What constitutes lesser offenses "necessarily included" in offense charged, under Rule 31(c) of Federal Rules of Criminal Procedure. 11 ALR Fed. 173.

Propriety of lesser-included-offense charge to jury in federal criminal case—general principles. 100 ALR Fed. 481.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 123 N.C. App. 336, 473 S.E.2d 415 (1996), setting aside judgments entered by Burroughs, J., at the 5 July 1994 Criminal Session of Superior Court, Mecklenburg County, upon defendant's conviction of three counts of involuntary manslaughter, and awarding defendant a new trial. Heard in the Supreme Court 18 March 1997.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State-appellant.

Theo X. Nixon for defendant-appellee.

WHICHARD, Justice.

On 18 October 1993, defendant was indicted for three counts of involuntary manslaughter arising out of a collision between two boats, one of which was operated by defendant. A jury found him guilty of all three charges, specifically finding in each case that defendant was "[o]perating his motorboat while under the influence of an impairing substance" and "[o]perating his motorboat after having consumed sufficient alcohol that he ha[d], at any relevant time after the boating, an alcohol concentration of .10 or more." Defendant was sentenced to consecutive terms of three years' imprisonment for each offense. On appeal, the Court of Appeals held that "[d]ue process . . . required the trial court to instruct on the lesser included offense of DWI boating as an alternative to the choices of either guilty or not guilty of involuntary manslaughter" and ordered a new trial. *State v. Hudson*, 123 N.C. App. 336, 343-44, 473 S.E.2d 415, 420 (1996). We reverse and remand to the Court of Appeals for consideration of additional issues raised by defendant and not passed upon in the original appeal.

The State's evidence tended to show that on 6 June 1993, defendant, Amy Stevens, and Jason Charlton traveled from defendant's

home on Lake Wylie to the Bourbon Street Yacht Club in defendant's nineteen-foot bass boat. They arrived at the club at approximately 9:00 p.m. During the course of the evening, defendant was observed consuming alcoholic beverages. At approximately midnight, defendant, Stevens, Charlton, and Tracey Hamilton left the club in defendant's boat and headed south on the lake. Defendant was operating the boat.

That same evening, Blake "Rusty" Hill was traveling on Lake Wylie in his twenty-six-foot cabin cruiser. Hill was proceeding north at a speed of approximately eighteen to twenty-two miles per hour when he glanced toward the shore to look at a miniature lighthouse. As Hill directed his attention back to the water in front of him, his cabin cruiser collided with defendant's boat. The collision instantly killed Stevens, Charlton, and Hamilton.

Defendant testified that immediately before the accident he had engaged the boat's idle device, which allowed the boat to proceed at approximately one to two miles per hour. While the boat was idling, defendant retrieved a flotation device for Hamilton to sit on from a storage compartment near the front of the boat, then bent down under the console to reach for a shirt. He remembered nothing else except regaining consciousness in the hospital about one week later.

Sharon Pierce Porterfield, associate director of medical records at Carolinas Medical Center, testified that a blood-alcohol test conducted at the hospital approximately an hour and a half after the collision revealed defendant's blood-alcohol concentration to be 0.239.

Two accident-reconstruction experts testified on defendant's behalf. Each stated that, at the moment of impact, Hill's larger boat was traveling at approximately twenty miles per hour while defendant's boat was either idling in the water or moving at a speed of less than two miles per hour. Both experts also testified that the larger boat overran the smaller.

The Court of Appeals set aside defendant's three involuntary manslaughter convictions and ordered a new trial, holding that the separate charge of operating a motor boat while impaired (DWI boating), *see* N.C.G.S. § 75A-10 (1994), should have been submitted to the jury as a lesser-included offense.

Involuntary manslaughter is " 'the unintentional killing of a human being without malice, proximately caused by (1) an unlawful

act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission.' " *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985) (quoting *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993)). The Court of Appeals recognized the "long-standing rule in this jurisdiction that a lesser included offense is one in which the greater offense contains all of the essential elements of the lesser offense," *State v. Weaver*, 306 N.C. 629, 637, 295 S.E.2d 375, 379 (1982), *overruled in part on other grounds by Collins*, 334 N.C. at 61, 431 S.E.2d at 193, and reasoned that DWI boating constitutes culpable negligence as a matter of law. It then held that because the elements of DWI boating must be proved to establish the element of culpable negligence, application of the *Weaver* definitional test results in the conclusion that "DWI boating is a lesser included offense of involuntary manslaughter predicated upon that crime." *Hudson*, 123 N.C. App. at 341, 473 S.E.2d at 419. The Court of Appeals concluded that the trial court therefore erred by failing to charge the jury separately on the offense of DWI boating. We granted the State's petition for discretionary review, and we now reverse.

[1] The State argues first that defendant waived his right to raise this issue before the Court of Appeals because he failed to ask the trial court to instruct the jury on DWI boating as a lesser-included offense of involuntary manslaughter and further failed to assign the issue as error on appeal. This argument has merit. In *Collins*, we held that earlier cases "imply[ing] that a defendant is entitled to assign error to the trial court's failure to give instructions on lesser-included offenses when there was no specific prayer for such instructions or objection to the instructions given . . . are disapproved and are no longer authoritative." *State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193. Nevertheless, we deny the State's request that we refuse to review the issue now. The Court of Appeals exercised its discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to consider this issue; we likewise exercise our discretion pursuant to N.C.G.S. § 7A-31 to review the Court of Appeals' decision so that the law pertaining to this issue in this jurisdiction will be consistent and clear.

[2] The rule in this jurisdiction has long been as follows:

> "When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense

> when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment."

State v. Banks, 295 N.C. 399, 415-16, 245 S.E.2d 743, 754 (1978) (quoting *State v. Bell*, 284 N.C. 416, 419, 200 S.E.2d 601, 603 (1973), *overruled in part on other grounds by Collins*, 334 N.C. at 62, 431 S.E.2d at 193), *overruled in part on other grounds by Collins*, 334 N.C. at 62, 431 S.E.2d at 193. In *Weaver*, we rejected an argument that an offense which was not ordinarily a lesser-included offense could become a lesser-included offense under specific factual circumstances. We explained that our approach in determining whether an offense is a lesser-included offense is definitional, not transactional:

> [A]ll of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

Weaver, 306 N.C. at 635, 295 S.E.2d at 379.

The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence. *McGill*, 314 N.C. at 637, 336 S.E.2d at 92. The elements of DWI boating are: (1) operating a motorboat or motor vessel on the waters of this state; (2) either (a) while under the influence of an impairing substance, or (b) after having consumed sufficient alcohol that the operator has, at any relevant time after the boating, a blood-alcohol concentration of 0.10 or more. N.C.G.S. § 75A-10.[1] The offense of DWI boating, on its face, contains an essential element that is not an element of involuntary manslaughter: it requires a finding of either impairment or a blood-alcohol concentration of 0.10 or higher. Although factual findings supporting this element of DWI boating could be used to support the culpable-negligence element of involuntary manslaughter, the finding of intoxication is not essential to a conviction of involuntary manslaughter because the culpable-negligence element can be based on other grounds. Indeed, in this case, the jury could have found culpable negligence on any of three other grounds that were described on the verdict sheet: failing to

1. The statute was amended in 1995 to provide that a blood-alcohol concentration of 0.08 or more will suffice to prove the second element of the offense.

maintain a proper lookout, failing to maintain the motorboat under proper control, or failing to display proper lighting on the boat. The jury did not find any of these grounds and based its verdict upon its findings of impairment and a blood-alcohol concentration greater than 0.10. That merely creates a factual situation in which the elements of the DWI boating offense and the culpable-negligence element of involuntary manslaughter are in apparent identity; it does not, however, alter the definitional approach to the determination of lesser-included offenses followed in this jurisdiction.

We therefore hold that DWI boating is not a lesser-included offense of involuntary manslaughter. Accordingly, defendant was not entitled to an instruction on DWI boating when the indictments against him charged only that he feloniously killed the victims.

Defendant raised additional issues in his brief to the Court of Appeals which that court deemed to be unlikely to recur upon retrial and therefore did not reach. For the reasons stated, the decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals for consideration of those issues.

REVERSED AND REMANDED.

MOLLY WIEBENSON, PETITIONER v. BOARD OF TRUSTEES, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM, RESPONDENT

No. 390PA96

(Filed 11 April 1997)

Public Officers and Employees § 42 (NCI4th)— shared position—six-month rotation—state employee

Petitioner was a full-time employee and member of the Retirement System at all times that she was working, and is entitled to credit for those years of service as reflected in the retirement records submitted to her by the State, where she shared a position with another person, each working six months per year. The final sentence of N.C.G.S. § 135-1(10), which defines "employee," is a provision of inclusion and does not require that all employees in any situation meet those specifications to qualify; the courts below incorrectly interpreted the final sentence to exclude petitioner. Under N.C.G.S. § 135-3, petitioner's member-

ship in the Retirement System began when she was originally employed by the Department of Human Resources in 1971 as a full-time, permanent employee; after thirteen years, on 31 May 1984, she went on an approved leave of absence for six months; she was reinstated to her prior status working full-time on 1 December 1984; and she went on several more periodic, approved leaves of absence which did not cause her to become a part-time employee. The North Carolina Administrative Code provides that periods of leave without pay do not constitute a break in service.

Am Jur 2d, Civil Service §§ 13, 15, 16, 59.

On petition for writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, 123 N.C. App. 246, 472 S.E.2d 592 (1996), reversing and remanding a judgment entered 7 June 1995 in Superior Court, Buncombe County, by Winner, J., said judgment adopting the recommended decision of an administrative law judge approved by respondent Board of Trustees. Heard in the Supreme Court 19 March 1997.

Thomas D. Roberts for petitioner-appellee.

Michael F. Easley, Attorney General, by Robert M. Curran, Assistant Attorney General, for respondent-appellant.

ORR, Justice.

Petitioner Molly Wiebenson was a career state employee, working full-time for the Department of Human Resources as a rehabilitation therapist at the Alcoholic Rehabilitation Center (ARC) in Black Mountain, North Carolina, beginning in 1971. During this time, petitioner was a member of the Teachers' and State Employees' Retirement System (Retirement System). In 1981, the General Assembly enacted a work-options program for state employees which was designed to improve employee morale and productivity by providing options for flexible work hours, job sharing, and permanent part-time positions. *See* N.C.G.S. § 126-75 (1995); 25 NCAC 1C .0509 (February 1996).

In 1984, petitioner and Evelyn Brank, another rehabilitation therapist at the ARC, approached Millard P. Hall, Jr., the director of the ARC, to inquire about sharing one position, each working six months per year. Petitioner and Ms. Brank sought assurances that their retirement eligibility with the State would not be jeopardized by partici-

pating in the job-sharing program. Mr. Hall sent them a memorandum in which he stated that he had "pursued this with the DHR Personnel" and that it would be possible for petitioner and Ms. Brank to share one position. Mr. Hall further stated:

> During the six months each of you work per year your Retirement, Insurance and other deductions you may have will be processed through the normal channels of deductions of payroll. During the months you are on leave you will be able to pay to the system your portion of these benefits and be maintained within the Retirement[,] Insurance and other benefit packages you are currently enrolled in.

Thereafter, petitioner and Ms. Brank decided to pursue the job-sharing option, and from 31 May 1984 through 19 January 1992, petitioner worked approximately six months per year at the ARC. The Retirement System continued to accept the retirement contributions deducted from petitioner's paycheck and to provide petitioner with annual statements, showing that she was accumulating retirement credit each year from 1984 through 1990. In fact, the annual retirement account statements sent to petitioner from 1985 through 1990 reflect a percentage of each year of service toward retirement and a cumulative figure. For example, the 1985 statement indicates that petitioner accrued ".5833" years of service toward her retirement in 1985, giving her a total of "13.0833" years of service toward retirement. In 1986, petitioner accumulated "0.500" years of service for a total of "13.5833" years. In late 1991, petitioner began making inquiries to the Retirement System in preparation for retirement. In an 18 November 1991 letter, J. Marshall Barnes, III, deputy director of the Department of State Treasurer, informed petitioner that the job-sharing arrangement did not allow her to participate in the Retirement System, and therefore petitioner had not been a member of the system since May 1984. Mr. Barnes' letter informed petitioner that the Retirement System would refund all retirement contributions plus interest that petitioner had made during the time she participated in the job-sharing program.

Petitioner petitioned the Office of Administrative Hearings for a contested-case hearing. After a hearing, an administrative law judge entered a recommended decision on 26 May 1994, concluding that petitioner was not an "employee" within the meaning of N.C.G.S. § 135-1(10) during the years that she participated in the job-sharing program because the statute requires a minimum of nine months of

employment per year. On 11 August 1994, State Treasurer Harlan E. Boyles entered a final agency decision adopting the recommended decision. Superior Court Judge Winner upheld the recommended decision on 7 June 1995. The Court of Appeals reversed and remanded.

The Court of Appeals first agreed that petitioner was not an "employee" eligible to participate in the Retirement System because N.C.G.S. § 135-1(10) required that employees work at least nine months per year. However, the Court of Appeals reasoned that in his memo to petitioner, the ARC director purported to be an agent of the Retirement System, and the Retirement System ratified the director's representations to petitioner by continuing to accept her contributions to the retirement system and by continuing to send her yearly statements indicating that petitioner was still a participating member of the Retirement System. We conclude, however, that petitioner remained an "employee" under N.C.G.S. § 135-1(10) during the period of time when she participated in the job-sharing program and was working full time. Therefore, we affirm the decision of the Court of Appeals, but for a different reason.

N.C.G.S. § 135-3(1) provides in part that "membership in the Retirement System shall begin immediately upon the election, appointment or employment of a 'teacher or employee,' as the terms are defined in this Chapter." N.C.G.S. § 135-1(10) defines the term "employee." The statute first provides that " '[e]mployee' shall mean all full-time employees, agents or officers of the State of North Carolina . . . : Provided that the term 'employee' shall not include . . . any part-time or temporary employee." The statute then contains a series of provisions of inclusion, listing types of employees who are covered by the statute, such as employees of the General Assembly and the National Guard. The final sentence provides that "[e]mployees of State agencies . . . who are employed in permanent job positions on a recurring basis and who work 30 or more hours per week for nine or more months per calendar year are covered by the provisions of this subdivision."

In *Stanley v. Retirement & Health Benefits Div.*, 55 N.C. App. 588, 286 S.E.2d 643, *disc. rev. denied*, 305 N.C. 587, 292 S.E.2d 571 (1982), the Court of Appeals reviewed another provision of chapter 135, which dealt with a teacher's entitlement to death benefits. The Retirement System argued that the provision excluded the petitioner's recovery of a death benefit. However, the Court of Appeals

held that the statutory provision in question was a provision of inclusion rather than a provision of exclusion and therefore did not apply to exclude the petitioner's recovery of a death benefit. The court stated:

> We have reviewed the statutory provisions in N.C.G.S. 135 in their entirety and conclude that this interpretation is consistent with the overall policies of the retirement, disability and death benefit scheme. The intent of the statute is not to exclude, but to include state employees under an umbrella of protections designed to provide maximum security in their work environment and to afford "a measure of freedom from apprehension of old age and disability." *Bridges v. Charlotte*, 221 N.C. 472, 477, 20 S.E.2d 825, 829 (1942).

Stanley, 55 N.C. App. at 591, 286 S.E.2d at 645.

Similarly, we conclude that the final sentence of N.C.G.S. § 135-1(10) is also a provision of inclusion and does not require that all employees in any situation meet these specifications to qualify. Instead, the sentence serves the purpose of including a certain subset of employees who meet the specifications, such as those working a teacher's schedule. Thus, the courts below incorrectly interpreted the final sentence of N.C.G.S. § 135-1(10) to exclude petitioner.

Under N.C.G.S. § 135-3, petitioner's membership in the Retirement System began when she was originally employed by the Department of Human Resources in 1971 as a full-time, permanent employee. After thirteen years of service as a full-time, permanent employee, on 31 May 1984, petitioner went on an approved leave of absence for six months. Subsequently, on 1 December 1984, petitioner was reinstated to her prior status working full time. Petitioner went on several more periodic, approved leaves of absence. Counsel for respondent acknowledged at oral argument that petitioner went on approved leaves of absence, and the letter included in the record sent to petitioner by Mr. Hall, director of the ARC, specifically refers to "the months you are on leave." While the petitioner's personnel records, attached to her brief, reflect a series of leaves of absence, they were not introduced into evidence below. Regardless, there is other uncontradicted evidence, as noted, that petitioner took regular approved leaves of absence between periods of full-time employment with the State. These leaves of absence did not cause petitioner to become a part-time employee. Instead, during the times that she was working full time, she acted and was treated by the State as a full-

time employee. When she was on approved leaves of absence, she was not working, and was on approved leave-without-pay status. The North Carolina Administrative Code provides that "[p]eriods of leave without pay do not constitute a break in service," 25 NCAC 1D .1003 (November 1995).

Under the facts before us, petitioner was a full-time employee and member of the Retirement System at all times that she was working, and is entitled to credit for those years of service as reflected in the retirement records submitted to her by the State. The decision of the Court of Appeals is

MODIFIED AND AFFIRMED.

ROGER FRED SOUTHERLAND, PLAINTIFF v. B.V. HEDRICK GRAVEL & SAND COMPANY, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, CARRIER

No. 331PA96

(Filed 11 April 1997)

Workers' Compensation § 46 (NCI4th)— injury to subcontractor—insurance certificate not obtained by general contractor—liability of general contractor

The Court of Appeals erred by holding that the Industrial Commission lacked jurisdiction over plaintiff's workers' compensation claim where plaintiff fell while doing roofing work under a subcontract; plaintiff's contract for the work required that the subcontractor carry workers' compensation insurance and furnish a certificate of insurance to the general contractor; plaintiff advised the general contractor that he maintained workers' compensation insurance but did not provide a certificate and the general contractor did not obtain a certificate from any other source; plaintiff's claim was denied by his carrier because the policy covered his employees but did not cover him; plaintiff's claim with the general contractor's carrier was denied; plaintiff filed a claim with the Industrial Commission and the Commission awarded benefits; and the Court of Appeals reversed, holding that no employer-employee relationship existed and that the Commission lacked jurisdiction. The language of the statute is clear and unambiguous; a 1987 amendment to N.C.G.S. § 97-19 clearly

extended the class of persons protected by this provision to include not only employees of the subcontractor but also the subcontractor himself, thereby giving the Industrial Commission jurisdiction (under the version of the statute then in effect) over a claim by a subcontractor. In this case, the general contractor did not require from the subcontractor a certificate or obtain a certificate from the Industrial Commission and may be held liable for plaintiff's injuries.

Am Jur 2d, Workers' Compensation §§ 143-145, 166, 171, 172, 228, 229.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 123 N.C. App. 120, 472 S.E.2d 216 (1996), vacating[1] an opinion and award entered 8 February 1995 by the Industrial Commission. Heard in the Supreme Court 18 March 1997.

Scott E. Jarvis & Associates, by Scott E. Jarvis, for plaintiff-appellant.

Russell & King, P.A., by Gene Thomas Leicht, for defendant-appellees.

FRYE, Justice.

This case involves the liability of defendant-contractor for a workers' compensation claim filed by plaintiff-subcontractor as the result of an on-the-job injury suffered by the subcontractor on 12 December 1990. The injury resulted from plaintiff's fall at a construction site in Asheville while he was engaged in the performance of roofing work under a subcontract with Buncombe Construction Company, Inc. (Buncombe), a subsidiary of defendant B.V. Hedrick Gravel & Sand Company. Plaintiff fell approximately thirty-three feet from a masonry wall to a concrete floor below. He sustained injuries to his left foot, left leg, pelvis, teeth, left ear, left wrist, left arm, and left shoulder and was out of work from 12 December 1990 through 18 March 1991.

At the time of his injury, plaintiff was an independent subcontractor of Buncombe, the general contractor on the project. Plaintiff,

1. While the disposition line of the Court of Appeals' opinion reads "vacated and reversed," in fact the opinion only vacated the Commission's opinion and award on grounds of lack of jurisdiction.

d/b/a Southern Construction Company, entered into a contract with Buncombe to perform the installation of a standing seam roof system with miscellaneous trims and accessories, including all equipment and labor on the project. The contract provided that the subcontractor would carry workers' compensation insurance at his own expense and furnish a certificate of insurance to the general contractor prior to commencing work under the contract. Prior to entering into this contract, plaintiff advised Buncombe that he maintained workers' compensation insurance coverage, but he did not provide Buncombe with a certificate of insurance, nor did Buncombe obtain a certificate from any other source.

Plaintiff filed a claim with his workers' compensation insurance carrier, which was denied because the policy covered his employees but did not cover plaintiff. He also filed a workers' compensation claim with Buncombe's workers' compensation insurance carrier, which was denied. Plaintiff then filed a workers' compensation claim with the Industrial Commission. The claim was heard before Deputy Commissioner Tamara R. Nance upon stipulated facts and stipulated documentary evidence. In her conclusions of law based upon the stipulated record, Deputy Commissioner Nance concluded:

> 1. Plaintiff's contractual agreement to carry workers' compensation insurance at his own expense did not constitute a written waiver of his right to coverage under N.C.G.S. § 97-19.
>
> 2. Defendants' argument that by contracting with plaintiff to the effect that plaintiff shall furnish a certificate of insurance, defendants "required" from plaintiff a certificate of insurance and therefore satisfied N.C.G.S. § 97-19, regardless of whether defendants ever actually received a certificate from plaintiff, is without merit. The undersigned is of the opinion that the word "require" in this instance means in fact actually obtain a certificate.
>
> 3. Even though a certificate of insurance would not have shown that plaintiff failed to elect to cover himself as a sole proprietor, and even though plaintiff had complied with N.C.G.S. § 97-93 by having coverage for his employees, the undersigned is of the opinion that N.C.G.S. § 97-19 must be strictly construed, and that by failing to require and obtain a certificate of insurance from plaintiff, defendants are liable for all compensation and benefits due under the Act for plaintiff's injury by accident.

Based upon these conclusions of law, Deputy Commissioner Nance awarded plaintiff workers' compensation benefits under the provisions of N.C.G.S. § 97-19 (as in effect between 5 August 1987 and 10 June 1996). Defendants appealed to the full Commission, and on 8 February 1995, the Commission affirmed, adopting the holding of the deputy commissioner as its own. Defendants appealed to the Court of Appeals, and the Court of Appeals, in a unanimous decision, vacated the Commission's opinion and award, holding

> that plaintiff, a sole proprietor, failed to elect to be included as an employee under the workers' compensation coverage of his business. Consequently, plaintiff has not established that an employer-employee relationship existed at the time of injury either by electing coverage under G.S. § 97-2(2), or by being an employee under G.S. § 97-19. Therefore, because no employer-employee relationship existed the Commission lacked jurisdiction to hear plaintiff's claim and we vacate the Commission's opinion and award.

Southerland v. B.V. Hedrick Gravel & Sand Co., 123 N.C. App. 120, 124, 472 S.E.2d 216, 219-20 (1996). We allowed plaintiff's petition for discretionary review.

This case involves the interpretation of N.C.G.S. § 97-19 as it existed at the time of plaintiff's injury, 12 December 1990. We note that this statute, enacted in 1929, was amended several times prior to the 1987 amendment that controls this case. The statute was also amended in 1989, 1991, 1994, 1995, and 1996. However, the sole issue before this Court is whether N.C.G.S. § 97-19 (as in effect between 5 August 1987 and 10 June 1996) extends workers' compensation benefits to subcontractors under the same conditions as it extends coverage to employees of subcontractors, thereby giving the Industrial Commission jurisdiction over a claim by plaintiff, a subcontractor, which arose on 12 December 1990. We hold that it does, and therefore, we must reverse the decision of the Court of Appeals.

"In resolving issues of statutory construction, we look first to the language of the statute itself." *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996). It is a well-established rule of statutory construction that " '[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained

therein.' " *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong's North Carolina Index 2d *Statutes* § 5 (1968)).

Prior to the 1987 amendment, N.C.G.S. § 97-19 specifically provided in pertinent part:

> Any . . . contractor . . . who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with G.S. 97-93 [requiring that employers carry workers' compensation insurance] . . . shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of *any employee of such subcontractor* due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the . . . contractor . . . shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to *any employee of such subcontractor* for compensation or other benefits under this Article.

N.C.G.S. § 97-19 (1985) (emphasis added). This statute was interpreted by our Court of Appeals to protect the employees of a subcontractor, not the subcontractor himself. *Doud v. K&G Janitorial Servs.*, 69 N.C. App. 205, 316 S.E.2d 664, *disc. rev. denied*, 312 N.C. 492, 322 S.E.2d 554 (1984). However, the General Assembly amended N.C.G.S. § 97-19, effective 5 August 1987, by inserting "any such subcontractor, any principal or partner of such subcontractor or" in the first and second sentences of the first paragraph of the statute immediately preceding the phrase "any employee of such contractor." Act of Aug. 5, 1987, ch. 729, sec. 4, 1987 N.C. Sess. Laws 1335, 1337-38 (amending the Workers' Compensation Act). The amended statute, as in effect on the date of plaintiff's accident, reads in pertinent part as follows:

> Any . . . contractor . . . who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with G.S. 97-93 [requiring that employers carry workers' compensation insurance] . . . shall be liable . . . to the same extent as such subcontractor would be if he were sub-

> ject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of *any such subcontractor, any principal or partner of such subcontractor or* any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the . . . contractor . . . shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to *any such subcontractor, any principal or partner of such subcontractor or* any employee of such subcontractor for compensation or other benefits under this Article.

N.C.G.S. § 97-19 (Supp. 1990) (emphasis added). The 1987 amendment clearly extended the class of persons protected by this provision to include not only employees of the subcontractor but also the subcontractor himself. Because the language of the statute itself is clear and unambiguous, there is no room for judicial construction, and we must give it its plain and definite meaning.

In the instant case, prior to the time of subcontracting the performance of the roofing work, the general contractor, Buncombe, did not require from the subcontractor, plaintiff, a certificate of insurance, and Buncombe did not obtain from the Industrial Commission a certificate stating that plaintiff had complied with N.C.G.S. § 97-93. Therefore, having failed to require or to obtain a certificate, Buncombe may be held liable for plaintiff's injuries, pursuant to N.C.G.S. § 97-19 as it existed at the time of plaintiff's accident. We note that this is the result reached by Deputy Commissioner Nance and by the Industrial Commission, the agency charged with carrying out the responsibilities of the Workers' Compensation Act. Since plaintiff is a member of the class of subcontractors entitled to individual coverage under N.C.G.S. § 97-19 as it existed at the time of his accident, the statute extended workers' compensation benefits to plaintiff under the same conditions as it extended coverage to plaintiff's employees. Accordingly, the Court of Appeals erred in holding that the Commission lacked jurisdiction over plaintiff's claim.

For the foregoing reasons, we reverse the decision of the Court of Appeals, which vacated the opinion and award entered by the Industrial Commission.

REVERSED.

STATE OF NORTH CAROLINA v. MARY CLARA ADAMS

No. 293PA96

(Filed 11 April 1997)

Constitutional Law § 264 (NCI4th)— criminal child abuse—inculpatory statement—attorney appointed only for civil abuse petition—no Sixth Amendment violation

The trial court erred in a prosecution for first-degree statutory sexual offense and two counts of felonious child abuse by suppressing defendant's statement to officers as being in violation of the Sixth Amendment to the Constitution of the United States where medical personnel reported possible child abuse to the Department of Social Services; DSS filed a petition alleging abuse and neglect; an attorney was appointed to represent defendant in regard to the abuse and neglect petition; defendant did not have counsel for any criminal charges; a detective interviewed defendant with her attorney present; the detective asked to talk with defendant again; the attorney advised defendant that she was not required to speak to the detective and defendant told the detective that she did not want to talk to the attorney; and defendant eventually went to the Law Enforcement Center without her attorney and made an incriminating statement. The filing of a petition alleging abuse and neglect commences a civil proceeding and, by its terms, the Sixth Amendment applies only to criminal cases. The Supreme Court could not say, as did the Court of Appeals, that the civil and criminal proceedings were so intertwined that the commencement of a civil proceeding triggers the protection involved in a criminal case. *In re Maynard*, 116 N.C. App. 616, dealt with a person's right to have her attorney appointed pursuant to N.C.G.S. § 7A-587 present when DSS discussed relinquishing the child for adoption and did not deal with a criminal action.

Am Jur 2d, Criminal Law §§ 743 et seq., 972 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31(c) and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) of a unanimous decision of the Court of Appeals, 122 N.C. App. 538, 470 S.E.2d 838 (1996), affirming an order entered 25 April 1994 by Ellis (B. Craig), J., in Superior Court, Cumberland County, suppressing a statement made by the defendant to law enforcement officers. Heard in the Supreme Court 10 December 1996.

The defendant was charged with first-degree statutory sexual offense and two counts of felonious child abuse. She moved to suppress certain statements she made to law enforcement officers on the ground that the statements were taken in violation of the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19 and 23 of the North Carolina Constitution.

A hearing was held on the defendant's motion to suppress. The evidence at the hearing showed that on 27 November 1992, the defendant and her fiance took their five-month-old daughter to Cape Fear Valley Medical Center for treatment for anal fissures. The Center referred the infant to Duke University Hospital for evaluation of possible physical and sexual abuse. The Center also reported, pursuant to N.C.G.S. § 7A-543, the possible child abuse to the Director of the Department of Social Services of Cumberland County (DSS).

The DSS, pursuant to N.C.G.S. § 7A-548(a), reported the possible child abuse to the district attorney and the Cumberland County Sheriff's Department. On 9 December 1992, the DSS filed a petition alleging abuse and neglect. Geraldine Spates, an attorney, was appointed, pursuant to N.C.G.S. § 7A-587, to represent the defendant in regard to the petition alleging abuse and neglect. The defendant did not have counsel for any criminal charges which might have been brought against her.

Detective Jo Autry of the Cumberland County Sheriff's Department was assigned to the case. Detective Autry interviewed the defendant on 30 December 1992 with the defendant's attorney present. On 20 January 1993, Detective Autry contacted Ms. Spates and asked to talk with the defendant again. Ms. Spates called the defendant and advised her she was not required to speak to the detective. The defendant told Ms. Spates that she did not want to talk to Detective Autry.

Detective Autry tried on numerous occasions to talk to the defendant. On 5 March 1993, the defendant went to the Law Enforcement Center without her attorney and was interviewed by Detective Autry and other officers. She made an incriminating statement that is the subject of the defendant's motion to suppress. The court made findings of fact consistent with the evidence and concluded "[t]hat at the time of the institution of the juvenile abuse and neglect petition, an adversarial judicial proceeding was instituted against the Defendant and that the Defendant's Sixth Amendment

right to counsel attached at that point." The court excluded from evidence the defendant's statement to the officers of 5 March 1993. The Court of Appeals affirmed.

Michael F. Easley, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State-appellant.

Malcolm Ray Hunter, Jr., Appellate Defender, and Gordon Widenhouse, for the defendant-appellee.

WEBB, Justice.

The issue in this case is whether the initiation of a civil juvenile petition for abuse and neglect is the equivalent of the initiation of formal, adversarial proceedings for purposes of the invocation of the Sixth Amendment right to the assistance of counsel. The superior court did not deal with the defendant's contentions under the Fifth Amendment or under the state Constitution, and neither party discusses them in the briefs. We shall deal in this case only with the defendant's right to counsel under the Sixth Amendment to the Constitution of the United States.

In *Kirby v. Illinois*, 406 U.S. 682, 32 L. Ed. 2d 411 (1972), the United States Supreme Court held that a defendant's Sixth Amendment right to counsel attaches only at the time adversary judicial proceedings have been initiated against him or her whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. The Court said:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689-90, 32 L. Ed. 2d at 417-18.

The superior court held that the filing of a petition alleging abuse and neglect triggered the defendant's Sixth Amendment right to an

attorney, which required the statement she made to the officers on 5 March 1993 to be suppressed. The Court of Appeals affirmed. We disagree.

As we read *Kirby*, it is only when criminal proceedings have been instituted against a defendant that a Sixth Amendment right to an attorney attaches. The Supreme Court also said that it is only then that the government has committed itself to prosecute, and it is only then that the adverse positions of the government and the defendant have solidified.

When the DSS filed the petition alleging abuse and neglect, the State was not committed to prosecute the defendant. The filing of a petition alleging abuse and neglect commences a civil proceeding. By its terms, the Sixth Amendment applies only to criminal cases. We cannot say, as did the Court of Appeals, that the civil and criminal proceedings are so intertwined that the commencement of a civil proceeding triggers the protection involved in a criminal case. We are bound to hold, pursuant to *Kirby*, that the defendant's Sixth Amendment right to an attorney did not attach at that time.

We also conclude that the defendant's statutory right to counsel was not violated. *In re Maynard*, 116 N.C. App. 616, 448 S.E.2d 871 (1994), *disc. rev. denied*, 339 N.C. 613, 454 S.E.2d 254 (1995), upon which the Court of Appeals relied, is not helpful to the defendant. That case dealt with a person's right to have her attorney, who was appointed pursuant to N.C.G.S. § 7A-587 to represent her in an abuse and neglect proceeding, present when representatives of the DSS discussed with her the relinquishment of her child for adoption. It did not deal with a criminal action.

For the reasons stated in this opinion, we reverse and remand to the Court of Appeals for remand to the Superior Court, Cumberland County, which may determine the defendant's claims pursuant to the Fifth Amendment to the Constitution of the United States and pursuant to the North Carolina Constitution.

REVERSED AND REMANDED.

STATE v. SISK

[345 N.C. 749 (1997)]

STATE OF NORTH CAROLINA v. AMY JANE SISK

No. 371A96

(Filed 11 April 1997)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 361, 473 S.E.2d 348 (1996), affirming a judgment entered by DeRamus, J., on 24 March 1995 in Superior Court, Forsyth County. On 7 November 1996 this Court allowed defendant's petition for discretionary review as to an additional issue. Heard in the Supreme Court 20 March 1997.

Michael F. Easley, Attorney General, by J. Philip Allen, Assistant Attorney General, for the State.

Paul M. James, III, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is affirmed for the reasons stated in the majority opinion by Judge Johnson. We hold that defendant's petition for discretionary review as to an additional issue was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

THERESA L. SOTELO v. CHARLES E. DREW

No. 398A96

(Filed 11 April 1997)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 123 N.C. App. 464, 473 S.E.2d 379 (1996), vacating the order entered by Aycock, J., on 4 November 1994 in District Court, Wayne County, and remanding the case to the trial court for entry of an order dismissing the Attorney General's motion pursuant to N.C. R. Civ. P. 60(b). Heard in the Supreme Court 20 March 1997.

Michael F. Easley, Attorney General, by Elizabeth J. Weese, Assistant Attorney General, on behalf of plaintiff-appellant.

Warren, Kerr, Walston, Hollowell & Taylor, L.L.P., by David E. Hollowell and Richard J. Archie, for defendant-appellee.

PER CURIAM.

AFFIRMED.

BRADLEY v. HALL

No. 63P97

Case below: 125 N.C.App. 211

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

BRIETZ v. PLANK

No. 512P96

Case below: 124 N.C.App. 456

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

BULLINS v. ABITIBI-PRICE CORP.

No. 547P96

Case below: 124 N.C.App. 530

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

CAUBLE v. SOFT-PLAY, INC.

No. 548P96

Case below: 124 N.C.App. 526

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

CHAPMAN v. BYRD

No. 461P96

Case below: 124 N.C.App. 13

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

CISNEROS v. CISNEROS

No. 503P96

Case below: 124 N.C.App. 666

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

CITY OF CHARLOTTE v. COOK

No. 83PA97

Case below: 125 N.C.App. 205

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 10 April 1997.

COLLINS & AIKMAN PRODUCTS CO. v.
HARTFORD ACCIDENT & INDEM. CO.

No. 128P97

Case below: 125 N.C.App. 412

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

FAIRWAY OUTDOOR ADVERTISING v. CITY OF SALISBURY

No. 558P96

Case below: 124 N.C.App. 666

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 April 1997.

GILLIAM v. FIRST UNION NAT. BANK

No. 93P97

Case below: 125 N.C.App. 416

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

GUILFORD COUNTY BD. OF COMRS.v. TROGDON

No. 48P97

Case below: 124 N.C.App. 741

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Petition by defendant (Peerless) for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Motion by defendant (Trogdon) to withdraw petition for discretionary review allowed 10 April 1997.

HERRING v. HAYES

No. 71P97

Case below: 125 N.C.App. 211

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

JORDAN v. CENTRAL PIEDMONT COMMUNITY COLLEGE

No. 470P96

Case below: 124 N.C.App. 113

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

No. 450A96

Case below: 123 N.C.App. 720

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 10 April 1997. Motion by defendants (Prolife Action, et al) to dismiss appeal in part allowed 10 April 1997.

KOLTIS v. N.C. DEPT. OF HUMAN RESOURCES

No. 108P97

Case below: 125 N.C.App. 268

Motion by intervenor respondent (Pitt County Hospital) to withdraw petition for discretionary review allowed 10 April 1997.

LOOS v. DUTRO

No. 107P97

Case below: 125 N.C.App. 615

Motion by defendant (Dutro) for temporary stay allowed 12 March 1997 pending receipt and determination of a timely filed petition for discretionary review.

McMILLIAN v. N.C. FARM BUREAU MUTUAL INS. CO.

No. 104PA97

Case below: 125 N.C.App. 247

Petition by defendant (NC Farm Bureau) for discretionary review pursuant to G.S. 7A-31 allowed 10 April 1997. Petition by defendant (Allstate) for discretionary review allowed 10 April 1997.

MEMBERS INTERIOR CONSTRUCTION v.
LEADER CONSTRUCTION CO.

No. 489P96

Case below: 124 N.C.App. 121

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

MIRACLE v. N.C. LOCAL GOV'T. EMPLOYEES'
RETIREMENT SYSTEM

No. 523P96

Case below: 124 N.C.App. 285

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

MULLIS v. AMP, INC.

No. 106P97

Case below: 125 N.C.App. 419

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

NELSON v. HAYES

No. 495P96

Case below: 124 N.C.App. 458

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

PERRITT v. ST. PIERRE

No. 460PA96

Case below: 124 N.C.App. 228

Petition by defendant (The City of Greensboro) for discretionary review pursuant to G.S. 7A-31 allowed 10 April 1997 for the purpose of remanding to the North Carolina Court of Appeals for reconsideration in light of this Court's decision in Lyles v. City of Charlotte, 344 N.C.App. 676.

RIGGS v. RIGGS

No. 14P97

Case below: 124 N.C.App. 647

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

ROBERTS v. FIRST CITIZENS BANK AND TRUST CO.

No. 3PA97

Case below: 124 N.C.App. 713

Motion by defendant to withdraw petition for discretionary review is treated as a motion to withdraw the appeal and is allowed 24 March 1997.

SALAS v. McGEE

No. 111P97

Case below: 125 N.C.App. 255

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 10 April 1997.

SOTELO v. DREW

No. 398A96

Case below: 123 N.C.App. 464

Motion by defendant to dismiss appeal denied 10 April 1997.

STATE v. BALDWIN

No. 126PA97

Case below: 125 N.C.App. 530

Motion by Attorney General for temporary stay allowed 24 March 1997. Petition by Attorney General for writ of supersedeas allowed 10 April 1997. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 10 April 1997. Justice Orr recused.

STATE v. BAYSDEN

No. 41P97

Case below: 105 N.C.App. 445

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 April 1997. Justice Parker recused.

STATE v. BAZEMORE

No. 131P97

Case below: 125 N.C.App. 422

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

STATE v. BURNS

No. 118A97

Case below: 125 N.C.App. 616

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 18 March 1997.

STATE v. GODWIN

No. 518P96

Case below: 124 N.C.App. 460

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 10 April 1997.

STATE v. GUNTER

No. 80P97

Case below: 125 N.C.App. 215

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

STATE v. HAMILTON

No. 95P97

Case below: 125 N.C.App. 396

Notice of appeal by defendant (substantial constitutional question) dismissed by the Court ex mero motu 10 April 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

STATE v. HEATH

No. 88P97

Case below: 125 N.C.App. 420

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 April 1997.

STATE v. HILL

No. 69P97

Case below: 125 N.C.App. 213

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

STATE v. HUNT

No. 5A86-6

Case below: Robeson County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Robeson County, denied 10 April 1997.

STATE v. JOHNSON

No. 516P96

Case below: 124 N.C.App. 462

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 April 1997.

STATE v. JORDAN

No. 485P96

Case below: 124 N.C.App. 231

Petition by defendant (Jordan) for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Petition by defendant (McElreath) for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 10 April 1997.

STATE v. NOLON

No. 59P97

Case below: 125 N.C.App. 213

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

STATE v. PHILLIP

No. 10P97

Case below: 124 N.C.App. 231

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 April 1997.

STATE v. PRICE

No. 534P96

Case below: 122 N.C.App. 580

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 April 1997.

STATE v. SEXTON

No. 499A91-3

Case below: Wake County Superior Court

Petition by defendant for writ of certiorari to review the decision of the Superior Court, Wake County, denied 10 April 1997.

STATE v. SMITH

No. 139P97

Case below: 125 N.C.App. 422

Petition by defendant for writ of supersedeas and motion for temporary stay denied 26 March 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 March 1997.

STATE v. WILSON

No. 132P97

Case below: 125 N.C.App. 423

Notice of appeal by defendant (substantial constitutional question) dismissed 10 April 1997. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

STEELE v. LEWIS & DAGGETT

No. 33P97

Case below: 124 N.C.App. 788

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

STUART v. CECIL

No. 84P97

Case below: 125 N.C.App. 215

Motion by plaintiffs (Stuart, et al) to dismiss petition for discretionary review denied 10 April 1997. Petition by defendant (General Motors Corporation) for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Justice Webb recused.

TATARAGASI v. TATARAGASI

No. 514P96

Case below: 124 N.C.App. 255

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 10 April 1997.

TIERNEY v. GARRARD

No. 496PA96

Case below: 124 N.C.App. 415

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 10 April 1997.

TREASURER OF STATE OF CONN. v. HOWARD

No. 4P97

Case below: 124 N.C.App. 673

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

WARREN v. JACKSON

No. 67P97

Case below: 125 N.C.App. 96

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

WATKINS v. ESTATE OF WATKINS

No. 465P96

Case below: 124 N.C.App. 229

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 April 1997.

PETITIONS TO REHEAR

FULTON CORP. v. FAULKNER

No. 305A93-2

Case below: 345 N.C. 419

Petition by plaintiff to rehear pursuant to Rule 31 denied 24 March 1997.

IN RE RENFER

No. 498A96

Case below: 345 N.C. 632

Motion by Attorney General for reconsideration denied 10 April 1997.

SOLES v. CITY OF RALEIGH CIVIL SERVICE COMM.

No. 280PA95

Case below: 345 N.C. 443

Petition by petitioner to rehear pursuant to Rule 31 denied 10 April 1997.

STATE v. MOODY

No. 64A96

Case below: 345 N.C. 563

Petition by defendant to rehear pursuant to Rule 31 dismissed 17 March 1997.

WHITFORD v. GASKILL

No. 399PA95

Case below: 345 N.C. 475

Petition by plaintiff to rehear pursuant to Rule 31 allowed 19 March 1997 for the sole purpose of entering the following order: Delete the following clause at the end of the last paragraph on the last page of the opinion: "for entry of judgment consistent with this opinion." and substitute the following clause in lieu thereof: "for further proceedings not inconsistent with this opinion."

APPENDIXES

AMENDMENT TO APPELLATE RULES

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

AMENDMENT TO THE RULES GOVERNING ADMISSION TO PRACTICE LAW IN THE STATE OF NORTH CAROLINA

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CLIENT SECURITY FUND

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING TRUST ACCOUNTING

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATIONS PRACTICING LAW

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendment to the Rules of Appellate Procedure

Rules 3(c), 8(a), 9(b)(5), 11(c), 12(c), 14(a), 15(b), 18(c), 21(c), 21(f), 23(e), 25(a), 26(b), 26(g), Appendix A and Appendix D are hereby amended to read as in the following pages. All amendments shall become effective as follows:

To rules 3, 9, 11, 12 and 25 and Appendixes A and D, immediately upon their adoption.

To rules 8, 14, 15, 18, 21, 23, and 26, on 1 July 1997.

Adopted by the Court in Conference this 6th day of March, 1997. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.aoc.state.nc.us).

Orr, J
For the Court

RULE 3

APPEAL IN CIVIL CASES—HOW AND WHEN TAKEN

(c) **Time for Taking Appeal.** Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties for the duration of any period of noncompliance with the service requirement of Rule 58 of the Rules of Civil Procedure~~, and~~ or by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision~~, and~~ . The full time for appeal commences to run and is to be computed from the date of compliance with the service requirement of Rule 58 of the Rules of Civil Procedure or from the entry of an order upon any of the following motions:

(1) a motion under Rule 50(b) for judgment n.o.v., whether or not with conditional grant or denial of new trial;

(2) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;

(3) a motion under Rule 59 to alter or amend a judgment;

(4) a motion under Rule 59 for a new trial.

If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

RULE 8

STAY PENDING APPEAL

I. ***Stay in Civil Cases.*** When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. In any appeal which is allowed by law to be taken from an agency to the appellate division, application for the Writ of Supersedeas may be made to the appellate

court in the first instance. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

RULE 9

THE RECORD ON APPEAL

(b) ***Form of Record; Amendments.*** The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the ~~docketing~~ filing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

RULE 11

SETTLING THE RECORD ON APPEAL

(c) ***By Judicial Order or Appellant's Failure to Request Judicial Settlement.*** Within 21 days (35 days in capitally tried cases) after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely ~~files~~ serves amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have ~~filed~~ served, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or

only one set of appellees proceeding jointly have so ~~filed~~ served, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so ~~filed~~ served, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

RULE 12

FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

(c) ***Copies of Record on Appeal.*** The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. ~~By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk.~~

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.

RULE 14

APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER G.S. 7A-30

(a) ***Notice of Appeal; Filing and Service.*** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chairman of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of

entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

RULE 15

DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. 7A-31

(b) ***Same; Filing and Service.*** A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

RULE 18

TAKING APPEAL; RECORD ON APPEAL— COMPOSITION AND SETTLEMENT

(c) ***Composition of Record on Appeal.*** The record on appeal in appeals from any agency shall contain:

(1) an index of the contents of the record, which shall appear as the first page thereof;

(2) a statement identifying the commission or agency from whose judgment, order or opinion appeal is taken, the session at which the judgment, order or opinion was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency, including a Form 44 for all cases which originate from the Industrial Commission,to be filed with the agency to present and define the matter for determination;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(6) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(8) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(9) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of

approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3); and

(10) assignments of error to the actions of the agency, set out as provided in Rule 10.

RULE 21

CERTIORARI

(c) ***Same; Filing and Service; Content.*** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(f) ***Petition for Writ in Post Conviction Matters—Death Penalty Cases.*** A petition for writ of certiorari to review orders of the trial court ~~denying~~ on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within 60 days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within 30 days of service of the petition.

RULE 23

SUPERSEDEAS

(e) ***Temporary Stay.*** Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted shall remain in effect until the period for filing a petition for certiorari in the United

States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve.

RULE 25

PENALTIES FOR FAILURE TO COMPLY WITH RULES

(a) ***Failure of Appellant to Take Timely Action.*** If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been ~~docketed~~ filed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

RULE 26

FILING AND SERVICE

(b) ***Service of All Papers Required.*** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal. For cases which arise from the Industrial Commission, a copy shall be served on the Chairman of the Industrial Commission.

(g) ***Form of Papers; Copies.*** Papers presented to either appellate court for filing shall be letter size (8-1/2 x 11") with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8-1/2 x 14"). All printed matter must appear in at least 11 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than ~~5~~ 10 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

APPENDIX A

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	Time (days)	From date of	Rule Ref.
Requesting judicial settlement of record	10	last day within which an appellee served could ~~file~~ serve objections, etc.	11(c) 18 (d)(3)

APPENDIX D. FORMS

2. APPEAL ENTRIES

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9~~(b)~~ (a) showing appeal duly taken by ~~written~~ oral notice under App. Rule 3~~(a)~~ (b) or 4(a)~~;~~ and

~~2) judicial approval of the undertaking on appeal required by App. Rule 6; and~~

~~3)~~2) the entry required by App. Rule 9~~(b)~~ (a) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice after the term of court, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

~~Per Tables 1, 2, and 3 of Appendix C,~~ Such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional and serves as authentication of the substance of the entries.

(Defendant) gave due notice of appeal to the (Court of Appeals)(Supreme Court). ~~Appeal bond in the sum of $ adjudged to be sufficient.~~ (Defendant) shall have 10 days in which to order the transcript, or, in the alternative, 35 days in which to serve a proposed record on appeal on the appellee. (Plaintiff) is allowed ~~15~~ 21 days thereafter within which to serve objections or a proposed alternative record on appeal.

This day of , 19 .

s/
Judge Presiding

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Interest on Lawyers Trust Accounts Program (IOLTA), as particularly set forth in 27 N.C.A.C. 1D .1301, be amended as follows (additions in bold type, deletions interlined):

Title 27, Chapter 1
Subchapter D

Rule .1301 Purpose

...

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 **or noninterest bearing loans** under the ~~six~~ **four** 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.

...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 1997.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 6th day of March ,1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March , 1997.

s/Orr, J.
For the Court

AMENDMENT TO THE RULES GOVERNING ADMISSION TO PRACTICE LAW IN THE STATE OF NORTH CAROLINA

The following amendment to the Rules Governing Admission to Practice Law in the State of North Carolina was adopted by the Council of the North Carolina State Bar upon the recommendation of the Board of Law Examiners of the State of North Carolina at the Council's quarterly meeting on January 24, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules Governing Admission to Practice Law in the State of North Carolina, as particularly set forth in 21 N.C.A.C. 30 .0501 (6), be amended as follows (additions in bold type):

.0501 REQUIREMENTS FOR GENERAL APPLICANTS

...

(6) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board within the twenty-four (24) month period next preceding the beginning day of the written bar examination prescribed by Section .0900 of this Chapter which the applicant applies to take, or shall take and pass the Multistate Professional Responsibility Examination within the twelve (12) month period thereafter; **or, if later, shall take and pass the first Multistate Professional Responsibility Examination offered after the Board releases the results of the applicant's written examination.**

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules Governing Admission to Practice Law in the State of North Carolina was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 1997.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendment to the Rules and Regulations Governing Admission to Practice Law in the State of North Carolina 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 6th day of March, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules Governing Admission to Practice Law in the State of North Carolina be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 26, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D .1517, be amended as follows (additions are underlined, deletions are highlighted):

Title 27, Chapter 1
Subchapter D

Section .1500 Rules Concerning the Administration of the Continuing Legal Education Program

...

Rule .1517 Scope and Exemptions

(a) Except as provided herein these rules shall apply to every active member licensed by the North Carolina State Bar. . . .

...

(f) The board may exempt an active member from the continuing legal education requirements if

(1) the member is sixty-five years of age or older and

(2) the member does not render legal advice to or represent a client unless the member associates another active member who assumes responsibility for the advice or representation.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 26, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of February, 1997.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 12th day of February, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 12th day of February, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 18, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D .1501 and .1602, be amended as follows (additions are bold, deletions are interlined):

Title 27, Chapter 1
Subchapter D

Section .1500 Rules Concerning the Administration of the Continuing Legal Education Program

Rule .1501 Purpose and Definitions

. . .

(b) Definitions

. . .

(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, **and c) the effects of substance abuse and chemical dependency on a lawyer's professional responsibilities.** This definition shall be interpreted consistent with the provisions of Rule .1501(b)(5) above.

****

Section .1600 Regulations Concerning the Administration of the Continuing Legal Education Program

Rule .1602 General Course Approval

. . .

(c) Professional Responsibility Courses on Substance Abuse and Chemical Dependency—Accredited professional responsibility courses on substance abuse and chemical dependency shall concentrate on the relationship between substance abuse, chemical dependency and a lawyer's professional responsibilities. Such courses may also include (1) education on the prevention, detection, treatment and etiology of substance abuse and chemical dependency, and (2) information about assistance for chemically dependent lawyers available through lawyers' professional organizations.

. . . .

(1) ~~(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 **unless a course on substance abuse satisfies the requirements of Rule .1602(c);**

(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.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 18, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of October, 1996.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 6th day of March, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D .1523, be amended as follows (additions in bold type, deletions interlined):

Title 27, Chapter 1
Subchapter D

Rule .1523 Noncompliance

. . . .

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause

Ninety-three days after mailing such notice, if no written response is filed with the board by the member attempting to show good cause or attempting to show that the member has complied with the requirements of these rules, upon the recommendation of the board **and the Membership and Fees Committee**, the council may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in the procedures of the Membership and Fees Committee, Rule .0903(c) of this subchapter.

(d) Procedure Upon Submission of a Timely Response to a Notice To Show Cause

(2) Consideration by the Board

If the member files a timely written response to the notice, the board shall consider the matter at its next regularly scheduled meeting **or may delegate consideration of the matter to a duly appointed committee of the board.** ~~The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents, including affidavits. The State Bar may also appear through counsel, may be heard, and may offer witnesses and documents, including affidavits. The burden shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules governing the continuing legal education program.~~ The board shall review all evidence presented by the member to determine whether good cause has been shown or to determine whether the member has complied with the requirements of these rules within the 90-day period after receiving the notice to show cause.

(2) Recommendation of the Board

The board shall determine whether the member has shown good cause why the member should not be suspended. If the board determines that good cause has not been shown and that the member has not shown compliance with these rules within the 90-day period after receipt of the notice to show cause, then the board shall **refer the matter to the Membership and Fees Committee for hearing together with** ~~make~~ a written recommendation to the **Membership and Fees Committee** ~~council~~ that the member be suspended.

(3) **Consideration by and Recommendation of the Membership and Fees Committee**

The Membership and Fees Committee shall consider the matter at its next regularly scheduled meeting. The burden of proof shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules governing the continuing legal education program. Except as set forth above, the procedure for such hear-

ing shall be as set forth in the Procedures of the Membership and Fees Committee, Rule .0903(d)(1) and (2) of this subchapter.

(4) Order of Suspension

Upon the recommendation of the **Membership and Fees Committee** ~~board~~, the council may determine that the member has not complied with these rules and may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in the Procedures of the Membership and Fees Committee, Rule .0903(d)(3) of this subchapter.

(e) Late Compliance Fee

Any member who complies with the requirements of the rules during the 90-day period after receiving the notice to show cause shall pay a late compliance fee as set forth in Rule .1608(b) of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 1997.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March ,1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that

they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D .1524, be amended as follows (additions in bold type, deletions interlined):

Title 27, Chapter 1
Subchapter D

Rule .1524 Reinstatement

(a) Reinstatement Within 30 Days of Service of Suspension Order

A member who is suspended for noncompliance with the rules governing the continuing legal education program may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after the service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member that the member has cured the continuing legal education deficiency for which the member was suspended. Such member shall not be required to file a formal reinstatement petition or pay a $250 reinstatement fee.

(b) Procedure for Reinstatement **More than 30 Days After Service of the Order of Suspension**

Except as noted below, the procedure for reinstatement **more than 30 days after service of the order of suspension** shall be as set forth in the procedures for the Membership and Fees Committee, Rule .0904(c) and (d) of this subchapter, and shall be administered by the Membership and Fees Committee.

(a) Reinstatement Petition

At any time more than 30 days after service of an order of suspension on a member, a ~~Any~~ member who has been suspended for noncompliance with the rules governing the continuing legal education program may seek reinstatement by filing a reinstatement petition with the secretary. The secretary shall transmit a copy of the petition to each member of the board . . . .

(d) Reinstatement Fee

. . .

(e) Determination of Board; Transmission to Membership and Fees Committee

. . .

(f) Consideration by Membership and Fees Committee

. . .

(g) Hearing Upon Denial of Petition for Reinstatement

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 1997.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of

the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D .1604, be amended as follows (additions in bold type, deletions interlined):

Title 27, Chapter 1
Subchapter D

Rule .1604 Accreditation of **Prerecorded Programs** ~~Videotape or Other Audiovisual Programs~~ **and Live Programs Broadcast to Remote Locations by Telephone, Satellite or Video Conferencing Equipment**

(a) ~~The board may permit a~~ **An** active member **may** ~~to~~ receive credit for attendance at, or participation in, ~~videotape presentations or where audiovisual recorded or reproduced~~ **a presentation where prerecorded** material is used.

(b) **An active member may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite or video conferencing equipment. The member may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast.**

(c) ~~An attorney~~ **A member** attending ~~such~~ a **prerecorded** presentation is entitled to credit if

(1) the presentation from which the program is ~~made~~ **recorded** 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.

(d) **A member attending a presentation broadcast by telephone, satellite or video conferencing equipment is entitled to credit if**

(1) **the live presentation of the program would, if attended by an active member, be an accredited course;**

(2) **there is a question and answer session with the presenter or presenters subject to the limitations set forth in Rule .1605(b)(5) of this subchapter; and**

(3) **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.~~

(e) To receive approval for attendance at ~~such~~ programs **described in paragraphs (a) and (b) above,** the following conditions must be met:

(1) **Unless the entire program was 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.**

(2) The person or organization sponsoring the program must **have a reliable method for recording and verifying** ~~keeps accurate records of~~ attendance. **Attendance at a telephone broadcast may be verified by assigning a personal identification number to a member. If attendance is recorded by a person, the person may not earn credit hours by virtue of attendance at that presentation.** ~~and must forward a~~ **A** copy of the record of attendance of active members **must be forwarded** to the board within 30 days after **the** presentation of the ~~videotape~~ program is completed. **Proof of attendance may be made by the verifying person on Board Form 5.**

(3) 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~~ **original or live** program ~~is made~~ must be made available to those persons attending the **prerecorded or broadcast** program who desire to receive credit under these regulations.

(4) ~~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.~~ A suitable ~~classroom or~~ rooms ~~must~~ be available for viewing the program and taking of notes.

(f) A minimum of five active members must physically attend the presentation of **a prerecorded** ~~the~~ program. **This requirement does not apply to participation from a remote location in the presentation of a live program broadcast by telephone, satellite or video conferencing equipment.**

(g) EXAMPLES:

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 the 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.

EXAMPLE (4): Attorney Q, an active member, listens to a live telephone seminar using the telephone in the conference room of her law firm. To record her attendance, Attorney Q was assigned a personal identification number (PIN) by the seminar sponsor. Once connected, Attorney Q punched in the PIN number on her touch tone phone and her attendance was recorded. The seminar received individual course approval from the board. Attorney Q may receive credit if the additional conditions under this Rule .1604 are also met.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 1997.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CLIENT SECURITY FUND

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Client Security Fund, as particularly set forth in 27 N.C.A.C. 1D .1418, be amended as follows (additions in bold type, deletions interlined):

Title 27, Chapter 1
Subchapter D

.1418 Processing Applications

. . .

(g) Provided, however, and the foregoing notwithstanding, in no case shall the Fund reimburse the otherwise reimbursable losses sustained **by any one applicant as a result of the dishonest conduct of one attorney in an amount in excess of $100,000.**

~~(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.~~

. . . .

~~(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 mater 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 the 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.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 1997.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, be amended by adding the following provisions:

Title 27, Chapter 1
Subchapter D

Section .2600 Certification Standards for the Immigration Law Specialty

.2601 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates immigration 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.

.2602 Definition of Specialty

The specialty of immigration law is the practice of law dealing with obtaining and retaining permission to enter and remain in the United States including, but not limited to, such matters as visas, changes of status, deportation and exclusion, naturalization, appearances before courts and governmental agencies, and protection of constitutional rights.

.2603 Recognition as a Specialist in Immigration Law

If a lawyer qualifies as a specialist in immigration 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 Immigration Law."

.2604 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in immigration 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.

.2605 Standards for Certification as a Specialist in Immigration Law

Each applicant for certification as a specialist in immigration 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 immigration 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 immigration law.

(1) An applicant shall affirm that during the five years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of immigration law, but not less than 400 hours in any one year. Service as a law professor concentrating in the teaching of immigration law may be substituted for one year of experience to meet the five-year requirement.

(2) An applicant shall show substantial involvement in immigration law for the required period by providing such information as may be required by the board regarding the applicant's participation in at least five of the seven categories of activities listed below during the five years immediately preceding the date of application:

(A) Family Immigration.

Representation of clients before the U.S. Immigration and Naturalization Service and the State Department in the filing of petitions and applications.

(B) Employment Related Immigration.

Representation of employers and/or aliens before at least one of the following: the N.C. Employment Security Commission, U.S. Department of Labor, U.S. Immigration and Naturalization Service, U.S. Department of State or U.S. Information Agency.

(C) Naturalization.

Representation of clients before the U.S. Immigration and Naturalization Service and judicial courts in naturalization matters.

(D) Administrative Hearings and Appeals.

Representation of clients before Immigration Judges in deportation, exclusion, bond redetermination, and other administrative matters; and the representation of clients in appeals taken before the Board of Immigration Appeals, Administrative Appeals Unit, Board of Alien Labor Certification Appeals, Regional Commissioners, Commissioner, Attorney General, Department of State Board of Appellate Review, and Office of Special Counsel for Immigration Related Unfair Employment Practices (OCAHO).

(E) Administrative Proceedings and Review in Judicial Courts.

Representation of clients in judicial matters such as applications for habeas corpus, mandamus and declaratory judgments; criminal matters involving the immigration law; petitions for review in judicial courts; and ancillary proceedings in judicial courts.

(F) Asylum and Refugee Status.

Representation of clients in these matters.

(G) Employer Verification, Sanctions, Document Fraud, Bond and Custody, Rescission, Registry, and Fine Proceedings.

Representation of clients in these matters.

(c) Continuing Legal Education—An applicant must earn no less than 48 hours of accredited continuing legal education (CLE) credits in immigration law during the four years preceding application. At least 20 of the 48 CLE credit hours must be earned during the first and second year preceding application and at least 20 of the CLE hours must be earned during the third and fourth years preceding application. Of the 48 hours, at least 42 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(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. At least two of the completed peer reference forms received by the board must be from lawyers or judges who have substantial practice or judicial experience in immigration law. 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, skills, and proficiency in immigration law. The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

.2606 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 .2606(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 .2605(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 immigration law as accredited by the board. At least 30 of the 60 CLE credit hours must be earned during the first three years after certification or recertification, as applicable. Of the 60 hours, at least 52 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(c) Peer Review—The specialist must comply with the requirements of Rule .2605(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 .2605 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 .2605 of this subchapter.

.2107 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in immigration law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly

adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 1997.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March ,1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March , 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR CONCERNING TRUST ACCOUNTING

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning trust accounting, as particularly set forth in 27 N.C.A.C. 2 10.1 (b), be amended by inserting the provisions shown in bold type below and by renumbering the following provisions as appropriate:

Title 27, Chapter 1

Rule 10.1 (b)

. . . .

(b) As a prequisite 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:

. . . .

(2) "canceled checks" shall mean the original checks or printed digital images of the original checks provided to the lawyer by the bank, provided that

(A) such images are legible reproductions of the front and back of the original checks with no more than six checks per page and no smaller images than 1 3/16 x 3 inches; and

(B) the bank maintains, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original checks upon request within a reasonable time.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly

adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 1997.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March ,1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March , 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING ORGANIZATIONS PRACTICING LAW

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 18, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning Organizations Practicing Law, as particularly set forth in 27 N.C.A.C. 1E .0100, be amended as follows (additions are bold, deletions are interlined):

Title 27, Chapter 1
Subchapter E

Section .0100 Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law

Rule .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 companies 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.

Rule .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 **legally disqualified to render professional services in North Carolina or, if the share-**

holder is not licensed in North Carolina, in any other jurisdiction in which the shareholder is licensed ~~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**s** "P.L.L.C." **or "PLLC"**;

(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 **legally disqualified to render professional services in North Carolina or, if the member is not licensed in North Carolina, in any other jurisdiction in which the member is licensed** ~~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.

Rule .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 name~~s~~ and address~~eses~~ of each person who will be an original shareholder or an employee who will practice law for the corporation **in North Carolina**; (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. **The application shall also (i) set forth the name, address, and license information of each original shareholder who is not licensed to practice law in North Carolina but who shall perform services on behalf of the corporation in another jurisdiction in which the corporation maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction.** ~~and~~ **The application shall include a** representation~~ing~~ 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 compli-

ance with the laws relating to professional corporations and these regulations. If the secretary determines that all persons who will be original shareholders are **active members in good standing with the North Carolina State Bar,** ~~duly licensed to practice law in North Carolina~~ **or duly licensed to practice law in another jurisdiction in which the corporation shall maintain an office,** 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~~s~~ of each original member or employee who will practice law for the professional limited liability company **in North Carolina**; (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 persons are duly licensed to practice law in North Carolina. **The application shall also (i) set forth the name, address, and license information of each original member who is not licensed to practice law in North Carolina but who shall perform services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. The application shall include a representation** ~~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 arti-

cles 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 **active members in good standing with the North Carolina State Bar,** ~~duly licensed to practice law in North Carolina~~ **or duly licensed in another jurisdiction in which the professional limited liability company shall maintain an office,** 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 **in North Carolina** 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. **Such application shall also (i) set forth the name, address, and license information of each shareholder who is not licensed to practice law in North Carolina but who performs services on behalf of the corporation in another jurisdiction in which the corporation maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. Upon a finding by the secretary that all shareholders are active members in good standing with the North Carolina State Bar, or are duly licensed to practice law in another jurisdiction in which the corporation maintains an office**, ~~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 **in North Carolina**, 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. **Such application shall also (i) set forth the name, address, and license information of each member who is not licensed to practice law in North Carolina but who performs services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction.** Upon a finding by the secretary that **all members are active members in good standing with the North Carolina State Bar, or are duly licensed to practice law in another jurisdiction in which the professional limited liability company maintains an office** ~~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 professional 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 appli-

cation for renewal of certificate of registration, together with the renewal fee **and a late fee of $10,** 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 late 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.

Rule .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 **active members in good standing with the North Carolina State Bar** ~~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 **in North Carolina or in matters of North Carolina law.**

(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 **legally disqualified to render professional services in North Carolina or, if the shareholder or member is not licensed in North Carolina, in any other jurisdiction in which the shareholder or member is licensed** ~~a "disqualified person," as such term is defined in G.S. 55B2(1),~~ or after a share-

holder 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 **to a licensee,** 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.

Rule .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.

Rule .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 **in North Carolina** are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

Name and Position
Address (incorporator, officer, director, shareholder, employee)

_____

_____

_____

_____

_____

_____

~~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.~~

2. **Each original shareholder who is not licensed to practice law in North Carolina but who will perform services**

on behalf of the corporation in another jurisdiction in which the corporation maintains an office is duly licensed to practice law in that jurisdiction. The name, address, and license information of each such person are:

Name, Address, Jurisdiction of Licensure, License Number

_____

_____

_____

3. **The jurisdictions other than North Carolina in which the corporation will maintain an office are:**

Name of Jurisdiction and Address of Office(s)

_____

_____

_____

4. 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.

5. 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.

6. 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 Profes-

sional 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 **the ownership of the shares of stock is in compliance with the requirements of G.S. 55B-4(2) and G.S. 55B-6** ~~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 Corporation 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 **in North Carolina** are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

   Name and Position
   Address (officer, director, shareholder, employee)

   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____

2. **Each shareholder who is not licensed to practice law in North Carolina but who performs services on behalf of the corporation in another jurisdiction in which the corporation maintains an office is duly licensed to practice law in that jurisdiction. The name, address, and license information of each such person are:**
   Name, Address, Jurisdiction of Licensure, License Number

   _____
   _____

3. The jurisdictions other than North Carolina in which the corporation maintains an office are:

Name of Jurisdiction and Address of Office(s)

_____

_____

_____

4. 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.

5. 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 _____ (transferee) is duly 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 **in North Carolina** are duly licensed to practice law in the state of North Carolina. The names and addresses of all such persons are:

   Name and Position
   Address (signer of articles, manager, member, employee)

   _____
   _____
   _____
   _____
   _____
   _____

~~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~~.

2. **Each original member who is not licensed to practice law in North Carolina but who will perform services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office is duly licensed to practice law in that jurisdiction. The names, addresses, and license information of each such person are:**

   Name, Address, Jurisdiction Where Licensed, License Number

   _____
   _____
   _____

3. The jurisdictions other than North Carolina in which the professional limited liability company will maintain an office are:

Name of Jurisdiction and Address of Office(s)

_____

_____

_____

4. 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.

5. 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.

6. 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 **the membership interest is in compliance with the requirements of G.S. 55C-2-01(c), and, by reference, G.S. 55B-4(2) and G.S. 55B-6** ~~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 **in North Carolina** are duly licensed to practice law in the State of North Carolina. The names and addresses of all such persons are:

   Name and Position
   Address (manager, member, employee)

   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____

2. **Each member who is not licensed to practice law in North Carolina but who performs services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office is duly licensed to practice law in that jurisdiction. The names, addresses, and license information of each such person are:**

   Name, Address, Jurisdiction Where Licensed, License Number

   _____
   _____

3. **The jurisdictions other than North Carolina in which the professional limited liability company maintains an office are:**

   Name of Jurisdiction and Address of Office(s)

   _____
   _____
   _____

4. 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.

5. 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: _____

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 18, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of October, 1996.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 18, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0115 be amended as follows (additions are in bold, deletions are interlined):

Title 27, Chapter 1
Subchapter B

Section .0100 Discipline and Disability of Attorneys

. . .

Rule .0115 Effect of a Finding of Guilt in any Criminal Case

(a) Any member **who has been** convicted of **or has tendered and has had accepted a plea of guilty or no contest to a** ~~or sentenced for the commission of a~~ **criminal offense showing professional unfitness** ~~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,~~ **may** be suspended from the practice of law as set out in Rule .0115(d) below.

. . .

(d) Upon the receipt of a **certified copy of a plea of guilty or no contest to or a** certificate of conviction of a member of a ~~serious crime~~ **criminal offense showing professional unfitness** ~~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~~ **may, in the chairperson's discretion,** 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.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 18, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of October, 1996.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

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The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 18, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C.

1B .0124 be amended as follows (additions are in bold, deletions are interlined):

Title 27, Chapter 1
Subchapter B

Section .0100 Discipline and Disability of Attorneys

. . .

Rule .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 written notice must be received by the client before a disbarred or suspended attorney enters into any agreement with or on behalf of any client to settle, compromise or resolve any claim, dispute or lawsuit of the client.** 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.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 18, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of October, 1996.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of

the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 18, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0125, be amended as follows (additions are in bold, deletions are interlined):

Title 27, Chapter 1
Subchapter B

Section .0100 Discipline and Disability of Attorneys

. . .

Rule .0125 Reinstatement

(a) After disbarment

. . .

(7) As soon as possible after the conclusion of the hearing, the hearing committee will file a report containing its findings, conclu-

sions, and recommendations with the secretary. ~~This report will be promptly transmitted to the council.~~

(8) A petitioner in whose case the hearing committee recommends that reinstatement be denied may file notice of appeal to the council. Appeal from the report of the hearing committee must be taken within 30 days after service of the committee report upon the petitioner and shall be filed with the secretary. If no appeal is timely filed, the recommendation of the hearing committee to deny reinstatement will be deemed final. All cases in which the hearing committee recommends reinstatement of a disbarred attorney's license shall be heard by the council and no notice of appeal need be filed by the N.C. State Bar.

(9) Transcript of Hearing Committee Proceedings

The petitioner will have 60 days following the filing of the notice of appeal in which to produce a transcript of the trial proceedings before the hearing committee. The chairperson of the hearing committee may, for good cause shown, extend the time to produce the record.

~~(8)~~ **(10)** Record to the Council

(A) Composition of the Record

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 counsel agree in writing to shorten the record. The petitioner will provide the **proposed** 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 **or order** regarding the record will be in writing and will be included in the record transmitted to the council.

(B) Settlement of the Record

(i) By agreement—at any time following service of the proposed record upon the counsel, the parties may by agreement entered in the record settle the record to the council.

(ii) By counsel's failure to object to the proposed record—within 20 days after service of the proposed record, the counsel may serve a written objection or a proposed alternative record upon the petitioner. If the counsel fails to serve

a notice of approval or an objection or a proposed alternative record, the petitioner's proposed record will constitute the record to the council.

(iii) By judicial settlement—If the counsel raises a timely objection to the proposed record or serves a proposed alternative record upon the petitioner, either party may request the chairperson of the hearing committee which heard the reinstatement petition to settle the record. Such request shall be filed in writing with the hearing committee chairperson no later than 15 days after the counsel files an objection or proposed alternative record. Each party shall promptly provide to the chairperson a reference copy of the proposed record, amendments and objections filed by that party in the case. The chairperson of the hearing committee shall settle the record on appeal by order not more than 20 days after service of the request for judicial settlement upon the chairperson. The chairperson may allow oral argument by the parties or may settle the record based upon written submissions by the parties.

~~(B)~~ **(C)** The petitioner will transmit a copy of the settled record to each member of the council **and to the counsel** no later than 30 days before the council meeting at which the petition is to be considered.

~~(C)~~ **(D)** The petitioner shall bear the costs . . .

~~(D)~~ **(E)** If the petitioner fails . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 18, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of October, 1996.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of

the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March, 1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 24, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0105(a) and .0112(g), be amended as follows (additions in bold type, deletions interlined):

Title 27, Chapter 1
Subchapter B

Rule .0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The chairperson of the Grievance Committee will have the power and duty

. . .

(19) to dismiss a grievance where it appears that the complaint, even if true, fails to state a violation of the

Rules of Professional Conduct and where counsel consents to the dismissal.

(20) to dismiss a grievance where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel and the chairperson of the Preliminary Screening Committee assigned to the grievance consent to the dismissal.

. . .

Rule .0112 Investigations: Initial Determination

. . .

(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, **except in cases which are dismissed pursuant to Rule .0105 of this subchapter.**

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 24, 1997.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of February, 1997.

s/L. Thomas Lunsford
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March ,1997.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1997.

s/Orr, J.
For the Court

THE REVISED RULES OF PROFESSIONAL CONDUCT
Of
The North Carolina State Bar

July 24, 1997

REVISION OF THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 4, 1997.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, R. 0.1-10.3 be totally rescinded and that the new version of said Rules of Professional Conduct which follows be substituted in lieu thereof, which version shall be referred to as "The Revised Rules of Professional Conduct of the North Carolina State Bar."

Index

The Revised Rules of Professional Conduct

0.1 PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] 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.

[2] 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.

[3] 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.

[4] 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.

[5] 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.

[6] 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.

[7] 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, public rights law, charitable organization representation, and the administration of justice.

[8] 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.

[9] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. 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 the government. Every lawyer should support all proper efforts to meet this need for legal services.

[10] 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.

[11] 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.

[12] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and, at the same time, assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves that public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these 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.

[13] 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.

[14] 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 the abuse of legal authority is more readily challenged by a self-regulated profession.

[15] The legal profession's relative autonomy carries with it a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested con-

cerns 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.

[16] 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.

0.2 SCOPE

[17] 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.

[18] 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.

[19] 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 1.6, 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.

[20] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes 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.

[21] 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.

[22] 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.

[23] 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.

[24] The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances to clients that communications will be protected against disclosure.

[25] 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. Research notes were prepared to compare counterparts in the original Rules of Professional Conduct (adopted 1985, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Revised Rules, and are not intended to affect the application or interpretation of the Rules and Comments.

0.3 TERMINOLOGY

(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) "Confidential information" denotes information described in Rule 1.6(a) and (b).

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

(e) "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a partner in a partnership or limited liability partnership, a shareholder in a professional corporation, and a member of a professional limited liability company.

(h) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

(i) "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.

(j) "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.

(k) "Substantial," when used in reference to degree or extent, denotes a material matter of clear and weighty importance.

(l) "Tribunal" denotes a court or a government body exercising adjudicative or quasi-adjudicative authority.

RULE 1.1 COMPETENCE

(a) A lawyer shall not handle a legal matter which the lawyer knows or should know he or she is not competent to handle, without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter without preparation adequate under the circumstances.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative 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.

[2] 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.

[3] 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 which is reasonably necessary under the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] 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. See also Rule 6.2.

Thoroughness and Preparation

[5] 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.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Distinguishing Professional Negligence

[7] An error by a lawyer may constitute professional malpractice under the applicable standard of care and subject the lawyer to civil liability. However, conduct that constitutes a breach of the civil standard of care owed to a client giving rise to liability for professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client competently. A lawyer who makes a good faith effort to be prepared and to be thorough will not generally be subject to professional discipline, although he or she may be subject to a claim for malpractice. For example, a single error or omission made in good faith, absent aggravating circumstances, such as an error while performing a public records search, is not usually indicative of a violation of the duty to represent a client competently.

[8] Repeated failure to perform legal services competently is a violation of this Rule. A pattern of incompetent behavior demonstrates that a lawyer cannot or will not acquire the knowledge and skills necessary for minimally competent practice. For example, a lawyer who repeatedly provides legal services that are inadequate or who repeatedly provides legal services that are unnecessary is not fulfilling his or her duty to be competent. This pattern of behavior does not have to be the result of a dishonest or sinister motive nor does it have to result in damages to a client giving rise to a civil claim for malpractice in order to cast doubt on the lawyer's ability to fulfill his or her professional responsibilities.

RULE 1.2 SCOPE OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued.

(1) A lawyer shall 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, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, or 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.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not 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 to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment

Scope of Representation

[1] 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 objec-

tives. 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. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. Lawyers are encouraged to treat opposing counsel with courtesy and to cooperate with opposing counsel when it will not prevent or unduly hinder the pursuit of the objective of the representation. To this end, a lawyer may waive a right or fail to assert a position of a client without first obtaining the client's consent. For example, a lawyer may consent to an extension of time for the opposing party to file pleadings or discovery without obtaining the client's consent.

[2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[3] 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.

Services Limited in Objectives or Means

[4] 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, a retainer 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.

[5] 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 1.1, or to surrender the right to terminate the

lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

[6] 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 legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. There is also a distinction between giving a client legitimate advice about asset protection and assisting in the illegal or fraudulent conveyance of assets.

[7] 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 1.6. However, the lawyer is required to avoid furthering the 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.

[8] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[9] Paragraph (d) 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 (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) 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.

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] 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. See Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] 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.

[3] Unless the relationship is terminated as provided in Rule 1.16, 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.

Distinguishing Professional Negligence

[4] Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of profession-

al malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this Rule.

[5] Conduct sufficient to warrant the imposition of professional discipline is typically characterized by the element of intent or scienter manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] 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 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 unacceptable. See Rule 1.2(a). Even when a client delegates authori-

ty to the lawyer, the client should be kept advised of the status of the matter.

[2] 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.

[3] 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. See Rule 1.14. 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. See Rule 1.13. 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.

Withholding Information

[4] 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 psychiatrist 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. Rule 3.4(c) directs compliance with such rules or orders.

RULE 1.5 FEES

(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 clearly excessive. Factors to be considered in determining whether a fee is clearly excessive 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) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) a contingent fee for representing a defendant in a criminal case, however, a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law; or

(2) a contingent fee in a civil case in which such a fee is prohibited by law.

(e) 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.

(f) 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 constituted 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

Basis or Rate of Fee

[1] 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. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

[2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). This does not apply when the advance payment is a true retainer to reserve serv-

ices rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, provided this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). 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.

[3] Once a fee agreement has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interests regardless of whether the lawyer has struck an unfavorable bargain. An attorney may seek to renegotiate the fee agreement in light of changed circumstances or for other good cause, but the attorney may not abandon or threaten to abandon the client to cut the attorney's 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. Fees, including contingent fees, should not be excessive as to percentage or amount.

[4] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

[5] 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, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) 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. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes over Fees

[6] Participation in the fee arbitration program of the North Carolina State Bar is mandatory when a client requests arbitration of a disputed fee. Before filing an action to collect a disputed fee, the client must be advised of the arbitration program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed and notification of the client is not required. In making reasonable efforts to advise the client of the existence of the fee arbitration program, it is preferable to address a written communication to the client at the client's last known address. If the address of the client is unknown, the lawyer should use reasonable efforts to acquire the current address of the client.

[7] If arbitration is requested by a client, the lawyer must participate in the arbitration process in good faith. Although the program requires only non-binding arbitration, the arbitration can be made binding with the consent of both parties. Whether the arbitration is binding or not, the lawyer must cooperate with the person who is charged with investigating the dispute and with the panel that hears the dispute. The lawyer should fully set forth his or her position and support that position by appropriate documentation. The lawyer is strongly encouraged to abide by the decision of the panel, even if the decision is non-binding.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, 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.

(b) "Confidential information" also refers to 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 or to whom assistance is being offered. For the purposes of this rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) Except when permitted under paragraph (d), a lawyer shall not knowingly:

(1) reveal confidential information of a client;

(2) use confidential information of a client to the disadvantage of the client; or

(3) use confidential information of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

(d) 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 consultation with 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 a 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 rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(6) 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; and

(7) 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

[1] 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 avoid any violation of the law in the proper exercise of their rights.

[2] 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.

[3] 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. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[4] 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.

[5] 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. See also Scope.

[6] 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.

Lawyer's Assistance Program

[7] 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.

Authorized Disclosure

[8] 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.

[9] 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 specified lawyers.

Disclosure Adverse to Client

[10] 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. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's con-

fidences even though the client's purpose is wrongful. However, to the extent a lawyer is required or permitted to disclose a client's purpose, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened criminal activity thus involves balancing the interests of one group of potential victims against those of another.

[11] Generally speaking, information relating to the representation must be kept confidential, as stated in paragraph (c). However, where the client is or has been engaged in criminal or fraudulent conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question, and the seriousness of that conduct. Several situations must be distinguished.

[12] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[13] Second, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (d)(4), the lawyer has the professional discretion to reveal information in order to prevent such consequences. It is very difficult for a lawyer to "know" when such a purpose will actually be carried out, for the client may have a change of mind.

[14] Third, 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 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (d)(5) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

[15] 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 is question. When practical, the lawyer should first seek to persuade the client to take suitable action making it unnecessary for the lawyer to make any disclosure. In any case, a disclosure adverse to the client's interests should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make the disclosure permitted by paragraphs (d)(4) and (d)(5) does not violate this rule.

[16] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[17] Paragraph (b)(5) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

Dispute Concerning a Lawyer's Conduct

[18] 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 (d)(6) 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.

[19] 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 (d)(6) 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 a 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.

Disclosures Otherwise Required or Authorized

[20] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (c) requires the lawyer to invoke the 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.

[21] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, 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 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

[22] The duty of confidentiality continues after the client lawyer relationship has terminated.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(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 consultation 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 consultation 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 the representation of any party the lawyer cannot adequately represent without using the confidential information of another client or a former client except as Rule 1.6 allows.

Comment

Loyalty to a Client

[1] 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. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[3] 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.

[4] 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.

Consultation and Consent

[5] 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.

Lawyer's Interests

[6] The lawyer's own interests should not be permitted to have an 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. See Rules 1.1 and 1.5. 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.

Conflicts in Litigation

[7] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, 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 codefendant. 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. Compare Rule 2.2 involving intermediation between clients.

[8] 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. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. 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.

[9] 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.

Interest of Person Paying for a Lawyer's Service

[10] 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. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, 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.

Other Conflict Situations

[11] 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.

[12] 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.

[13] 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 clients are the estate as an entity and the personal representative in his or her official capacity. The lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also 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.

Conflict Charged by an Opposing Party

[15] 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 clearly calls into 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. See Scope.

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS AND OTHER SPECIFIC APPLICATIONS

(a) A lawyer shall not enter into a business transaction with a client under any circumstances unless it is fair to the client. A lawyer shall not enter into a business transaction with a client in which the lawyer and the client have differing interests and wherein the client expects the lawyer to exercise his or her independent professional judgment for the protection of the client, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing.

(b) 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 informa-

tion, confidential or otherwise, acquired by the lawyer during the course of the representation.

(c) 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.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer publication, literary, or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that a lawyer may advance court costs and expenses of litigation including expenses of investigation and medical examinations and cost of obtaining and presenting evidence, provided the client remains ultimately liable for such costs and expenses.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(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 1.6.

(g) 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 consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) 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 claim for such liability with an unrepresented client or former client without first advis-

ing that person in writing that independent representation is appropriate in connection therewith.

(i) 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 consultation regarding the relationship. This provision shall not be construed to disqualify other lawyers in the affected lawyer's firm.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien to secure the lawyer's fee or expenses, provided the requirements of Rule 1.8(a) are satisfied; and

(2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

Comment

Transactions Between Client and Lawyer

[1] 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. 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. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utility services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Because of the actual and potential conflicts of interests, paragraph (b) prohibits the sale of 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 the lawyer knows by

virtue of the representation that such client has received funds suitable for investment.

[3] 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. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

[4] 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 (d) 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 Rule 1.5 and paragraph (j).

Person Paying for a Lawyer's Services

[5] A lawyer may be paid from a source other than the client. Paragraph (f) 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 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. 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. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Limiting Liability

[6] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Family Relationships Between Lawyers

[7] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7,

1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

[8] Paragraph (j) states the general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. The rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e). The rule also permits a lawyer to acquire a lien to secure the lawyer's fee or expenses provided the requirements of Rule 1.7(b) are satisfied. Specifically, the lawyer must reasonably believe that the representation will not be adversely affected after taking into account the possibility that the acquisition of a proprietary interest in the client's cause of action or any res involved therein may cloud the lawyer's judgment and impair the lawyer's ability to function as an advocate. The lawyer must also disclose the risks involved prior to obtaining the client's consent. Prior to initiating a foreclosure on property subject to a lien securing a legal fee, the lawyer must notify the client of the right to require the lawyer to participate in the mandatory fee dispute arbitration program. See Rule 1.6(f).

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

(a) 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 consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information protected from disclosure by Rule 1.6 to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal confidential information protected from disclosure by Rule 1.6 except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Comment

[1] The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Lawyers Moving Between Firms

[3] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to

the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule 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 lawyers 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 imputation were applied 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.

[4] 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 may be a presumption that all confidences known by the 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.

[5] The other rubric formerly used for dealing with disqualification is the appearance of impropriety. 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, disqualification 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 disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

Confidentiality

[6] 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 the files of only a limited number of clients and participate in discussions 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.

[7] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[8] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer, while with one firm, acquired no knowledge or 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. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[9] 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. See Rules 1.6 and 1.9.

Adverse Positions

[10] 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. Hence, this aspect of the problem is governed by Rule 1.9(a). 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 paragraphs (b) and (c) concerning confidentiality have been met.

[11] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a

lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[12] Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role on behalf of the new client.

[13] With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10 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 Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) 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 and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or 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. However, if they present themselves to the public as a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. 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 information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved.

[2] 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 and its local affiliates.

[3] 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.

[4] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11 (a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.

[5] 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 1.6, 1.9 and 1.11. However, if the more extensive disqualification in Rule 1.10 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 1.10 were applied to the government. On balance, therefore, the

government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification

[6] 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 Rules 1.9(b) and 1.10(b).

[7] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[8] The duty of loyalty to a client obliges a lawyer 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 necessarily entail abstention of other lawyers through imputed disqualification. If a lawyer has 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 1.9(b) and Rule 1.10(b) concerning confidentiality have been met.

RULE 1.11 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 govern-

ment agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(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 in 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 if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(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, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(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

[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another. 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 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

[2] 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 information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[3] 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.

[4] Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

[5] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[6] 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.

[7] 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 1.7 and is not otherwise prohibited by law.

[8] Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

RULE 1.12 FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), 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 consultation.

(b) A lawyer shall not negotiate for 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 as a judge or 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), 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 any 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

[1] This Rule generally parallels Rule 1.11. 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. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refused to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is like-

ly to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or withdraw in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

[2] Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[3] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[4] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seri-

ousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point, it may be useful or essential to obtain an independent legal opinion.

[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that, under certain conditions, highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[7] The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

[8] There are times when the organization's interest may be or may become adverse to those of one or more of its constituents.

In such circumstances, the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[9] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[10] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[11] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[12] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RULE 1.14 CLIENT UNDER A DISABILITY

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some

other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent, the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

[4] If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Disclosure of the Client's Condition

[5] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

RULE 1.15-1 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.

(b) For purposes of this rule, Rule 1.15-2 and Rule 1.15-3, the following definitions will apply:

(1) A "bank" is defined as a North Carolina or federally chartered bank, savings and loan association, or credit union.

(2) A "trust account" is an account in which a lawyer holds funds in a fiduciary relationship on behalf of one or more clients and/or in which a lawyer holds funds in a fiduciary relationship as described in paragraph (b)(3) below.

(3) A "fiduciary account" is an account in which a lawyer holds funds in a fiduciary relationship pursuant to the lawyer's service as a trustee, guardian, personal representative, attorney in fact or escrow agent.

(4) 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.

(5) The term "client" shall include all persons, firms, or entities for whom the lawyer performs any legal services.

(6) The term "instrument" shall include any instrument under the Uniform Commercial Code and any record of the electronic transfer of funds.

(c) As a prerequisite to the receipt of any funds belonging to another person or entity, either from a client or from a third party, a lawyer shall maintain one or more bank accounts, separately identifiable from any business or personal account of the lawyer. Each account in which client funds are held shall be clearly labeled and designated as a trust account. Each trust account shall be maintained at a bank in North Carolina, unless otherwise directed in writing by the client. Each account in which funds are held by the lawyer pursuant to the lawyer's service as a trustee, guardian, personal representative, attorney in fact or escrow agent shall be appropriately labeled as a fiduciary account unless such funds are held in a trust account.

(d) All 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 trust account.

(e) No funds belonging to the lawyer shall be deposited into a trust account or a fiduciary account 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 or a third party 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 disputed by the client, in which event the disputed portion shall remain in the trust account until the dispute is resolved.

(f) Except as authorized by Rule 1.15-3 of this chapter, interest earned on funds deposited in a trust account (less any deduction for bank service charges 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 or to any interest earned on funds deposited in a fiduciary account.

(g) A lawyer shall not use or pledge the funds held in a trust or fiduciary account to obtain credit or other personal financial benefit.

(h) Any property belonging to a client received by a lawyer, other than funds deposited in a trust or fiduciary account, 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 which is not clearly identified in such safe deposit box or other place of safekeeping.

(i) Any property or titles to property, personal or real, delivered to the lawyer 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

[1] The purpose of a lawyer's trust account is to segregate the funds belonging to clients from those belonging to the lawyer. The lawyer 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 lawyer's creditors or place the funds in the lawyer's estate in the event of death or disability. Every lawyer who receives funds belonging to clients must maintain a trust account. 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. However, funds held by a lawyer acting as a fiduciary, such as a trustee, personal representative, guardian, escrow agent or attorney in fact, must be segregated from the lawyer's per-

sonal funds, properly labeled and maintained in accordance with the applicable provisions of Rule 1.15-1 and Rule 1.15-2.

[2] The definitions in Rule 1.15-1(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.

[3] Rule 1.15-1 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 for expenses should be deposited in the trust account. The new language eliminates the ambiguity. Under the new rule, all money received by the lawyer except that to which the lawyer is immediately entitled must be deposited in the trust account, including funds for payment of expenses. Funds delivered to the lawyer 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 lawyer for personal purposes or subjected to the potential claims of the lawyer's creditors.

[4] 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 lawyer which is not used to pay for the legal services provided by the lawyer and, by agreement of the parties, is nonrefundable upon discharge of the lawyer. It is a payment to which the lawyer is immediately entitled and, therefore, 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 or some other basis is not a payment to which the lawyer is immediately entitled. This is really a security deposit and should be placed in the trust account. As the lawyer earns the fee or bills against the deposit, the funds should be withdrawn from the account. Rule 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated.

[5] The lawyer 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 lawyer.

RULE 1.15-2 RECORD KEEPING AND ACCOUNTING FOR CLIENT FUNDS AND 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 also maintain complete records of all funds, securities, or other property received by the lawyer pursuant to the lawyer's service as a trustee, personal representative, guardian, attorney in fact or escrow agent. A lawyer shall retain the records required under this rule for a period of six years following completion of the transactions generating the records. The financial records shall be subject to audit for cause and random audit in accordance with the Rules of the North Carolina State Bar.

(c) The minimum records required by paragraph (b) for all trust and fiduciary accounts shall consist of the following:

(1) A file of bank receipts or file of deposit slips listing the source, client, and date of the receipt of all funds deposited in a trust or fiduciary account;

(2) All canceled instruments drawn on a trust or fiduciary account, or printed digital images thereof furnished by the bank, provided

(i) such images are legible reproductions of the front and back of the original instruments with no more than six instruments per page and no smaller images than 1 3/16 x 3 inches; and

(ii) the bank maintains, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original instruments upon request within a reasonable time;

(3) Any bank statements or documents received from the bank regarding a trust or fiduciary account, including, but not limited to, notices of the return of any instrument drawn on the account for insufficient funds; and

(4) All records required by law to be maintained for a fiduciary account.

(d) The minimum records required by paragraph (b) for trust accounts, as distinguished from the records required for both trust and fiduciary accounts described in paragraph (c), shall also include the following:

(1) Canceled instruments, or printed digital images thereof that meet the requirements set forth in paragraph (c)(2), showing the amount, date, and recipient of all trust account disbursements, and the client balance against which each instrument is drawn; and

(2) A 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 a trust account for that person.

(e) All receipts of trust or fiduciary 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 or fiduciary funds and non-trust or non-fiduciary funds, the deposit shall be made to a trust or fiduciary account intact and the non-trust or non-fiduciary portion shall be withdrawn when the bank has credited the account upon final settlement or payment of the instrument.

(f) An instrument drawn from a trust 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 a trust account shall be payable to cash or bearer.

(g) 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.

(h) 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 enti-

tled in the possession of the lawyer or held in a trust account by the lawyer.

(i) Every lawyer maintaining a trust account or a fiduciary 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 instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in any bank which does not agree to make such reports pursuant to the directive.

(j) A lawyer shall produce for inspection and copying 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.

(k) If, in connection with the representation of a client or as a trustee, personal representative, guardian, escrow agent or attorney in fact, a lawyer holds any funds or property in a trust or fiduciary account, safe deposit box or other place of safekeeping and such funds or property may be abandoned, 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. If the identify and location of the owner are determined, the funds, or other property shall be transferred to the owner forthwith. If the identity or the location of the owner cannot be determined and the provisions of G.S. 116B-18 are satisfied, the funds or property shall be deemed abandoned property and the lawyer shall comply with the requirements of Chapter 116B regarding the escheat of abandoned property.

(l) A lawyer who learns or discovers that funds have been withdrawn, without authority, from a trust account or fiduciary account shall promptly inform the North Carolina State Bar.

Comment

[1] 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 and fiduciary property are maintained. Therefore, there are minimum record-keeping requirements.

[2] 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 lawyer reconcile the trust account regularly. The lawyer 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 lawyer.

[3] 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.

[4] A properly maintained trust account or fiduciary account should not have any instruments 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.

[5] Should a lawyer need technical assistance concerning the escheat of property to the State of North Carolina, the lawyer should contact the escheat officer at the office of the North Carolina State Treasurer in Raleigh, North Carolina.

RULE 1.15-3 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 bank. 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 1.15-1 of this chapter those funds not nominal in amount or not expected to be held for a short period of time. Certifi-

cates 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.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of law or the Rules of Professional Conduct;

(2) in representing a client before a tribunal, the lawyer reasonably believes that the client is bringing the legal action, conducting the defensive or asserting a position for the purpose of harassing or maliciously injuring any person;

(3) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(4) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client knowingly and freely assents to the termination of the representation;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant, imprudent or contrary to the advice and judgment of the lawyer;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation has been rendered unreasonably difficult by the client;

(6) the client 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; or

(7) other good cause for withdrawal exists.

(c) When permission for withdrawal from representation of a client is required by the rules of a tribunal, a lawyer shall not withdraw from the representation of a client in a proceeding before that tribunal without the permission of the tribunal.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] 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.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. 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.

Discharge

[4] A client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's ser-

vices. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] 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.

[6] 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. See Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Forfeiture by the client of a substantial financial investment in the representation may have such effect on the client's interests. Withdrawal is also 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.

[8] 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.

Assisting the Client upon Withdrawal

[9] 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.

[10] Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

[11] 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 canceled 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 submission. The lawyer's personal notes and incomplete work product need not be released.

[12] A lawyer who 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.

RULE 1.17 SALE OF A LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) Upon transferring the law practice to the purchaser, the seller ceases to engage in the private practice of law in North Carolina;

(b) The practice is sold as an entirety to a single purchaser, which is another lawyer or law firm licensed to practice law in North Carolina. Without violating this provision, the seller may agree to transfer matters in one legal field to one purchaser, while transferring matters in another legal field to another purchaser, provided that such purchasers concentrate in those legal fields;

(c) Written notice is sent to each of the seller's clients regarding:

(1) the proposed sale, including the identity of the purchaser;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (f);

(3) the client's right to retain other counsel and to take possession of the client's files prior to the sale or at any time thereafter; and

(4) the fact that the client's consent to the transfer of the client's files and legal representation to the purchaser will be presumed if the client does not take any action or

does not otherwise object within thirty (30) days of receipt of the notice.

(d) If the seller or purchaser identifies a conflict of interest that prohibits the purchaser from representing the client, the seller's notice to the client shall advise the client to retain substitute counsel to assume the client's representation and to arrange to have the substitute counsel contact the seller.

(e) If a client cannot be given notice, the files and the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary for the court to decide whether to issue the order. In the event the court fails to grant a substitution of counsel in a matter, that matter shall not be included in the sale and the sale otherwise shall be unaffected.

(f) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

(g) The seller and purchaser may agree that the purchaser does not have to pay the entire sales price for the seller's law practice in one lump sum. The seller and purchaser may enter into reasonable arrangements to finance the purchaser's acquisition of the seller's law practice without violating Rules 1.5(e) and 5.4(a). The seller, however, shall have no say regarding the purchaser's conduct of the law practice.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for

sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale attendant upon retirement from the private practice of law in North Carolina. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

Single Purchaser

[5] The Rule requires a single purchaser unless all matters in particular legal fields are transferred to purchasers who concentrate in those fields. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.

Client Confidences, Consent and Notice

[6] Written notice of the proposed sale must be sent to all clients who are currently represented by the seller and to all former clients whose files will be transferred to the purchaser. Although it is not required by this rule, the placement of a notice of the proposed sale in a local newspaper of general circulation would supplement the effort to provide notice to clients as required by subpart (c) of the rule.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual

notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser, the client must be sent written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 30 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice. The notice to clients must advise clients that they have a right to retain a lawyer other than the purchaser. In addition, the notice must inform clients that their right to counsel of their choice continues after the sale even though they consent to the transfer of the representation to the purchaser.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed

the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.

[11] The purchaser may not intentionally fragment the practice which is the subject of the sale by charging significantly different fees in substantially similar matters. Doing so would make it possible for the purchaser to avoid the obligation to take over the entire practice by charging arbitrarily higher fees for less lucrative matters, thereby increasing the likelihood that those clients would not consent to the new representation.

Other Applicable Ethical Standards

[12] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (see Rule 1.7); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[13] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[14] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[15] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by the Rule.

[16] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

RULE 1.18 SEXUAL RELATIONS WITH CLIENTS PROHIBITED

(a) A lawyer shall not have sexual relations with a current client of the lawyer.

(b) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the client before the legal representation commenced.

(c) A lawyer shall not require or demand sexual relations with a client incident to or as a condition of any professional representation.

(d) For purposes of this rule, "sexual relations" means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(e) For purposes of this rule, "lawyer" means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance.

Comment

[1] Rule 1.17, the general rule on conflict of interest, has always prohibited a lawyer from representing a client when the lawyer's ability to competently represent the client may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships with clients, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a client are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a client if a sexual relationship with the client presents a significant danger to the lawyer's ability to represent the client adequately. The present rule clarifies that a sexual relationship with a client is damaging to the lawyer-client relationship and creates an impermissible conflict of interest which cannot be ameliorated by the consent of the client.

Exploitation of the Lawyer's Fiduciary Position

[2] The relationship between a lawyer and client is a fiduciary relationship in which the lawyer occupies the highest position of

trust and confidence. The relationship is also inherently unequal. The client comes to a lawyer with a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the client's problem. The same factors that lead the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in a position of vulnerability.

[3] A sexual relationship between a lawyer and a client may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that a sexual relationship with a client resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for a sexual relationship with a client, the lawyer violates one of the most basic ethical obligations, i.e., not to use the trust of the client to the client's disadvantage. This same principle underlies the rules prohibiting the use of client confidences to the disadvantage of the client and the rules that seek to ensure that lawyers do not take financial advantage of their clients. (See Rule 1.6 and Rule 1.8.)

Impairment of the Ability to Represent the Client Competently

[4] A lawyer must maintain his or her ability to represent a client dispassionately and without impairment to the exercise of independent professional judgment on behalf of the client. The existence of a sexual relationship between lawyer and client under the circumstances proscribed by this rule presents a significant danger that the lawyer's ability to represent the client competently may be adversely affected because of the lawyer's emotional involvement. This emotional involvement has the potential to undercut the objective detachment that is demanded for adequate representation. A sexual relationship also creates the risk that the lawyer will be subject to a conflict of interest. For example, a lawyer who is sexually involved with his or her client risks becoming an adverse witness to his or her own client in a divorce action where there are issues of adultery and child custody to resolve. Finally, a blurred line between the professional and personal relationship may make it difficult to predict to what extent client confidences will be protected by the attorney-client privilege in the law of evidence since client confidences are protected by privilege only when they are imparted in the context of the attorney-client relationship.

No Prejudice to Client

[5] The prohibition upon representing a client with whom a sexual relationship develops applies regardless of the absence of a showing of prejudice to the client and regardless of whether the relationship is consensual.

Prior Consensual Relationship

[6] Sexual relationships that predate the lawyer-client relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are not present when the sexual relationship exists prior to the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should be confident that his or her ability to represent the client competently will not be impaired.

No Imputed Disqualification

[7] The other lawyers in a firm are not disqualified from representing a client with whom the lawyer has become intimate. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the client with whom he or she is having a sexual relationship is specific to that lawyer's representation of the client and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the client.

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or

effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 2.2 INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer adequately discloses to each client the implication of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges and confidentiality, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Comment

[1] A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

[2] The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role, the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

[3] A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have

an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

[4] In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails, the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

[5] The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

[6] A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[7] Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

[8] In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. The lawyer should explain to the clients the effect of the common representation upon the lawyer's duty of confidentiality and the attorney-client privilege. The lawyer should also disclose that the lawyer must withdraw from the representation of both clients in the event that their interests prove to be in irreconcilable conflict.

[9] Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

[10] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client so requests or the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

[3] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

[4] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer

must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[5] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a 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 the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] 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.

Representations by a Lawyer

[2] 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. Compare Rule 3.1. However, an assertion purporting to be on 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 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

[3] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

[4] 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. A lawyer who receives information clearly establishing that a person other than the client has perpetrated fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

[5] 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 take reasonable remedial measures.

Perjury by a Criminal Defendant

[6] Whether an advocate for a criminally accused has a duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

[7] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the

lawyer participates, although in a merely passive way, in deception of the court.

[8] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[9] The other resolution of the dilemma is that the lawyer may reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

[10] If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate may make disclosure to the court. In the event of such disclosure, it is for the court then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication if the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and, as such, a waiver of the right to further representation.

Constitutional Requirements

[11] The definition of the lawyer's ethical duty when serving as defense counsel in a criminal case may be qualified by constitutional

provisions for due process and the right to counsel in criminal cases. These provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

[12] A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to Be False

[13] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matter that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey or advise a client to disobey a rule or ruling of a tribunal except a lawyer acting in good faith may take appropriate steps to test the validity of such a rule or ruling;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a 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; or

(f) 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 a managerial 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

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material

is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including lost income, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Paragraph (c) permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules; however, the lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the 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 the 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.

[5] 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 a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, and as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact and is prohibited by paragraph (e). However, a lawyer may argue, on an analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

[6] Paragraph (f) permits a lawyer to advise managerial employees of a client to refrain from giving information to another party because the statements of employees with managerial responsibility may be imputed to the client. See also Rule 4.2.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not:

(1) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(2) communicate ex parte with a juror or prospective juror except as permitted by law;

(3) communicate ex parte with a judge or other official except:

(i) in the course of official proceedings;

(ii) in writing, if a copy of the writing is furnished simultaneously to the opposing party;

(iii) orally, upon adequate notice to opposing party; or

(iv) as otherwise permitted by law.

(4) engage in conduct intended to disrupt a tribunal; including:

(i) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;

(ii) engaginge in undignified or discourteous conduct that is degrading to a tribunal;

(iii) intentionally or habitually violating any established rule of procedure or evidence; or

(5) after discharge of the jury, ask questions of or make comments to a juror that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.

(b) All restrictions imposed by this rule also apply to communications with or investigations of members of the family of a venireman or a juror.

(c) 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

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the North Carolina Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of provisions. The rule also prohibits gifts of substantial value to judges or other officials of a tribunal and stating or implying an ability to influence improperly a public official.

[2] 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 a venireman or a juror about the case. After the trial, communication by a lawyer with a juror is permitted so long as the lawyer 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.

[3] Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

[4] Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's communications with or investigations of veniremen and jurors.

[5] Because of the 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.

[6] 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.

[7] 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 the judge 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 unrepresented. 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 the client.

[8] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that the statement will materially prejudice an adjudicative proceeding in the matter.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, or reputation of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a 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 reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(d) The foregoing provisions of Rule 3.6 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.

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

Comment

[1] 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, particularly 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.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

[3] Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. 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.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) 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 firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) 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. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) 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;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) 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 the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

[2] 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. 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. In our system of criminal justice, the accused is to be given the benefit of all reasonable doubt. 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.

[3] Paragraph (c) 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.

[4] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial hardship to an individual or to the public interest.

[5] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[6] Paragraph (g) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

RULE 3.9 RESERVED

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a

transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person 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. It is not a violation of this Rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good faith attempt to resolve the controversy.

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body, even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

(1) in writing, if a copy of the writing is promptly delivered to opposing counsel;

(2) orally, upon adequate notice to opposing counsel; or

(3) in the course of official proceedings.

Comment

[1] 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.

[2] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, 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, a lawyer having an independent justification or legal authorization for communicating with a represented person is permitted to do so.

[3] This rule does not prohibit a lawyer from lobbying elected officials on behalf of a client where the government body upon which the elected official serves is not an opposing party in the particular matter. Communications authorized by law include the right of a party to a controversy with a government agency or body to speak with government officials about the matter. Even when the government agency or body is represented by a lawyer with regard to a particular matter, a lawyer may communicate with the elected government officials who have authority over that agency under the circumstances set forth in paragraph (b).

[4] Parties to a matter may communicate directly with each other. The purpose of this rule is to prohibit a lawyer, or the lawyer's agents, from undermining an opponent's client-lawyer relationship through direct contact with a client in the absence of opposing counsel. Nothing herein is intended to discourage good faith efforts by individual parties to resolve their differences. Nor does the Rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of their dispute.

[5] After a lawyer for another person or entity has been notified that an 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 person whose act or omission in connection with the 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 or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule.

[6] This Rule also applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(1) give advice to the person, 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 the client; and

(2) 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

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY 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 all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A partner or supervisory lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders the conduct involved; or

(2) the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided, but fails to take reasonable action to avoid the consequences.

Comment

[1] Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

[2] The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

[3] Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

[4] Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the imme-

diacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[5] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction or knowledge of the violation.

[6] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Moreover, this Rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not

be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 5.3 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 be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders the conduct involved; or

(2) the lawyer has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided but fails to take reasonable action to avoid the consequences.

Comment

[1] Lawyers generally employ nonlawyers in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such nonlawyers, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such nonlawyers 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 super-

vising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] A lawyer who discovers that a nonlawyer has wrongfully misappropriated money from the lawyer's trust account must inform the North Carolina State Bar pursuant to Rule 1.15-2(g).

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased or disabled lawyer or a lawyer who has disappeared may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

(3) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or a 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 the disbarred lawyer; and

(4) 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.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with, or in the form of, a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may

hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] Although a nonlawyer may serve as a director or officer of a professional corporation organized to practice law if permitted by law, such a nonlawyer director or officer may not have the authority to direct or control the conduct of the lawyers who practice with the firm.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(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

[1] 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 (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. 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.

[2] 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.

[3] 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.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

(a) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer or law firm that restricts the right of a lawyer to practice after 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

[1] 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. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

RULE 6.1 RESERVED

RULE 6.2 RESERVED

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established written policies in this respect can enhance the credibility of such assurances.

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may

be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

RULE 6.5 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

[1] 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.

RULE 7.1 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

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award 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 the specific factual and legal circumstances.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or other written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) Any communication made pursuant to this rule other than that of a lawyer referral service as described in subsection (e) shall include the name of at least one lawyer or law firm responsible for its content.

(d) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable cost of advertisements or communications permitted by this Rule; and

(2) pay for a law practice in accordance with Rule 1.17.

(e) A lawyer may participate in a lawyer referral service subject to the following conditions:

(1) the lawyer is professionally responsible for its operation including the use of a false, deceptive or misleading name by the referral service;

(2) the referral service is not operated for a profit;

(3) the lawyer may pay to the lawyer referral service only a reasonable sum which represents a proportionate share of the referral service's administrative and advertising costs;

(4) the lawyer does not directly or indirectly receive anything of value other than from legal fees earned from representation of clients referred by the service;

(5) employees of the referral service do not initiate contact with prospective clients and do not engage in live telephone or in-person solicitation of clients;

(6) the referral service does not collect any sums from clients or potential clients for use of the service; and

(7) all advertisements by the lawyer referral service shall:

(i) state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state where such information may be obtained; and

(ii) explain the method by which the needs of the prospective client are matched with the qualifications of the recommended lawyer.

Comment

[1] To assist the public in obtaining legal services, lawyers are permitted to make known their services not only through reputation, but also through organized information campaigns in the form of advertising. Nevertheless, lawyers should be aware that advertising may entail practices that are misleading, overreaching, deceptive, coercive, intimidating, or vexatious.

[2] 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.

[3] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[4] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination.

Paying Others to Recommend a Lawyer

[5] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Paragraph (d) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

[6] A lawyer may participate in a lawyer referral service that is not operated for a profit and pay the usual fees charged by such programs. Any lawyer who participates in a referral service is professionally responsible for the operation of the service in accordance with these Rules regardless of the lawyer's knowledge, or lack of knowledge, of the activities of the service. The service may not charge potential clients a fee and employees of the service may not engage in telephone or in-person solicitation of clients. The term "referral" implies that some attempt is made to match the needs of the prospective client with the qualifications of the recommended lawyer. To avoid misrepresentation, paragraph (e)(vii)(B) requires that every advertisement for the service must include an explanation of the method by which a prospective client is matched with the lawyer to whom he or she is referred.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "This is an advertisement for legal services" on the outside envelope and at the beginning of the body of the written communication in print as large or larger than the lawyer's or law firm's name and at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan, so long as such contact does not involve coercion, duress, or harassment and is not false, deceptive, or misleading.

Comment

[1] 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 cir-

cumstances 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 over-reaching.

[2] 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 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

[3] 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 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer to 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.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior family or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.

[5] Even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion,

duress, harassment, compulsion, intimidation, or threats within the meaning of Rule 7.3(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 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] 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 7.2.

[7] Paragraph (c) of this Rule requires that all direct mail solicitations of prospective clients must be mailed in an envelope on which the statement "This is an advertisement for legal services" appears. Postcards may not be used for direct mail solicitations. The advertising disclosure statement must also appear at the beginning of the enclosed letter in print at least as large as the print used for the letterhead. The requirement 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.

[8] 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 7.1, 7.2 and 7.3(b). See 8.4(a).

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) 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.

(c) 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

[1] 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. Certification procedures imply that an objective entity has recognized a lawyer's higher degree of specialized ability than is suggested by general licensure to practice law. Those objective entities should apply standards of competence,

experience and knowledge to insure that a lawyer's recognition as a specialist is meaningful and reliable. To avoid misrepresentation and deception, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. The Rule requires that any representation of specialty may be made only if the certifying organization is the North Carolina State Bar, an organization approved by the North Carolina State Bar, or an organization approved by the American Bar Association under procedures approved by the North Carolina State Bar. To insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding the certification.

[2] A lawyer may, however, describe his or her practice without using the term "specialize" in any manner which is truthful and not misleading. This Rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a "concentration" or an "interest" or a "limitation".

[3] Recognition of expertise in patent matters is a matter of long-established policy of the Patent and Trademark Office. A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may not be used by a lawyer in private practice if it implies a connection with a government agency or with a public or charitable legal services organization or is false or misleading in violation of Rule 7.1. 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 paragraph, the use of the name of a deceased or retired former member of a firm shall not render the firm name a trade name nor shall the use of such designations as "Law Offices of John Doe," "Smith and Associates," "Jones Law Firm," and the like.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as a lawyer affiliated with the firm.

(d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm, whether or not the lawyer is precluded from practicing law.

(e) Lawyers may state or imply that they practice in a partnership or other professional organization only when that is the fact.

(f) No lawyer may practice in a partnership or other professional organization in which any lawyer not licensed to practice law in North Carolina owns an interest as a partner, shareholder, member or other similar designation unless law offices are maintained in North Carolina and in a state where such other lawyer is licensed and a certificate of registration authorizing said professional relationship is first obtained from the secretary of the North Carolina State Bar.

Comment

[1] A firm may be designated by the names of all or some of its members, and by the names of deceased or retired 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. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names, as well as such names as "Law Offices of John Doe" and "Smith and Associates," to designate law firms has proven a useful means of identification and are permissible. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to use a designation such as "Smith and Associates" for a solo practice. The name of a retired partner may be used in the name of a law firm only if the partner has ceased the practice of law.

[2] It is unlawful for a person trained as an attorney to practice North Carolina law without a North Carolina law license. It is therefore misleading for such a person to be listed in the firm letterhead as having any continuing affiliation with the firm unless the law firm actively maintains a law office in a jurisdiction where the lawyer is licensed. If law offices are maintained in another jurisdiction, the law firm is an interstate law firm and must register with the North Carolina State Bar as required by 27 N.C.A.C. 1E, Section .0200.

[3] This rule does not prohibit the employment by a law firm of a lawyer who is licensed to practice in another jurisdiction, but not in North Carolina, provided the lawyer's practice is limited to areas that do not require a North Carolina law license, such as immigration law, federal tort claims, military law, and the like. The lawyer's name may not be included in the firm letterhead and all communications by such lawyer on behalf of the firm must indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina.

[4] Nothing in these rules shall be construed to confer the right to practice North Carolina law upon any lawyer not licensed to practice law in North Carolina.

[5] With regard to paragraph (e), lawyers sharing office facilities, but 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 8.1 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 1.6.

Comment

[1] 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. Sect. 84-28(b)(3) defines failure to answer a formal inquiry of the North Carolina State Bar as misconduct for which discipline is appropriate.

[2] 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.

[3] 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 applicalbe to the client-lawyer relationship.

RULE 8.2 JUDGES AND OTHER ADJUDICATORY OFFICERS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other adjudicatory officer, or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. 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.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. A lawyer should come to the defense of a member of the judiciary who the lawyer knows is being unjustly attacked.

[4] While a lawyer as a citizen has a right to criticize such officials publicly, the lawyer should be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

RULE 8.3 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 the court having jurisdiction over the matter.

(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 North Carolina Judicial Standards Commission or other appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a 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.

[2] Although the North Carolina State Bar is always an appropriate place to report a violation of the Rules of Professional Conduct, the courts of North Carolina have concurrent jurisdiction over the

conduct of the lawyers who appear before them. Therefore, a lawyer's duty to report may be satisfied by reporting to the presiding judge the misconduct of any lawyer who is representing a client before the court. The court's authority to impose discipline on a lawyer found to have engaged in misconduct extends beyond the usual sanctions imposed in an order entered pursuant to Rule 11 of the North Carolina Rules of Civil Procedure.

[3] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[4] 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 in many jurisdictions, 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 possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[5] 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.

[6] 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 treatment through such program. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. For this reason, Rule 1.6(b) includes in the definition of confidential information any information regarding a lawyer or judge seeking assistance received by a lawyer acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court. Because such information is protected from disclosure by Rule 1.6, a lawyer is exempt from the reporting

requirements of paragraphs (a) and (b) with respect to such information. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, conversion of client funds to his or her use.

RULE 8.4 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.; or

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

Comment

[1] Many kinds of illegal conduct reflect adversely on a lawyer's 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, 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. A lawyer's dishonesty, fraud, deceit or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partners or law firm. A lawyer who steals funds, for instance, is guilty of the most serious disciplinary violation, regardless of whether the victim is the lawyer's employer, partner, law firm, client or a third party.

[2] The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of Paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown, by clear, cogent and convincing evidence, that the lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act, although to establish a violation of Paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honestly, trustworthiness, or fitness as a lawyer. If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of Paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.

[3] A showing of actual prejudice to the administration of justice is not required to establish a violation of Paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. The phrase "conduct prejudicial to the administration of justice" in Paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In State Bar v. Jerry Wilson, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[4] 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 attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW.

(a) Disciplinary Authority. A lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction where the lawyer is admitted for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in North Carolina, the rules to be applied shall be the rules of North Carolina, and

(ii) if the lawyer is licensed to practice in North Carolina and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Comment

Disciplinary Authority

[1] Paragraph (a) restates long-standing law.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations.

The lawyer may be licensed to practice in North Carolina and one or more other jurisdictions with differing rules, or may be admitted to practice before a particular court with rules that differ from those of North Carolina or other jurisdictions in which the lawyer is licensed to practice. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of an attorney shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court before which the lawyer is admitted to practice (either generally or pro hac vice), the lawyer shall be subject only to the rules of professional conduct of that court. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in North Carolina shall be subject to the Rules of Professional Conduct of the North Carolina State Bar, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

[5] If North Carolina and another admitting jurisdiction were to proceed against a lawyer for the same conduct, the two jurisdictions should, applying this rule, identify the same governing ethics rules.

[6] The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

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

ADMIRALTY, NAVIGATION, AND BOATING

§ 39 (NCI4th). Operating a boat while intoxicated

DWI boating is not a lesser-included offense of involuntary manslaughter and defendant was not entitled to an instruction on DWI boating where the indictments against him charged only that he feloniously killed the victim. The offense of DWI boating on its face contains an essential element that is not an element of involuntary manslaughter in that it requires a finding of either impairment or a blood-alcohol concentration of .10 or higher. **State v. Hudson,** 729.

ADMINISTRATIVE LAW AND PROCEDURE

§ 30 (NCI4th). Adjudication of "contested case" generally

The decision of the Commission of Health Services to deny a rule-making petition to extend anonymous HIV testing was not the result of unlawful procedure. The definition of contested case specifically excludes administrative rule-making and the Commission for Health Services is not an agency to which the provisions of G.S. 150B-40 apply. **Act-Up Triangle v. Commission for Health Services,** 699.

§ 54 (NCI4th). Administrative Procedure Act; jurisdiction

The superior court had jurisdiction under G.S. 150B-20(d) to review the denial of a rule-making petition to extend anonymous HIV testing. **Act-Up Triangle v. Commission for Health Services,** 699.

§ 60 (NCI4th). Judicial review of facts; sufficiency of evidence to support findings or decision

The superior court did not err by affirming the decision of the Commission for Health Services to deny a rule-making petition to extend anonymous HIV testing where the record was replete with exhibits and affidavits on both sides of the issue of anonymous HIV testing. **Act-Up Triangle v. Commission for Health Services,** 699.

§ 69 (NCI4th). Judicial review; review of facts; sufficiency of evidence to support findings or decision

The superior court did not err by affirming the decision of the Commission for Health Services to deny a rule-making petition to extend anonymous HIV testing. **Act-Up Triangle v. Commission for Health Services,** 699.

APPEAL AND ERROR

§ 150 (NCI4th). Preserving constitutional issues

Two defendants were not heard on appeal from a capital sentencing hearing where they contended that the trial court committed reversible constitutional error in overruling an objection to closing arguments made by the State but made no constitutional claims at trial. **State v. Barnes,** 184.

§ 157 (NCI4th). Appeal permitted without prior motion, objection, or request generally

There was merit to the State's argument that defendant waived his right to raise on appeal the issue of whether the separate charge of DWI boating should have been submitted to the jury as a lesser-included offense of manslaughter where defendant failed to ask the trial court for a lesser-included offense instruction and did not raise the issue as error; however, the Supreme Court exercised its discretion to review the

al violation occurred and the City could be sued under 42 U.S.C. § 1983. **Moore v. City of Creedmoor,** 356.

Summary judgment should not have been granted for a police officer and city commissioner in their official capacities on claims under 42 U.S.C. § 1983 arising from a dispute concerning an African-American dinette. **Ibid.**

Summary judgment was improperly granted for a police chief and city commissioner in their individual capacities in a 42 U.S.C. 1983 action arising from a dispute concerning an African-American dinette. Qualified immunity may protect government officials from personal liability for performing the discretionary functions of an office to the extent that such conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known; applying this test requires a factual determination. **Ibid.**

§ 105 (NCI4th). Property rights or interests protected by due process

Whether an individual has a due process right with respect to an occupation depends on whether that individual possesses a property interest in continued employment. **Soles v. City of Raleigh Civil Service Comm.,** 443.

§ 115 (NCI4th). Right of free speech and press generally

Summary judgment was improperly granted for defendant police chief and defendant city commissioner in their individual capacities on claims under 42 U.S.C. § 1983 arising from a dispute concerning an African-American dinette. Where the First Amendment is implicated, any action which is taken in reckless disregard of a plaintiff's right will give rise to a § 1983 action; whether defendants retaliated against plaintiffs because Mr. Moore had exercised his freedom of speech was a factual issue which should be determined by a jury. **Moore v. City of Creedmoor,** 356.

§ 166 (NCI4th). Ex post facto law; sentencing law; court decisions

The return to the acting in concert instructions enumerated before *State v. Blankenship* did not act as an ex post facto law because the crimes were committed here before the certification date for Blankenship. **State v. Barnes,** 184.

§ 169 (NCI4th). Former jeopardy; attachment of jeopardy generally

The trial judge's rejection of a plea arrangement after defendant had tendered a plea of guilty to second-degree murder in open court pursuant to the arrangement did not violate defendant's right against double jeopardy. **State v. Wallace,** 462.

§ 202 (NCI4th). Former jeopardy; kidnapping and murder

The trial court properly denied defendant's motion to dismiss a charge of second-degree kidnapping on the ground of double jeopardy in a prosecution for murder and kidnapping where the evidence established that the blows used for restraint were separate and apart from the blows causing death. **State v. Stroud,** 106.

The trial court did not subject defendant to multiple punishments for the same offense by submitting to the jury a charge of second-degree kidnapping and a charge of felony murder based on the underlying felony of kidnapping where defendant was not sentenced for kidnapping. **Ibid.**

§ 231 (NCI4th). Former jeopardy; new trial after appeal or post conviction attack; reversal for insufficiency of evidence or trial error

The review by the North Carolina Supreme Court of a Court of Appeals' reversal of a trial court denial of a motion to dismiss in a prosecution arising from a kidnaping

CONSTITUTIONAL LAW—Continued

CRIMINAL LAW

CRIMINAL LAW—Continued

There was sufficient evidence to convict defendant Harris of first-degree murder on the theory of aiding and abetting where the evidence amply supported the jury's finding that defendant was either actually or constructively present at the scene; moreover, actual or constructive presence is no longer required to prove a crime under an aiding and abetting theory. **State v. Gaines,** 647.

§ 76 (NCI4th Rev.). Motion for change of venue; prejudice, pretrial publicity or inability to receive fair trial

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery by denying defendants' motion for change of venue based upon pretrial publicity. **State v. Barnes,** 184.

§ 78 (NCI4th Rev.). Change of venue; circumstances insufficient to warrant change

When considering a motion for change of venue, our appellate courts have the power to consider the evidence and the totality of the circumstances in determining whether the trial court erred in resolving the motion, and the most persuasive evidence as to whether pretrial publicity was prejudicial or inflammatory usually will be the jurors' responses to questions asked them during jury selection. **State v. Barnes,** 184.

The trial court did not err in denying defendant's motion for a change of venue on the ground of pretrial publicity in a prosecution for the first-degree murder and rape of a seven-year-old girl. **State v. Perkins,** 254.

§ 103 (NCI4th Rev.). Discovery proceedings; information subject to disclosure by State; defendant's statement

Where the prosecutor informed defense counsel that a witness planned to testify that defendant had called a murder victim a "bitch" and had stated that he "hated" the victim, the trial court did not err by permitting the witness to testify that defendant also stated that he wished the victim was dead since the substance of the planned testimony of the witness was conveyed to defense counsel. **State v. East,** 535.

§ 115 (NCI4th Rev.). Discovery proceedings; information subject to disclosure by defendant; reports of examinations and tests

The trial court did not err by ordering defendant's psychiatrist, who had delivered an oral report of his examination of defendant to defense counsel, to prepare a written report of his findings for the State. **State v. East,** 535.

§ 120 (NCI4th Rev.). Regulation of discovery; failure to comply

The trial court did not abuse its discretion by not granting defendant's motions to dismiss or for a new trial where defendant contended that the State's violation of discovery orders in failing to preserve evidence required the trial court to grant his motions. **State v. Hunt,** 720.

§ 131 (NCI4th Rev.). Plea arrangements relating to sentence

The trial judge did not err by rejecting a plea arrangement in which he had earlier concurred allowing defendant to plead guilty to second-degree murder and receive a sentence of twenty years on the basis that new evidence recited in open court in support of defendant's tendered guilty plea revealed for the first time that defendant shot the victim through the victim's front screen door. **State v. Wallace,** 462.

Defendant was not entitled to be tried only for second-degree murder and to receive a sentence of only twenty years on the ground that defendant acted in reliance

CRIMINAL LAW—Continued

upon a plea arrangement to his detriment when he tendered a plea of guilty to second-degree murder in open court where the trial judge rejected the plea of guilt by withdrawing his concurrence to the plea arrangement in accordance with G.S. 15A-1021(c). **Ibid.**

§ 258 (NCI4th Rev.). Continuance; illness or incapacitation of accused

When defendant became ill during the trial and the court ordered a temporary recess to obtain medical treatment for defendant, the trial court did not err in informing the jury of the reason for the delay. **State v. Moody,** 563.

§ 325 (NCI4th Rev.). Joinder or consolidation of charges against multiple defendants; homicide

There was no error in a capital prosecution for first-degree murder, burglary, and robbery in the trial court's denial of motions to sever the capital sentencing proceeding. The differences in evidence did not result in such antagonistic defenses as to deny a fair sentencing proceeding; each defendant could show why he should not receive the death penalty without arguing that the others should. **State v. Barnes,** 184.

§ 331 (NCI4th Rev.). Joinder or consolidation of charges against multiple defendants; homicide and related offenses

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery as to defendant Barnes by joining his case with that of the other defendants. **State v. Barnes,** 184.

§ 346 (NCI4th Rev.). Severance of multiple defendants; jury instructed to disregard prejudicial matter

Defendant Barnes was not entitled to severance in a prosecution for capital murder, burglary, and robbery; the common sense of the jury, aided by appropriate instructions, is relied on not to convict one defendant on the basis of evidence which related only to the other. **State v. Barnes,** 184.

§ 348 (NCI4th Rev.). Severance of multiple defendants; miscellaneous

The trial court did not abuse its discretion by denying one defendant's motion for severance in a capital prosecution for first-degree murder, burglary, and robbery given the strong policy favoring consolidated trials, the limited evidence at issue, and our trust in the common sense of the jury and the limiting instructions of the trial court. **State v. Barnes,** 184.

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery by denying one defendant's motion for severance where he contended that the introduction of his statements in a sanitized form denied him a fair trial and that his statements in their original form would have demonstrated that he was merely a passive participant in the crimes. **Ibid.**

§ 363 (NCI4th Rev.). Misconduct of witnesses generally

The trial court did not abuse its discretion in a capital first-degree murder prosecution for the killing of an off-duty police officer by denying defendant's motion to exclude uniformed police officers from the courtroom because they would improperly influence the jury. **State v. Larry,** 497.

§ 388 (NCI4th Rev.). Expression of opinion on evidence during trial; examination of witnesses; clarification of testimony

The trial court did not err in a capital prosecution for first-degree murder by denying defendant's motion for a mistrial where a State's witness testified that defend-

CRIMINAL LAW—Continued

§ 444 (NCI4th Rev.). Argument of counsel; miscellaneous comments on defendant's general character and truthfulness

There was no error in a capital sentencing proceeding where the prosecutor in his argument referred to defendant as a "thing"; the argument can reasonably be characterized as urging the jury to recognize the especially cruel nature of this murder. **State v. Woods,** 294.

The prosecutor's arguments about defendant's character in a capital sentencing hearing were not improper; the character of a defendant is an appropriate consideration during sentencing and several of defendant's nonstatutory mitigators placed his character at issue. **State v. Larry,** 497.

§ 446 (NCI4th Rev.). Argument of counsel; witnesses' motives to lie

There was no error in a capital sentencing hearing where the defendant contended that the prosecutor in his closing argument expressed his opinion that defendant's mother, his sisters, and another witness were liars. **State v. Woods,** 294.

§ 447 (NCI4th Rev.). Argument of counsel; expert witnesses

There was no gross impropriety in a capital sentencing hearing in a prosecutor's argument which defendant contended misrepresented the testimony of defendant's expert psychologist. **State v. Geddie,** 73.

There was no error in a capital sentencing proceeding where defendant contended that the prosecutor's argument as to the defense mental health expert's testimony distorted the evidence regarding the diagnosis of schizoid personality disorder and led the jury to infer that the witness did not know much about his business. **State v. Woods,** 294.

There was no gross impropriety in a capital sentencing hearing where the prosecutor legitimately made the point that while defendant denied using cocaine and defense witnesses who knew defendant all denied any knowledge of drug use by defendant, the defense mental health expert found him to be a cocaine addict. **Ibid.**

§ 449 (NCI4th Rev.). Argument of counsel; explanation of roles of judge, prosecutor, defense counsel

The prosecutor in a capital sentencing hearing did not improperly ask the jury to rely on the judgment of the prosecutor. **State v. Larry,** 497.

§ 451 (NCI4th Rev.). Argument of counsel; interjection of counsel's personal beliefs; other

The prosecutor did not inject impermissible personal opinions in his argument to the jury in a capital sentencing proceeding by his argument questioning the truth of defendant's claim that the male victim had threatened him with a knife and by his argument that "[w]e would never ask you to convict if we did not believe it was the truth." **State v. East,** 535.

§ 453 (NCI4th Rev.). Argument of counsel; comment on rights of victim, victim's family

An argument by the prosecutor in a capital sentencing proceeding contending that defendant was the beneficiary of all the constitutional protections of our criminal justice system and asking what right defendant gave the victim was not grossly improper. **State v. Geddie,** 73.

The prosecutor's closing argument in a capital sentencing proceeding asking if the jurors could imagine themselves in the position of the murder and kidnapping

victims' parents was permissible as a type of victim impact statement. **State v. Bond,** 1.

The prosecutor's closing argument in a capital sentencing proceeding asking the jurors to put themselves in the position of the seven-year-old rape and murder victim was improper, but this argument did not deny defendant due process. **State v. Perkins,** 254.

The prosecutor's closing argument in a capital sentencing proceeding was not so grossly improper as to require intervention ex mero motu where defendant contended that the argument improperly suggested that the jury would be accountable to the victim's family. **State v. Woods,** 294.

There was no error requiring intervention ex mero motu in a capital sentencing proceeding where defendant contended that the State improperly attempted to elicit sympathy for the victims. **State v. Connors,** 319.

The prosecutor's closing argument in a capital sentencing proceeding with regard to letters written by the victim to his estranged wife did not improperly treat the content of the letters as victim-impact evidence and was not so grossly improper as to require the trial court to intervene on its own motion. **State v. Moody,** 563.

§ 454 (NCI4th Rev.). Argument of counsel; victim's age, circumstances, or characteristics

The prosecutor's closing argument asking the jury in a capital sentencing proceeding to try to imagine the fear and emotions of a kidnapping victim while she and her brother, the murder victim, were held hostage for eight hours in a small car and her brother was forced by defendant to commit armed robberies was not so grossly improper as to require the trial court to intervene in the absence of an objection by defendant. **State v. Bond,** 1.

The prosecutor's argument in a capital sentencing hearing did not render the trial fundamentally unfair where defendant contended that the prosecutor's argument that the victim, a police officer, was a martyr to the cause of good was improper. **State v. Larry,** 497.

§ 456 (NCI4th Rev.). Argument of counsel; violent, dangerous, or depraved nature of offense or conduct

The prosecutor in a capital sentencing proceeding did not make an improper argument based on the general public's fear of violent crime and on the jurors' own fears of violent crimes where the prosecutor held up a picture of the exterior of the victim's apartment building and argued that this was the most grotesque of all the pictures shown because "she was where we all think we can go and be safe," continued to argue the sanctity of the home, and ended with ". . . you're safe nowhere." **State v. Woods,** 294.

§ 458 (NCI4th Rev.). Argument of counsel; comment on aggravating or mitigating factors or circumstances

There was no gross impropriety requiring intervention ex mero motu in a prosecutor's argument in a capital sentencing hearing where defendant contended that the prosecutor misstated the function of mitigating evidence when he argued that many people grow up impoverished and in abusive conditions but that not all of them rob and kill others. **State v. Geddie,** 73.

There was no gross impropriety requiring intervention ex mero motu in a capital sentencing hearing where defendant contended that the prosecutor misstated

§ 461 (NCI4th Rev.). Argument of counsel; deterrent effect of death penalty

The trial court did not err by not intervening ex mero motu in a capital sentencing hearing where the prosecutor argued that death was the only way to insure that defendant would not kill again. **State v. Geddie,** 73.

There was no error in a capital sentencing proceeding where the prosecutor made several arguments referring to what a life sentence would be like and stating that it would not be adequate to deter other murders. **State v. Woods,** 294.

There was no error in a capital sentencing proceeding where the prosecutor asked what the only guarantee would be that this defendant would not rape and kill again. **State v. Connors,** 319.

§ 464 (NCI4th Rev.). Argument of counsel; possibility of parole, pardon, or executive commutations

Any error in a capital sentencing hearing was harmless beyond a reasonable doubt where defendant contended that the prosecutor improperly urged the jury to consider the possibility of parole in its sentencing deliberations but the court sustained defendant's objections or defendant failed to object to each of the statements. **State v. Larry,** 497.

§ 467 (NCI4th Rev.). Argument of counsel; permissible inferences

There was no error in closing arguments in a capital sentencing hearing where the prosecutor's argument was a reasonable inference to be drawn from the evidence concerning defendant's entry into the victim's apartment. **State v. Woods,** 294.

A portion of the prosecutor's closing argument in a capital sentencing proceeding was not so inflammatory and unsupported by the evidence as to require intervention ex mero motu where the prosecutor cast the victim's final words as having been spoken to her daughter; although the argument touched upon facts not specifically testified to, it was reasonable to infer from the evidence that the victim's last words would have been to express her love for her child. **Ibid.**

Statements by the prosecutor in a capital sentencing hearing which defendant contended were outside the evidence were based on reasonable inferences from the evidence presented and were within the wide latitude allowed to counsel during jury arguments. **State v. Larry,** 497.

§ 468 (NCI4th Rev.). Argument of counsel; comment on matters not in evidence

Even if the evidence did not support the prosecutor's closing argument in a capital sentencing proceeding that defendant killed the victim to prevent her from testifying against him, this argument did not violate defendant's right to due process. **State v. Perkins,** 254.

§ 469 (NCI4th Rev.). Argument of counsel; comment on matters not in evidence requiring court action ex mero motu

The trial court did not err in a first-degree murder prosecution by not intervening ex mero motu to prohibit certain prosecutorial arguments which defendant contends were beyond the evidence or misstated the law. **State v. Gaines,** 647.

§ 471 (NCI4th Rev.). Argument of counsel; misstatement of evidence

The prosecutor's argument in a capital sentencing proceeding was proper and supported by the evidence where defendant contended that the prosecutor had suggested a limited basis for the defense mental health expert's opinion; the prosecutor is

CRIMINAL LAW—Continued

free to underscore those points of defendant's case which he or she perceives as weak. **State v. Woods,** 294.

§ 473 (NCI4th Rev.). Argument of counsel; comments regarding defense attorney

The trial court did not err by failing to intervene ex mero motu in a first-degree murder prosecution where defendant contended that the prosecutor improperly attacked defense counsel's integrity and credibility during closing arguments. **State v. Gaines,** 647.

§ 475 (NCI4th Rev.). Argument of counsel; miscellaneous comments or actions

There was no error requiring intervention ex mero motu in a capital sentencing hearing where the prosecutor stated that defendant killed the victim for less than "thirty pieces of silver." **State v. Geddie,** 73.

There was no prejudicial error in a first-degree murder prosecution where defendant contended that the trial court erroneously disallowed the defense argument that a State's witness had talked in jail to a defense witness in that the trial court erroneously allowed the prosecutor's argument that the defense witness was not in jail when the conversation allegedly occurred. **State v. Westbrooks,** 43.

There was no error in a capital sentencing proceeding as to defendant Barnes where the prosecutor lay on the floor to demonstrate a previous attempted armed robbery by Barnes of a sixteen-year-old girl. **State v. Barnes,** 184.

References in a prosecutor's closing argument in a capital sentencing proceeding to defendant's election to plead not guilty were harmless beyond a reasonable doubt. **State v. Larry,** 497.

§ 478 (NCI4th Rev.). Conduct of counsel during trial; questioning of defendant, witnesses

The form of the prosecutor's objections and the prosecutor's conduct during cross-examination of defense witnesses did not amount to prosecutorial misconduct. **State v. Laws,** 585.

§ 480 (NCI4th Rev.). Conduct of counsel during trial; miscellaneous

The cumulative effect of the arguments of the prosecutor in a capital sentencing hearing did not create prejudicial error where the comments did not so infect the trial with unfairness as to make the result a denial of due process and did not stray so far from the bounds of propriety as to impede the defendant's right to a fair trial. **State v. Woods,** 294.

§ 482 (NCI4th Rev.). Conduct affecting jury; exposure to evidence not formally introduced

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery where a juror volunteered during the state's presentation of evidence that it had been brought to his attention by his brother that his brother had known two of the defendants in prison. **State v. Barnes,** 184.

§ 483 (NCI4th Rev.). Conduct affecting jury; miscellaneous

The trial court did not abuse its discretion in a capital prosecution in disposing of issues concerning a juror who read Bible verses before deliberations began, a juror who read the Bible aloud in the jury room, and a juror who called a minister to ask about the death penalty. **State v. Barnes,** 184.

CRIMINAL LAW—Continued

The pattern jury peremptory instruction set forth in N.C.P.I.—Crim. 150.11 is for statutory mitigating circumstances and should not be given for nonstatutory mitigating circumstances. **Ibid.**

§ 694 (NCI4th Rev.). Peremptory instructions involving particular mitigating circumstances in capital cases; voluntary participation in homicidal act

The trial court did not commit plain error in a capital sentencing proceeding by failing to submit the statutory mitigating circumstance that the victim was a voluntary participant in defendant's homicidal conduct or consented to the homicidal act where the victim was an off-duty police officer who pursued defendant after a robbery. **State v. Larry,** 497.

§ 696 (NCI4th Rev.). Instructions to jury; recorded conference on instructions

Error will not be presumed from a silent record where defendant contends that he was absent at unrecorded charge conferences during two recesses in his capital trial but the record is silent about what occurred at the recesses in question. **State v. Bond,** 1.

§ 697 (NCI4th Rev.). Court's discretion to give substance of, or to refuse to give, requested instruction

The trial court instructed the jury in substantial conformity with defendant's requested instruction on lack of mental capacity. **State v. Burgess,** 372.

§ 732 (NCI4th Rev.). Instruction that weight and credibility are issues for the jury to decide

The trial court did not err by failing to give the pattern jury instruction on the weight to be given a defendant's confession where defendant pleaded guilty to first-degree murder and there was no question as to his guilt of the crime charged. **State v. Moody,** 563.

§ 745 (NCI4th Rev.). Opinion of court on evidence; use of, or refusal to use, emotion-packed, vulgar, or profane terms in instructions

The trial court did not err in a first-degree murder prosecution by using the word victim throughout its instructions. **State v. Gaines,** 647.

§ 758 (NCI4th Rev.). Opinion of court on evidence; characterizing defendant's statements as a confession

The trial court did not err in a first-degree murder prosecution by instructing the jury that defendant Harris had confessed to some of the acts alleged where Harris contended that his statement was inculpatory but did not amount to a confession. **State v. Gaines,** 647.

An instruction in a first-degree murder prosecution that defendant had confessed to some of the acts charged did not amount to an improper expression of opinion. **Ibid.**

§ 761 (NCI4th Rev.). Instructions on burden of proof and presumptions; reasonable doubt; generally

There was no plain error in a noncapital first-degree murder prosecution where defendant contended that the trial court erred by instructing jurors that they must

CRIMINAL LAW—Continued

§ 1140 (NCI4th Rev.). Aggravating factors under Fair Sentencing Act; nonstatutory factors; prior criminal activity

The trial court could properly rely on defendant's present adjudication as an habitual felon to enhance defendant's present sentence and then use his 1987 habitual felon adjudication as an aggravating factor to increase the enhanced sentence when both habitual felon adjudications were based upon the same three convictions. **State v. Kirkpatrick,** 451.

§ 1156 (NCI4th Rev.). Aggravating factors under Fair Sentencing Act; nonstatutory factors; course of criminal conduct

The trial court did not improperly use defendant's contemporaneous murder convictions as a nonstatutory aggravating factor for an arson conviction when it found that "the arson was committed during a course of conduct in which other crimes endangered the lives of others" where the other crimes involved assaults on one murder victim's children. **State v. Burgess,** 372.

§ 1218 (NCI4th Rev.). Aggravating factors under Fair Sentencing Act statutory factors; prior convictions; commission of joinable offense

The trial court could properly find as an aggravating factor for an arson conviction that "defendant was armed with a deadly weapon at the time of the crime" where the act of carrying the deadly weapon could have been, but was not, the basis for other joinable criminal convictions. **State v. Burgess,** 372.

§ 1324 (NCI4th Rev.). Capital punishment generally

The North Carolina death penalty statute is constitutional. **State v. Moody,** 563.

§ 1335 (NCI4th Rev.). Capital punishment; submission and competence of evidence generally

The trial court did not err in a capital sentencing proceeding by failing to edit defendant's statement to an S.B.I. agent to exclude references to defendant's sexual relationship with the victim's wife because this evidence was relevant to defendant's motive to kill the victim. **State v. Moody,** 563.

§ 1337 (NCI4th Rev.). Capital punishment; admission of evidence not presented or inadmissible at guilt phase of trial

Defendant placed his character in issue in a capital sentencing proceeding when a defense witness read from letters defendant had written to her in which defendant stated that he was a pretty good person, that he thought about the Lord daily, and that he knew he should give his life to the Lord, and the State was entitled to rebut this evidence by asking the witness on cross-examination whether she had accused defendant of raping her daughter in 1978. **State v. Perkins,** 254.

§ 1340 (NCI4th Rev.). Capital punishment; competence of evidence; aggravating and mitigating circumstances

There was no error in a capital first-degree murder prosecution in the exclusion of evidence where defendant made no offer of proof but argued on appeal that a defendant in a capital case had an affirmative right to place relevant mitigating evidence before the sentencer and that an offer of proof was unnecessary. **State v. Geddie,** 73.

The trial court did not err in a capital sentencing hearing by excluding statements made by defendant at the time of his arrest in which defendant claimed that the gun went off accidentally. **Ibid.**

CRIMINAL LAW—Continued

An officer was properly permitted to rebut mitigating evidence that defendant was retarded by lay opinion testimony that, based on his personal experiences with defendant, he did not think defendant was retarded. **State v. Bond,** 1.

A capital sentencing jury's view of a Volkswagen automobile in which defendant and his accomplice held the murder victim and his sister hostage for nearly eight hours before the victim was killed was relevant on the issue of the especially heinous, atrocious, or cruel aggravating circumstance. **Ibid.**

The trial court did not err in a capital sentencing proceeding by overruling defendant's objection to the introduction of three letters from the murder victim to his estranged wife expressing his love for his wife and his anguish that she had left him on the ground that any probative value of the letters would be outweighed by the danger of unfair prejudice where the letters were introduced to rebut defendant's theory of mitigation that he believed the victim's wife was being abused by the victim. **State v. Moody,** 563.

§ 1342 (NCI4th Rev.). Capital punishment; competence of evidence; aggravating and mitigating circumstances; prior criminal record or other crimes

Evidence elicited by the prosecutor on cross-examination of defendant in a capital sentencing proceeding that defendant had been sentenced to fifteen years in prison for attempted first-degree rape was admissible to establish the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence to the person; assuming that evidence of the length of time served by defendant pursuant to this conviction was not relevant in a capital sentencing proceeding, defendant was not prejudiced by the admission of such evidence. **State v. Perkins,** 254.

The trial court did not err during a capital sentencing proceeding as to defendant Frank Chambers by allowing testimony concerning a prior breaking and entering in support of the aggravating circumstance of a prior conviction for a felony involving the use or threat of violence. A proper in-court identification was unnecessary because the State introduced into evidence certified copies of the transcript of plea and judgment. **State v. Barnes,** 184.

§ 1346 (NCI4th Rev.). Capital punishment; instructions; consideration of evidence

In a capital first-degree murder sentencing proceeding wherein the trial court submitted the aggravating circumstances that the murder was committed while defendant was engaged in the commission of a first-degree rape and that the murder was especially heinous, atrocious, or cruel, any error in the trial court's failure to give the jury a limiting instruction informing it not to consider the rape when determining the existence of the especially heinous, atrocious, or cruel aggravating circumstance did not rise to the level of plain error. **State v. Perkins,** 254.

There was no error in a capital sentencing proceeding as to two defendants where the prosecutor encouraged the jury to consider one victim's psychological torture in observing his wife's death in determining the existence of the especially heinous, atrocious, or cruel aggravating circumstance and later encouraged the jury to use the death of the wife to find the existence of the course of conduct aggravating circumstance. **State v. Barnes,** 184.

§ 1348 (NCI4th Rev.). Capital punishment; instructions; parole eligibility

The prosecutor's cross-examination of defendant in a capital sentencing proceeding about the length of time he served for a prior attempted rape conviction did

CRIMINAL LAW—Continued

not raise the issue of defendant's eligibility for parole in the event the jury recommended a life sentence and did not entitle defendant to an instruction on parole eligibility. **State v. Perkins,** 254.

The trial court did not err in a capital sentencing hearing by denying defendant's motion to allow the jury to consider life without parole as a sentencing option. **State v. Woods,** 294.

The trial court had no authority in a capital sentencing proceeding to apply the amended G.S. 15A-2002 to have the jury consider the possibility of life without parole where defendant was being sentenced for first-degree murders committed before 1 October 1994. **State v. Connors,** 319.

The trial court did not err in a capital sentencing proceeding by refusing to instruct the jury that defendant, if sentenced to life imprisonment, would either spend the rest of his life incarcerated or be paroled at a date no sooner than twenty years from his first confinement, that the trial judge had the discretion to sentence defendant consecutively, and that the penalty for first-degree rape was life imprisonment with no parole for twenty years. **Ibid.**

§ 1349 (NCI4th Rev.). Capital punishment; aggravating and mitigating circumstances generally

The trial court did not err in its instructions on weighing the aggravating circumstances against the mitigating circumstances in a capital sentencing proceeding. **State v. Geddie,** 73.

There was no prejudicial error as to defendants Barnes and Blakney in a capital prosecution where they contended that the prosecution's argument on mitigating circumstances erroneously informed jurors that it was up to them to decide whether every mitigating circumstance, both statutory and nonstatutory, carried mitigating value, but the prosecutor immediately after objection went on to differentiate between statutory and nonstatutory mitigators. **State v. Barnes,** 184.

§ 1354 (NCI4th Rev.). Capital punishment; sentence recommendation by jury generally

The trial court did not err in denying defendant's motion to have each juror in a capital sentencing proceeding record his or her vote on each aggravating and mitigating circumstance on the Issues and Recommendation as to Punishment form. **State v. Moody,** 563.

§ 1355 (NCI4th Rev.). Capital punishment; sentence recommendation by jury; requirement of unanimity

The trial court did not err by instructing the jury in a capital sentencing proceeding in language requiring the jury to be unanimous in order to return a life verdict. **State v. Moody,** 563.

§ 1359 (NCI4th Rev.). Capital punishment; consideration of aggravating circumstances generally

The record established that robbery and pecuniary gain aggravating circumstances were not supported by precisely the same evidence, and the trial court thus properly submitted both circumstances to the jury in this capital sentencing proceeding. **State v. East,** 535.

CRIMINAL LAW—Continued

§ 1366 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; capital felony committed during commission of another crime

The trial court did not err by three times submitting in a capital sentencing proceeding the aggravating circumstance that the murder was committed during the course of a felony based upon the kidnapping of the murder victim, the kidnapping of the murder victim's sister, and one count of armed robbery. **State v. Bond,** 1.

The trial court did not err during a capital sentencing proceeding by submitting the aggravating circumstance that the killing was committed during the course of an armed robbery. **State v. Larry,** 497.

The trial court did not err in a capital sentencing hearing by submitting each of defendant's four prior robbery convictions as separate aggravating circumstances where the State presented distinct evidence that defendant had been convicted for committing one common law robbery and three separate armed robberies. **Ibid.**

§ 1367 NCI4th Rev.). Capital punishment; particular aggravating circumstances; capital felony committed during commission of another crime; effect of felony-murder rule

The underlying felony of kidnapping was properly submitted as an aggravating circumstance where defendant was convicted on theories of felony murder and murder by torture. **State v. Stroud,** 106.

§ 1370 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; especially heinous, atrocious, or cruel offense; instructions

The trial court's instructions on the especially heinous, atrocious, or cruel aggravating circumstance provided constitutionally sufficient guidance to the jury. **State v. Stroud,** 106.

There was no plain error in a capital sentencing proceeding as to defendants Barnes and Chambers where they contended that the instruction on the especially heinous, atrocious, or cruel aggravating circumstance permitted the jury to find the circumstance vicariously based on the actions and specific intent of another defendant. **State v. Barnes,** 184.

§ 1371 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; particularly heinous, atrocious, or cruel offense; submission of circumstance to jury

The trial court properly submitted the especially heinous, atrocious, or cruel aggravating circumstance to the jury in a capital sentencing proceeding for two first-degree murders of two elderly persons by beating them to death. **State v. East,** 535.

§ 1375 (NCI4th Rev.). Capital punishment; consideration of mitigating circumstances; definition; instructions

The trial court did not err in a capital sentencing proceeding by denying defendant's instruction on the value of statutory mitigating circumstances. **State v. Conner,** 319.

There was no constitutional error in the instructions in a capital sentencing proceeding in the use of the word "may" in the instruction on Issue Three. **Ibid.**

There was no error in a capital sentencing proceeding where the jury failed to find mitigating circumstances that defendant argues were supported by the evidence. **Ibid.**

CRIMINAL LAW—Continued

The defendant is entitled at most to a peremptory instruction but the jury may reject the evidence and not find the fact at issue if it does not believe the evidence, and failure to find mitigating circumstances does not render a jury's sentencing recommendation arbitrary. **Ibid.**

The trial court did not err in a capital sentencing proceeding by not instructing the jury that it could base its sentencing recommendation in part on sympathy for defendant's plight. The trial court properly instructed the jury regarding the statutory catchall mitigating circumstance which permits jurors to weigh sympathy in their determinations. **State v. Connors,** 319.

Although a statement on the Issues and Recommendation as to Punishment form given to jurors in a capital sentencing proceeding that "yes" should be written beside a mitigating circumstance if one or more jurors find that circumstance by a preponderance of the evidence "and that it has mitigating value" was incorrect for statutory mitigating circumstances, this statement did not constitute plain error where this mistake was brought to the court's attention before the jury began its deliberations, and the court gave correct supplemental instructions to the jury. **State v. Moody,** 563.

§ 1381 (NCI4th Rev.). Capital punishment; particular mitigating circumstances generally

The trial did not commit plain error in a capital sentencing proceeding by failing to submit the statutory mitigating circumstance that the victim was a voluntary participant in defendant's homicidal conduct or consented to the homicidal act where the victim was an off-duty police officer who pursued defendant after a robbery. **State v. Larry,** 497.

§ 1382 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; lack of prior criminal activity

The trial court did not err in a capital sentencing proceeding by submitting to the jury the mitigating circumstance that defendant had no significant history of prior criminal activity where his record included three violent assaults. **State v. Geddie,** 73.

§ 1384 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; mental or emotional disturbance

The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance that defendant was under the influence of a mental or emotional disturbance at the time of the offense. **State v. Geddie,** 73.

Failure of the jury in a capital sentencing proceeding to find the mental or emotional disturbance mitigating circumstance when the trial court had given a peremptory instruction on this circumstance did not violate defendant's rights to due process and a fair trial. **State v. East,** 535.

§ 1385 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; mental or emotional disturbance; intoxication

The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance of mental or emotional disturbance based on voluntary intoxication. **State v. Geddie,** 73.

§ 1386 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; defendant was accomplice or accessory

The jury's failure to find the mitigating circumstance that "defendant was an accomplice in or an accessory to the capital felony committed by another person and his participation was relatively minor" was not error. **State v. Bond,** 1.

§ 1392 (NCI4th Rev.). Capital punishment; other mitigating circumstances arising from the evidence

The jury's failure to find nonstatutory mitigating circumstances concerning defendant's family history and upbringing did not indicate that the death sentence was arbitrarily imposed. **State v. Bond,** 1.

The trial court did not err by failing to submit to the jury the requested nonstatutory mitigating circumstance that "defendant discontinued school at the age of 16" where testimony by defendant's witness was ambiguous. **Ibid.**

The trial court did not err by failing to submit to the jury the requested nonstatutory mitigating circumstance that defendant was not present when his accomplice shot the victim where this circumstance was subsumed by another circumstance submitted to the jury. **Ibid.**

The trial court did not err by combining two requested mitigating circumstances into the single circumstance that defendant began his substance abuse at the age of nine and has been diagnosed as being dependant on a combination of alcohol, cocaine, and marijuana. **Ibid.**

In a capital sentencing proceeding for a first-degree murder committed by defendant as an accessory before the fact, evidence that the principal was ineligible for the death penalty was properly excluded from the jury's consideration as a mitigating circumstance. **Ibid.**

The trial court did not err in a capital sentencing proceeding by instructing the jury not to consider nonstatutory mitigating circumstances unless it found that those circumstances had mitigating value. **State v. Geddie,** 73.

There was no plain error in a capital sentencing proceeding in the instructions on mitigating value for nonstatutory mitigating circumstances. **State v. Conner,** 319.

§ 1402 (NCI4th Rev.). Death penalty held not excessive or disproportionate

The record in a capital murder prosecution fully supported the finding of aggravating circumstances, did not suggest that the penalty was imposed under the influence of passion, prejudice, or any other arbitrary factor, and was not disproportionate. **State v. Geddie,** 73.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant ordered his sixteen-year-old accomplice to kill two kidnapping victims if they "messed up," and the accomplice shot and killed one victim in defendant's absence when the victim attempted to disarm the accomplice. **State v. Bond,** 1.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant beat the victim to death over the course of many hours. **State v. Stroud,** 106.

Death sentences for first-degree murders were not disproportionate where the defendants robbed and viciously murdered two elderly victims and, in the course of the murders and the events that followed, showed an utter disregard for the value of human life. **State v. Barnes,** 184.

A death sentence was proportionate where defendant inflicted wounds on the victim consistent with torture before leaving her to bleed to death, the victim was murdered a few feet from where her infant daughter sat, and the victim was bound, gagged, cut, stabbed and burned and would have suffered tremendously before dying. **State v. Woods,** 294.

A death penalty was not disproportionate. **State v. Connors,** 319.

CRIMINAL LAW—Continued

A sentence of death imposed upon defendant for first-degree murder of a seven-year-old girl which occurred during a rape was not excessive or disproportionate. **State v. Perkins,** 254.

Sentences of death imposed upon defendant for the first-degree murders of two elderly persons by beating them to death were not excessive or disproportionate. **State v. East,** 535.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant conspired with the victim's wife over a period of several weeks to kill the victim. **State v. Moody,** 563.

The death penalty for a first-degree murder was proportionate. **State v. Larry,** 497.

DISTRICT ATTORNEYS

§ 5 (NCI4th). Removal from office; prosecutorial misconduct

District attorneys are not subject to removal by impeachment. **In re Spivey,** 404.

The statute creating a procedure for removal of district attorneys from office by the superior court, G.S. 7A-66, does not violate the North Carolina Constitution. **Ibid.**

The removal of a district attorney from office for his behavior in a bar, including his repeated references to an African-American bar patron by a racial epithet, did not violate the district attorney's First Amendment rights. **Ibid.**

The trial court properly found that a district attorney's use of racial epithets against a member of the public in an apparent attempt to provoke an affray in public was conduct prejudicial to the administration of justice that brings the judicial office into disrepute. **Ibid.**

It was within the inherent power of the superior court to appoint an independent counsel to gather and present evidence in a judicial inquiry into whether a district attorney should be removed from office for misconduct. **Ibid.**

A district attorney was not prejudiced by the fact the superior court sought the assistance of the SBI in investigating his alleged misconduct even if the investigation went beyond that agency's authority. **Ibid.**

A district attorney was not prejudiced by procedural irregularities in a removal proceeding under G.S. 7A-66. **Ibid.**

DIVORCE AND SEPARATION

§ 291 (NCI4th). Modification or termination of alimony; what constitutes changed circumstances generally

The defendant's status as a dependent spouse is not properly reconsidered upon a motion by plaintiff to modify or terminate an alimony order, and the court's findings in this case show that the court did not do so. **Cunningham v. Cunningham,** 430.

§ 292 (NCI4th). Modification or termination of alimony; change as requiring modification

Where an alimony order based upon a separation agreement incorporated into a divorce decree included a provision that automatically adjusted the amount of the alimony payments to account for the supporting spouse's income fluctuations, the fact that plaintiff's income has changed since the time of the original agreement is not a sufficient basis for determining that a substantial change of circumstances exists to

DIVORCE AND SEPARATION—Continued

warrant a modification of the alimony order absent a showing that the change in income hinders plaintiff's ability to meet his alimony obligation. **Cunningham v. Cunningham,** 430.

§ 297 (NCI4th). Modification or termination of alimony; findings, generally

The change of circumstances issue in an alimony modification proceeding is remanded for consideration by the trial court where the trial court's order contained findings regarding the increase in the value of defendant wife's investment portfolio since entry of the original alimony order but it is unclear from the findings whether the increase in taxable income generated by defendant's investments is less than, equal to, or more than necessary to support herself, while maintaining her accustomed standard of living, without depleting her estate. **Cunningham v. Cunningham,** 430.

§ 298 (NCI4th). Modification or termination of alimony; change of circumstances; sufficiency of evidence

An increase in defendant wife's income from part-time work from $2,400 per year to $7,000 per year was not alone sufficient to warrant a modification of the alimony order. **Cunningham v. Cunningham,** 430.

EVIDENCE AND WITNESSES

§ 82 (NCI4th). Relevancy and competency requirements; definition of "relevant evidence"

The trial court did not err in a first-degree murder prosecution by allowing the State to present evidence that the decedent was a police officer. **State v. Larry,** 497.

§ 84 (NCI4th). Relevancy and competency requirements; relation of evidence to facts in issue

Statements by the prosecutor during sentencing in a codefendant's case to persuade the sentencing judge to make the codefendant serve his sentences consecutively were not admissions of a party opponent and were neither competent nor relevant as substantive evidence in the guilt-innocence phase of defendant's trial for murder, rape, and conspiracy. **State v. Collins,** 170.

§ 90 (NCI4th). Grounds for exclusion of relevant evidence; prejudice as outweighing probative value

The trial court did not abuse its discretion by concluding that the physical exhibition to the jury of a codefendant not on trial with defendant would have been cumulative and a needless waste of time pursuant to Rule of Evidence 403. **State v. Collins,** 170.

§ 162 (NCI4th). Threats made by defendant generally

The trial court did not err in a noncapital first-degree murder prosecution by admitting as corroborating evidence a witness's statement to an investigating officer that she had initially been too afraid to give information to an investigating officer because of a prior threat of violence from defendant arising from an eviction. **State v. Coffey,** 389.

§ 179 (NCI4th). Admissibility of particular evidentiary facts; motive in murder and like cases

The trial court did not err in the prosecution of defendant for first-degree murder of his estranged wife by excluding testimony regarding rumors concerning her sexual relations with a black man and possible drug use. **State v. Julian,** 608.

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

§ 966 (NCI4th). Recorded recollection generally

An S.B.I. agent's reading from the narrative report prepared from his notes of inculpatory statements made by defendant was admissible under the doctrine of past recorded recollection set forth in Rule of Evidence 803(5). **State v. Moody,** 563.

§ 1092 (NCI4th). Silence of defendant as implied admission; competence to impeach defendant's testimony

There was no error in a first-degree murder prosecution in which defendant was charged with murdering her husband in the admission of statements made by defendant to a detective before her arrest, in the cross-examination of defendant about those statements, and in the argument of the prosecutor about the statements because, under common law rules, it would have been natural for defendant to have told officers about a conversation in which she was told the identity of the person who killed her husband. **State v. Westbrooks,** 43.

The trial court did not err in a first-degree murder prosecution by using defendant's post-arrest, post-Miranda silence for impeachment where the record discloses that defendant was not induced to remain silent, executed a waiver and voluntarily gave a statement to investigating officers. **Ibid.**

The use of a first-degree murder defendant's silence before and after arrest for substantive purposes was not prejudicial given the overwhelming evidence against defendant. **Ibid.**

There was no plain error in a prosecution for the murder of a police officer where defendant Gaines contended that his rights were violated by the use of his prearrest silence for impeachment purposes during his cross-examination, but he did not object at trial. **State v. Gaines,** 647.

§ 1113 (NCI4th). Admissions by party opponent generally

Statements by the prosecutor during sentencing in a codefendant's case to persuade the sentencing judge to make the codefendant serve his sentences consecutively were not admissions of a party opponent and were neither competent nor relevant as substantive evidence in the guilt-innocence phase of defendant's trial for murder, rape, and conspiracy. **State v. Collins,** 170.

An S.B.I. agent could properly read from a narrative report prepared from his notes of inculpatory statements made by defendant even though the notes were not acknowledged or adopted by defendant since defendant's statements were admissible as admissions of a party opponent. **State v. Moody,** 563.

§ 1123 (NCI4th). When acts and declarations of coconspirator are competent

The hearsay statements of defendant Blakney, admitted in a capital trial of three defendants for first-degree murder, burglary, and robbery, fit within the exception for statements of a coconspirator found in G.S. 8C-1, Rule 801(d)(E). **State v. Barnes,** 184.

§ 1130 (NCI4th). Admissibility of hearsay evidence against codefendant

The trial court did not err in a capital prosecution for first-degree murder, burglary, and robbery by admitting hearsay statements by two codefendants against defendant Barnes. **State v. Barnes,** 184.

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

free to leave, that he was told that any statement made would be voluntary, and that he had previous experience with the criminal justice system. **State v. Gaines,** 647.

§ 1274 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; defendant's mental capacity

The trial court did not err in a capital prosecution for first-degree murder, robbery, and burglary in its determination that defendant Blakney had knowingly and intelligently waived his Miranda rights where a psychologist testified that he believed that Blakney's mental retardation in addition to his consumption of alcohol rendered him unable fully to understand his Miranda rights. **State v. Barnes,** 184.

§ 1275 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; use of drugs or alcohol by defendant

The trial court did not err as to defendant Blakney in a capital prosecution for first-degree murder, robbery, and burglary in its determination that Blakney had knowingly and intelligently waived his Miranda rights where a psychologist testified that he believed that Blakney's consumption of alcohol and his mental retardation rendered him unable fully to understand his Miranda rights. **State v. Barnes,** 184.

§ 1339 (NCI4th). Confessions and other inculpatory statements; sufficiency of evidence to support findings; inducement of statement by custodial interrogation

A noncapital first-degree murder defendant's statements to officers were voluntarily and knowingly made under the totality of the circumstances, including defendant's testimony that his statement was made knowingly and was true. **State v. Coffey,** 389.

§ 1346 (NCI4th). Confessions and other inculpatory statements; sufficiency of evidence to support findings; mental or physical capacity to waive rights

The evidence at a suppression hearing supported the trial court's finding that, although defendant is of subnormal intelligence, he had the mental capacity to waive his constitutional rights against self-incrimination and to counsel prior to making two confessions. **State v. Moody,** 563.

§ 1354 (NCI4th). Confessions and other inculpatory statements; proving confessions; reading of transcript or confession to jury

An S.B.I. agent's notes of inculpatory statements made by defendant were not required to be suppressed because they were not a verbatim transcript which included the agent's questions where there was no attempt to introduce the notes as defendant's written statement. **State v. Moody,** 563.

§ 1501 (NCI4th). Bloody or torn clothing; victim

The trial court did not err in a prosecution for the murder of a police officer by admitting the victim's bloody shirt, pants, belt, radio, radio holder, and handcuff case, or commit plain error by admitting his nameplate and badge, even though defendant offered to stipulate that the victim was wearing the full clothing and equipment of a police officer. **State v. Gaines,** 647.

§ 1688 (NCI4th). Photographs of victims prior to crime

Defendant did not show error, much less plain error, in a prosecution for the murder of a police officer in the admission of a photograph of the officer taken while he was alive. **State v. Gaines,** 647.

EVIDENCE AND WITNESSES—Continued

§ 1694 (NCI4th). Photographs of homicide victims; location and appearance of victim's body

The trial court did not abuse its discretion in the admission of color photographs of the bodies of two murder victims at the crime scene and during the autopsy. **State v. East,** 535.

§ 1708 (NCI4th). Photographs of crime scene generally

The trial court did not abuse its discretion as to defendant Blakney in a capital prosecution for first-degree murder, burglary, and robbery by allowing into evidence eighteen photographs that depicted the crime scene. **State v. Barnes,** 184.

§ 1756 (NCI4th). Models generally

The trial court did not abuse its discretion in a capital prosecution for first-degree murder, burglary, and robbery by allowing the use of mannequins for the purpose of illustrating the number and direction of bullet wounds incurred by the victims. **State v. Barnes,** 184.

§ 1866 (NCI4th). Fingerprints and palm prints; effect of where prints were found; in victim's automobile

The trial court did not err by denying defendant's motion for dismissal in a prosecution arising from a kidnaping and robbery in a motel parking lot where the evidence was clearly sufficient to establish that defendant's fingerprint on the victim's vehicle could only have been impressed at the time the crime was committed. **State v. Cross,** 713.

§ 2054 (NCI4th). Particular subjects of lay testimony; bloodstains

A detective did not improperly speculate about the actual presence of the perpetrator's blood at the crime scene by his testimony that he requested that bloodied items recovered from the crime scene be tested for a possible DNA match with blood samples from defendant and a codefendant and that he did not have any reason to suspect that the perpetrator shed blood in the victim's house. **State v. Armstrong,** 161.

§ 2055 (NCI4th). Particular subjects of lay testimony; fingerprints

A detective's testimony that it was common not to find identifiable fingerprints at a crime scene was a statement of fact which his employment and experience qualified him to give without his being qualified as an expert. **State v. Armstrong,** 161.

§ 2172 (NCI4th). Basis or predicate for expert's opinion; admissibility of facts on which conclusion is based

Testimony by defendant's expert witness about a "rage reaction" experienced by the witness in his personal life was not admissible as a basis for the witness's expert opinion that a rage reaction could possibly have caused defendant to kill the victim. **State v. Laws,** 585.

§ 2261 (NCI4th). Opinion testimony by experts; cause or circumstances of death generally

The trial court properly permitted an S.B.I. agent to give expert opinion testimony in a prosecution for two murders that the male victim was standing when first hit with a blunt-force instrument and that the door to the house was closed at the time he was accosted, although the S.B.I. agent was not an expert in blood-spatter evidence. **State v. East,** 535.

EVIDENCE AND WITNESSES—Continued

§ 2293 (NCI4th). Opinion testimony by experts; anger; anxiety; panic

An expert witness who testified that a rage reaction could possibly have caused defendant to kill the victim was properly precluded from testifying about a rage reaction the witness experienced in his personal life. **State v. Laws,** 585.

§ 2302 (NCI4th). Opinion testimony by experts; specific intent; malice; premeditation

The trial court erred in excluding testimony by a forensic psychologist that defendant had "snapped" at the time of two murders because this testimony tended to show that defendant was not in a cool state of blood when he shot the victims, but this error was not prejudicial. **State v. Burgess,** 372.

§ 2641 (NCI4th). Attorney-client privilege; waiver of privilege; testimony of client

There was no prejudicial error in a first-degree murder prosecution where defendant contended that the trial court erroneously allowed the attorney for a State's witness to invoke the attorney-client privilege, but assuming that the client waived the privilege, defendant cannot show prejudice because the client had testified regarding her plea bargain and any testimony by the attorney would have been cumulative. **State v. Westbrooks,** 43.

§ 2675 (NCI4th). Privileged communications; psychologist and client; applicability to particular actions and proceedings

A psychiatrist's report of the results of his examination of defendant was not protected by the psychologist-client privilege of G.S. 8-53.3 where the psychiatrist was appointed by the trial court to evaluate defendant's mental status rather than to treat defendant. **State v. East,** 535.

§ 2750.1 (NCI4th). Scope of examination when defendant opens door

A first-degree murder victim's statements to witnesses concerning the status of the marriage between the victim and defendant were admissible to contradict defendant's contention at trial that she and the victim had no marital problems. **State v. Westbrooks,** 43.

§ 2797 (NCI4th). Impertinent or insulting questions

The trial court did not err in a capital sentencing proceeding where defendant contended that the prosecutor improperly called him a liar during cross-examination of the defense mental health expert. **State v. Woods,** 294.

§ 2865 (NCI4th). Cross-examination; effect of lack of opportunity

The trial court did not abuse its discretion in a first-degree murder prosecution where defendant contends that the trial court erred by limiting her right to confront, cross-examine, and impeach State's witnesses, precluding inquiry about their parole eligibility under their guilty pleas. **State v. Westbrooks,** 43.

§ 2877 (NCI4th). Cross-examination in particular actions or prosecutions; homicide

The defendant was not prejudiced in a capital sentencing hearing by the prosecutor's cross-examination of him where defendant argued that the total effect of the prosecutor's questions about defendant's reliance on counsel, his plea to a prior crime, and a suggestion that defendant testified because his counsel told him that was the only way to save his life violated his constitutional rights to counsel and to

EVIDENCE AND WITNESSES—Continued

EXTRADITION

HEALTH

two knives and a pair of scissors to stab the victim eighteen times, that defendant also bludgeoned the victim with a ceramic vase, and that defendant inflicted stab wounds after the victim was severely disabled and had lost consciousness. **State v. Laws,** 585.

§ 256 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; evidence concerning planning and execution

The trial court erred in a prosecution arising from the robbery of a convenience store and the killing of two employees by submitting first-degree murder to the jury based on premeditation and deliberation where the evidence merely raised a suspicion that defendant fired the fatal shots and the jury was not instructed on acting in concert. **State v. Wilson,** 119.

§ 257 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; intent to kill; where defendant took weapon with apparent intent to use weapon

There was sufficient evidence of premeditation and deliberation in a capital first-degree murder prosecution where defendant's conduct before and after the killing supports a finding that the scuffle with the victim did not overcome defendant's faculties and reason. **State v. Larry,** 497.

§ 287 (NCI4th). Sufficiency of evidence; second-degree murder; killing during course of altercation, argument and the like

The trial court did not err in a capital first-degree murder prosecution by denying defendant's request for an instruction on second-degree murder where defendant argued provocation, but there was ample evidence to support a finding that defendant's ability to reason was not overcome by his argument with the victim. **State v. Geddie,** 73.

§ 366 (NCI4th). Sufficiency of evidence; participants in homicide crimes; first-degree murder

The evidence of defendant Harris's conduct before and after a killing was sufficient to support a finding that Harris acted with premeditation and deliberation where Harris contended that evidence that he provided the weapon and hid it afterward is not substantial evidence of mens rea to commit first-degree murder. **State v. Gaines,** 647.

§ 368 (NCI4th). Sufficiency of evidence; accessory; aiders and abettors generally

The trial court did not err in a first-degree murder prosecution by denying defendant Harris's motion to dismiss where the evidence demonstrated that Harris encouraged and intended to assist Gaines, that Gaines knew of Harris's support and encouragement, and that Harris was not merely present. **State v. Gaines,** 647.

The trial court did not err in a first-degree murder prosecution by instructing the jury on the "friend" exception as a part of the instruction on aiding and abetting. **Ibid.**

§ 374 (NCI4th). Sufficiency of evidence; acting in concert; conspiracy; first-degree murder

The trial court did not err by denying defendant Harris's motion to dismiss a charge of first-degree murder on the grounds of insufficient evidence of acting in concert where the evidence was conflicting as to his actual presence, but the State presented as evidence the victim's dying identification of his killers and testimony from a witness who saw three black men run from the scene, and defendant presented evi-

dence that he either remained at the car or walked some distance with the shooter but not all the way to the scene. The evidence was also sufficient to show that defendant shared the plan to shoot the victim and that he encouraged and aided the shooter, provided him with a shotgun, accompanied him to the area and either remained at the car or accompanied him as far as the parking lot at the scene, left with the shooter and another man after the killing, and took possession of the murder weapon and hid it. **State v. Gaines,** 647.

§ 393 (NCI4th). Sufficiency of evidence; intoxication

The trial court did not err in a capital first-degree murder prosecution by denying defendant's request for an instruction on second-degree murder where defendant argued that testimony that he had drunk two pints of "white lightning" raised a reasonable inference of voluntary intoxication sufficient to negate specific intent to kill. **State v. Geddie,** 73.

There was no merit in a prosecution for first-degree murder and conspiracy to defendant's argument that an accomplice's alcohol consumption negated premeditation and deliberation. **State v. Westbrooks,** 43.

§ 408 (NCI4th). Use of particular words or phrases in instructions

The trial court did not err in a first-degree murder prosecution by using the word victim throughout its jury instructions. **State v. Gaines,** 647.

§ 510 (NCI4th). Instructions; felony murder rule; effect of presence or absence at time of crime

There was no prejudicial error in a prosecution for first-degree murder, robbery, kidnapping, and other offenses by refusing to give defendant's requested instructions on presence at the scene of the crimes. Under the instructions which were given, a reasonable juror could not have concluded that defendant's failure to intervene was enough evidence for inferring that he shared in the coconspirator's plan. **State v. Williams,** 137.

§ 552 (NCI4th). Instructions; second-degree murder as lesser-included offense of first-degree murder; lack of evidence of lesser crime

The trial court did not err in a first-degree murder prosecution by not submitting the possible verdict of second-degree murder as an accessory before the fact where there was substantial evidence to prove each element of first-degree murder and evidence of second-degree murder was totally lacking. **State v. Westbrooks,** 43.

The trial court did not err in a capital prosecution for first-degree murder by not instructing the jury on the lesser-included offenses of second-degree murder and manslaughter; it is not unconstitutional to require defendant to negate premeditation and deliberation in order to be entitled to an instruction on second-degree murder and manslaughter; the uncontradicted evidence that defendant carried a loaded gun to commit a robbery and threatened to kill the victim if the victim moved is sufficient positive evidence of premeditation and deliberation. **State v. Larry,** 497.

§ 558 (NCI4th). Instructions; voluntary manslaughter as lesser-included offense of higher degrees of homicide; generally

The evidence in a capital prosecution for murder did not support an instruction on the lesser-included offense of manslaughter where the uncontradicted evidence that defendant carried a loaded gun to commit a robbery and threatened to kill the vic-

tim if he moved was sufficient, positive evidence of premeditation and deliberation. **State v. Larry,** 497.

§ 583 (NCI4th). Instructions; acting in concert

The trial court did not err in a capital prosecution for first-degree murder in its instruction to the jury on the doctrine of acting in concert with regard to premeditated and deliberate first-degree murder. *State v. Blankenship,* 337 N.C. 543, is overruled. **State v. Barnes,** 184.

§ 588 (NCI4th). Instruction on imperfect self-defense

The trial court did not err in a capital prosecution for first-degree murder by not instructing the jury on imperfect self-defense. **State v. Larry,** 497.

§ 612 (NCI4th). Instructions; self-defense; reasonableness of apprehension generally

The trial court did not commit plain error by instructing the jury that perfect and imperfect self-defense require the defendant to have a reasonable belief in the need to kill in self-defense. **State v. Laws,** 585.

§ 669 (NCI4th). Instructions; intoxication; where there was a lack of evidence that capacity to think and plan was effected by drunkenness

The trial court did not err in a capital first-degree murder prosecution by denying defendant's request for an instruction on second-degree murder based on evidence of voluntary intoxication where the evidence tended only to show that defendant was intoxicated and was insufficient to show that he was utterly incapable of forming a deliberate and premeditated purpose to kill. **State v. Hunt,** 720.

§ 706 (NCI4th). Cure of error in instructions by conviction of first-degree murder; alleged error in regard to voluntary manslaughter instruction

The trial court's failure to instruct on voluntary manslaughter was harmless error where the court properly instructed on first-degree and second-degree murder and the jury returned a verdict of guilty of first-degree murder. **State v. East,** 535.

§ 718 (NCI4th). Specification by jury of theory of verdict

It is the better practice for the trial court in a first-degree murder case to submit a verdict sheet which requires the jury to specify the theory upon which it convicted defendant. **State v. Manley,** 484.

§ 727 (NCI4th). Priority of additional punishment for underlying felony as independent criminal offense on conviction for felony murder; merger

Where defendant was convicted of two first-degree murders based upon theories of premeditation and deliberation and felony murder, the underlying felony of arson did not merge with the murders, and the trial court could properly sentence defendant separately for each of the murders and for the underlying felony of arson. **State v. Burgess,** 372.

Where defendant was convicted of two first-degree murders based upon theories of premeditation and deliberation and felony murder, there was no merger of either murder conviction by its use as an underlying felony for the other murder, and the trial court could properly sentence defendant separately for each murder. **Ibid.**

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 19 (NCI4th). Surplusage

An indictment for acting in concert to commit murder supported a verdict of first-degree murder on an accessory-before-the-fact theory; allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage. **State v. Westbrooks,** 43.

INSURANCE

§ 510 (NCI4th). Uninsured motorist coverage; rejection of coverage

Where the trial court properly denied defendant fleet insurer's motion for leave to amend its answer to allege that the insured had rejected UIM coverage, the amount of UIM coverage available under the fleet policy is equal to the liability coverage limit of the policy. **Isenhour v. Universal Underwriters Ins. Co.,** 151.

§ 530 (NCI4th). Underinsured coverage; reduction of insurer's liability

A fleet insurer which provided primary UIM coverage was not entitled to a credit for the $25,000 UIM settlement received by plaintiff from his personal (excess) automobile insurer since the excess insurer was not yet required to pay any of its UIM coverage because the policy limit of the primary coverage had not been met. **Isenhour v. Universal Underwriters Ins. Co.,** 151.

JUDGES, JUSTICES, AND MAGISTRATES

§ 35 (NCI4th). Judicial conduct; censure and removal; conduct prejudicial to the administration of justice

An order recommending censure of a district court judge was rejected where respondent appeared to act in good faith, acted openly with full disclosure to all parties, and upon objection did not see his initial course to fruition. Although ex parte communications and the voluntary injection of judicial officials into cases not properly before them are not approved, the judge's actions here do not rise to the level constituting conduct prejudicial the administration of justice. **In re Martin,** 167.

§ 36 (NCI4th). Judicial conduct; censure and removal; conduct prejudicial to the administration of justice; particular illustrations

A recommendation by the Judicial Standards Commission that a judge be censured was rejected because, although it is not within the trial judge's province to negotiate a plea or enter a judgment on a plea to a charge which is not a lesser included offense of the charge at issue, the respondent's conduct was not of such character as to bring the judicial office into disrepute. **In re Fuller,** 157.

JURY

§ 34 (NCI4th). Exemptions and excuses from jury duty; challenges to procedure used in excusing or deferring potential jurors

There was no error in a capital first-degree murder prosecution where the trial court instructed the clerk to summon additional jurors after the trial commenced and those jurors appeared before various district court judges to seek excusals or deferrals on statutory grounds. The record indicates that all excusals and deferrals occurred pretrial or in a defendant's presence after the trial began. **State v. Geddie,** 73.

JURY—Continued

JURY—Continued

§ 141 (NCI4th). Voir dire examination; parole procedures

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to question venire members about their understanding of parole eligibility. **State v. Geddie,** 73.

The trial court did not err in the denial of defendant's motion to permit voir dire of prospective jurors in a capital sentencing proceeding regarding their beliefs about parole eligibility. **State v. Stroud,** 106.

The trial court did not err in a capital resentencing proceeding by denying defendant's motion to permit voir dire of prospective jurors regarding parole eligibility. **State v. Connors,** 319.

§ 146 (NCI4th Rev.). Propriety of instruction to jurors regarding death penalty

There was no prejudicial error during jury selection for a capital first-degree murder where the court instructed prospective jurors that the law of North Carolina requires that the juror vote to recommend that defendant be sentenced to death if the jury finds beyond a reasonable doubt the existence of all factors necessary to impose the death penalty. **State v. Larry,** 497.

§ 153 (NCI4th). Voir dire examination; whether jurors could vote for death penalty verdict

The prosecutor's question to prospective jurors in a capital trial as to whether they would vote to impose the death penalty if the State proved beyond a reasonable doubt that the death penalty was the appropriate punishment was not a misstatement of the law and did not violate defendant's due process rights. **State v. East,** 535.

§ 158 (NCI4th). Reopening of questioning and challenge to juror previously accepted

The trial court did not err by reopening the jury voir dire to allow the prosecution to exercise a peremptory challenge of a prospective juror it had already accepted where the juror told the prosecutor that he had no personal feeling concerning the death penalty but later told defense counsel that he personally could not support a death sentence. **State v. Bond,** 1.

§ 201 (NCI4th). Prejudice and bias; preconceived opinions generally

The trial court did not err by its denial of defendant's challenge for cause of a juror who stated that he might be hesitant about returning a verdict of not guilty if the State proved three of the four elements of a crime and the three heavily outweighed the one where the juror thereafter stated unequivocally that he would follow the law as explained to him by the court. **State v. Perkins,** 254.

§ 203 (NCI4th). Effect of preconceived opinions; where juror indicated ability to be fair and impartial

The trial court did not err by the denial of defendant's challenge for cause of a prospective juror who stated during voir dire that he had known another young girl who was murdered and that he had strong feelings about it which he would likely take into the jury room where the juror thereafter told the court that his strong feelings would not prevent him from being an impartial juror. **State v. Perkins,** 254.

PRINCIPAL AND AGENT

§ 25 (NCI4th). Powers of attorney; construction; effects of limits on authority

An attorney-in-fact acting pursuant to a broad general power of attorney lacks the authority to make a gift of the principal's real property unless that power is expressly conferred. **Whitford v. Gaskill,** 475.

An attorney-in-fact had authority to make a gift of the principal's homeplace realty where language was added to the statutory short-form power of attorney giving the attorney-in-fact the power "to transfer the real estate known as the homeplace that I inherited from my mother." **Ibid.**

PUBLIC OFFICERS AND EMPLOYEES

§ 42 (NCI4th). Employees subject to personnel system

Petitioner was a full-time employee and member of the Retirement System at all times that she was working and is entitled to credit for those years of service where she shared a position with another person, each working six months per year. **Wiebenson v. Bd. of State Employees' Ret. Sys.,** 734.

RETIREMENT

§ 3 (NCI4th). Claims for benefits generally

A contract existed between plaintiffs and the State where plaintiffs were employed for more than five years on 1 July 1982 and their retirement and disability benefits were vested at that time, the method of calculating disability benefits was changed, each of the plaintiffs became disabled after that date and each received benefits which were reduced from what they would have received if there had been no change in the law. Plaintiffs were entitled to have their rights calculated on 1 July 1982, when the change was made, even though some members of the class would receive this much or more under the revised plans. The development of a pension plan in unanticipated ways is not an important public purpose which would justify the impairment of a contract. **Faulkenbury v. Teachers' and State Employees' Ret. Sys.,** 683.

The trial court did not err in an action arising from a change in the way disability benefits are calculated for state and local employees by holding that the applicable statutes of limitations were G.S. 128-27(i) and G.S. 135-5(n). **Ibid.**

The trial court did not err in an action arising from a change in the way disability benefits were calculated by allowing plaintiffs to recover the actuarial equivalents of the underpayments and it was not error to require state and local governments to pay interest on the underpayments resulting from a change in the way the benefits were calculated. **Ibid.**

ROBBERY

§ 77 (NCI4th). Sufficiency of evidence; to show property was taken with intent permanently to deprive owner of it

The State's evidence was sufficient to support a jury finding that defendant intended to permanently deprive the victim of his car so as to support defendant's conviction of armed robbery of a kidnapping victim who was shot and killed by defendant's accomplice while defendant was absent. **State v. Bond,** 1.

SEARCHES AND SEIZURES

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

TAXATION

TRIAL

WORKERS' COMPENSATION

ZONING

§ 19 (NCI4th). Approval and recordation of subdivision plats

The trial court should have issued a declaratory judgment that plaintiff's plat shows a division of land that is exempt from Harnett County's subdivision regulations where plaintiff submitted a plat which showed a division of land into parcels in excess of ten acres. **Three Guys Real Estate v. Harnett County,** 468.

WORD AND PHRASE INDEX