NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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OF
NORTH CAROLINA

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ROBERT F. ORR

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JAMES G. EXUM, JR.

Former Justices

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1	J. Richard Parker	Manteo
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2	William C. Griffin, Jr.	Williamston
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4B	Charles H. Henry	Jacksonville
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17B	Clarence W. Carter	King
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	William Z. Wood, Jr.	Winston-Salem
	L. Todd Burke	Winston-Salem
22	C. Preston Cornelius	Mooresville
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23	Michael E. Helms[6]	North Wilkesboro

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	L. BRADFORD TILLERY[12]	Wilmington

SPECIAL EMERGENCY JUDGE

	DONALD L. SMITH	Raleigh

1. Elected to the North Carolina Supreme Court and sworn in 1 January 1999.
2. Elected and sworn in 4 January 1999 to replace Donald E. Jacobs who retired 31 December 1998.
3. Retired 31 December 1998.
4. Elected and sworn in 25 November 1998.
5. Elected and sworn in 4 January 1999 to replace H. W. Zimmerman, Jr. who retired 31 July 1998.
6. Elected and sworn in 1 January 1999 to replace Julius A. Rousseau, Jr. who retired 31 December 1998.
7. Elected and sworn in 1 January 1999 to replace Forrest A. Ferrell who retired 31 December 1998.
8. Elected and sworn in 1 January 1999.
9. Elected and sworn in 1 January 1999.
10. Resigned 29 September 1998.
11. Resigned 5 October 1998.
12. Retired 31 December 1998.

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NICHOLAS LONG[19]	Roanoke Rapids
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Elected and sworn in as Superior Court Judge 4 January 1999.
2. Elected and sworn in 1 December 1998 to replace L. W. Payne, Jr. who retired 30 November 1998.
3. Appointed and sworn in 15 December 1998.
4. Elected and sworn in 7 December 1998.
5. Elected and sworn in 7 December 1998.
6. Appointed and sworn in 7 December 1998 as Chief Judge to replace Robert W. Johnson who retired 1 December 1998.
7. Elected and sworn in 7 December 1998.
8. Elected and sworn in 7 December 1998.
9. Elected and sworn in 7 December 1998.
10. Elected and sworn in 7 December 1998 to replace Michael E. Helms who became Superior Court Judge.
11. Appointed Chief Judge to replace Forrest A. Ferrell who retired 31 December 1998.
12. Elected and sworn in 1 January 1999.
13. Elected and sworn in 1 January 1999.
14. Elected and sworn in 7 December 1998.
15. Appointed and sworn in 29 January 1999 to replace Richard C. Boner who became a Superior Court Judge.
16. Elected and sworn in 7 December 1998.
17. Deceased 28 December 1998.
18. Appointed and sworn in 3 December 1998.
19. Deceased 30 October 1998.

ATTORNEY GENERAL OF NORTH CAROLINA

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MICHAEL F. EASLEY

Deputy Attorney General for Administration
SUSAN RABON

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ORDERS

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

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Given over my hand and seal of the Board of Law Examiners this the 16th day of September, 1998.

Fred P. Parker III
Executive Director
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I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 4th day of September, 1998, and said person has been issued a certificate of this Board:

Laura G. Johnson ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 16th day of September, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 11th September, 1998 and said persons have been issued license certificates.

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Colinda Katrice Howard ..... Charlotte
Megan O'Donnell Jorns ..... Ft. Bragg
Mark E. Pearce ..... Durham
David Kent Purks ..... Cary
Philip Wade Richardson ..... Winston-Salem
Jeff P. Robins ..... Carrboro
Beth Davis Wilkinson ..... Chapel Hill

JULY 1998 RECENTLY ADMITTED APPLICANTS

Jennifer Marie Abraham ..... Winston-Salem
Eric Mitchell Albright ..... Greensboro
Sean E. Andrussier ..... Cary
Stanley B. Baker ..... Charlotte
Maria Blue Barry ..... Charlotte
Susan Marie Brown ..... Chapel Hill
Andrew Lowell Chapin ..... Greensboro
Brian Paul Deeb ..... St. Petersburg, Florida
Stephen John Dunn ..... Charlotte
Bryan P. Durrett ..... Raleigh
Roger Allen Echols, Jr. ..... Hillsborough
Mary E. Euler ..... Selma
Thomas Hugh Faulk, Jr. ..... Indian Trail
Adam M. Fetterman ..... Asheville
J. Steven Fisher ..... Granite Quarry
David S. Greaves ..... Chapel Hill
Dalmir S. Grewal ..... Pacific Palisades, California
Eric Peter Haase ..... Duluth, Georgia
George T. Hagood ..... Charlotte
Jacqueline Seabolt Hardy ..... Charlotte
James Patrick Hayden ..... Charlotte
Donald M. Hill, Jr. ..... Charlotte
Elizabeth Ashley Hinds ..... Mt. Brook, Alabama
Robert Holmes Hood, Jr. ..... Charleston, South Carolina
Joy Anita Jones ..... Angier

Lori Rae Keeton ..... Charlotte
Eileen Maria King ..... Greensboro
Kathleen Ann Kingsbury ..... Greensboro
Jay H. Krall ..... Raleigh
David Matthew Krasnow ..... Raleigh
Elizabeth Pratt McLauglin ..... Durham
Jon C. Michael ..... Winston-Salem
Jennifer Josephine Morton ..... Greensboro
Timothy A. Nordgren ..... Raleigh
Kelly Todd Patterson ..... Winston-Salem
Virginia A. Peikarski ..... Winston-Salem
Sandra Jyll Polin ..... Raleigh
Jean M. Radke ..... Cary
Crystal Lynnette Sain ..... Mooresville
Pamela A. Scott ..... Raleigh
Gregory Lee Shelton ..... Miami, Florida
Mary Lynn Roberts Sloan ..... Charlotte
Mark Omega South ..... Winston-Salem
Jennifer Tallmadge ..... Charlotte
Meredith Linton Taylor ..... Raleigh
Jeffrey Paul Trent ..... Greensboro
Stephanie Renee Uzel ..... Charlotte
Louie Wilson, III ..... Raleigh

Given over my hand and seal of the Board of Law Examiners this the 23rd day of September, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 11th September, 1998 and said person has been issued a license certificate.

JULY 1998 RECENTLY ADMITTED APPLICANTS

Brynne Vanhettinga ..... Rutherfordton

Given over my hand and seal of the Board of Law Examiners this the 29th day of September, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 4th September, 1998 and said person has been issued a license certificate.

JULY 1998 RECENTLY ADMITTED APPLICANTS

Patrick Joseph Mulligan IV ..... Wilmington

Given over my hand and seal of the Board of Law Examiners this the 29th day of September, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 25th September, 1998 and said persons have been issued license certificates.

JULY 1998 RECENTLY ADMITTED APPLICANTS

Mildred Ajuchi Akachukwu ..... Durham
Linnie Worthington Causey ..... Chapel Hill
Gary Scott Leigh ..... Shelby
Robert Wayne Rideout, Jr. ..... Raleigh
Daniel Tasman Tower ..... Raleigh
Elizabeth Anne Weeks ..... Greenville

Given over my hand and seal of the Board of Law Examiners this the 5th day of October, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 25th day of September 1998, and said persons have been issued certificates of this Board:

Todd A. Caraway ..... Applied from the State of Michigan
Charles E. Dadswell ..... Applied from the State of Ohio
Stephen M. Hader ..... Applied from the State of New York
Marilyn A. Miller ..... Applied from the State of Illinois
Michael R. Neilson ..... Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners this the 5th day of October, 1998.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 25th September, 1998 and said person has been issued a license certificate.

JULY 1998 RECENTLY ADMITTED APPLICANTS

Douglas Aaron Oberdorfer ..... Neptune Beach, Florida

Given over my hand and seal of the Board of Law Examiners this the 5th day of November, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 30th October, 1998 and said persons have been issued a license certificate.

JULY 1998 RECENTLY ADMITTED APPLICANTS

Anne Elizabeth Nauful Boyd ..... New York, New York
Anthony Lamar Williams ..... Raleigh
Michael A. Koehler ..... Fredericksburg, Virginia

Given over my hand and seal of the Board of Law Examiners this the 5th day of November, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 30th day of October 1998, and said persons have been issued certificates of this Board:

Gregory J. Brown ..... Applied from the State of Ohio
Randel J. Springer ..... Applied from the State of Ohio
Thomas Edward Cabaniss ..... Applied from the State of Virginia
A. Thomas Morris ..... Applied from the State of Virginia
Jeffrey Alan Shore ..... Applied from the State of Illinois
Jacqueline Terry ..... Applied from the State of New York
Gerard William McNaught ..... Applied from the State of Massachusetts
Mark A. Robinson ..... Applied from the State of Kentucky
Fred D. Smith, Jr. ..... Applied from the State of Virginia
Charles A. Waters ..... Applied from the State of Texas

David L. Hayden ..... Applied from the State of Texas
Denis P. Zuzik ..... Applied from the State of Pennsylvania
James Lee Thompson ..... Applied from the State of Virginia
John E. Holloway ..... Applied from the State of Virginia
Jay M. Gudeman ..... Applied from the State of Indiana

Given over my hand and seal of the Board of Law Examiners this the 6th day of November, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 20th day of November 1998, and said persons have been issued certificates of this Board:

Michael P. Rizer ..... Applied from the State of Ohio
Paul Stephen Donohue ..... Applied from the State of New York
Eliot F. Bloom ..... Applied from the State of New York
Robert Edward Nunley ..... Applied from the District of Columbia
Heather M. Harvey ..... Applied from the State of Texas
David Heath Larry ..... Applied from the District of Columbia
James Pope Langstaff ..... Applied from the District of Columbia
David Matthew Zimmerman ..... Applied from the State of Pennsylvania
Geoffrey G. Young ..... Applied from the State of Tennessee
Patrick F. Balestrieri ..... Applied from the State of New York
Sandra Kay Visser ..... Applied from the State of Michigan
Renee R. McDermott ..... Applied from the State of Indiana

Given over my hand and seal of the Board of Law Examiners this the 30th day of November, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 11th day of September 1998, and said person has been issued a certificate of this Board:

JULY 1998 RECENTLY ADMITTED APPLICANTS

Katherine Elizabeth Orr ..... Matthew

Given over my hand and seal of the Board of Law Examiners this the 11th day of December, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 11th day of December 1998, and said persons have been issued certificates of this Board:

FEBRUARY 1998 RECENTLY ADMITTED APPLICANTS

Lynn M. Kelly ..... Greensboro
Patricia Staco ..... Raleigh

JULY 1998 RECENTLY ADMITTED APPLICANTS

Carol Jean Bauman ..... New Hill
Ray F. Bowman III ..... Vernon, Illinois
Emily Williams Eisele ..... Raleigh
Stephen Paul Ewald ..... Charlotte
Jay Michael Gallinger ..... Asheville
Christopher E. Greene ..... Charlotte
Joseph Mark Hough ..... Raleigh
Dean Huntington ..... Indianapolis, Indiana
Karla Diane Kerlin ..... Glendale, California
Mai Tuyet Lam ..... Charlotte
Holly S. Marcille ..... Charlotte
Laura Mata-Adams ..... Cary
Sharon Patick-Wilson ..... Savannah, Georgia
W. Chaplin Spencer, Jr. ..... Rock Hill, South Carolina
James H. Taylor, III ..... Greenville
Christian Sean Thornburg ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 17th day of December, 1998.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 27th day of November 1998, and said person has been issued a certificate of this Board:

James Patrick Sutton ..... Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners this the 19th day of January, 1999.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 11th day of December 1998, and said person has been issued a certificate of this Board:

Gary A. Davis .....Applied from the State of Tennessee

Given over my hand and seal of the Board of Law Examiners this the 19th day of January, 1999.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 15th January 1999 and said person has been issued a license certificate.

JULY 1997 RECENTLY ADMITTED APPLICANT

James L. Goldsmith, Jr. .....Greenville, South Carolina

Given over my hand and seal of the Board of Law Examiners this the 26th day of January, 1999.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 22nd day of January 1999, and said person has been issued a certificate of this Board:

Robert P. Kirchheimer, Jr. .....Applied from the State of Illinois

Given over my hand and seal of the Board of Law Examiners this the 27th day of January, 1999.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF: THE APPEAL OF SPRINGMOOR, INC. AND AMMONS, INC. FROM THE DENIAL OF APPLICATIONS FOR EXEMPTION BY THE WAKE COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1994

No. 79PA97

(Filed 3 April 1998)

Constitutional Law § 119 (NCI4th); Taxation § 28 (NCI4th)—homes for aged, sick, infirm—exclusion of property from taxation—religious or Masonic affiliation—violation of establishment of religion clause

Subpart (v) of N.C.G.S. § 105-275(32), which sets out the requirement of religious or Masonic affiliation for the exclusion from the tax base of property owned by a home for the aged, sick or infirm pursuant to subsection (32), violates the prohibition against the establishment of religion found in the First Amendment of the United States Constitution and Article I, § 13 of the North Carolina Constitution. Furthermore, subpart (v) is an integral part of the definition of a qualifying home for the aged, sick or infirm contained in subsection (32) and may not be severed therefrom so that the entire subsection (32) must fail.

Justice LAKE dissenting.

Appeal of Wake County pursuant to N.C.G.S. § 7A-30(1) from a unanimous decision of the Court of Appeals, 125 N.C. App. 184, 479 S.E.2d 795 (1997), reversing an order of the Property Tax

Commission entered 16 November 1995 and holding N.C.G.S. § 105-275(32) unconstitutional in part. On 5 June 1997, the Supreme Court allowed discretionary review of an additional issue. Heard in the Supreme Court 14 October 1997.

Wake County Attorney's Office, by Shelley T. Eason, Deputy Wake County Attorney, for appellant Wake County.

James M. Kimzey for appellees Springmoor, Inc., and Ammons, Inc.

North Carolina Association of County Commissioners, by James B. Blackburn III, General Counsel, and Kimberly M. Grantham, Assistant General Counsel, amicus curiae.

Poyner & Spruill, L.L.P., by Susanne F. Hayes and Robin T. Morris, on behalf of Non-Profit Qualifying Homes for the Aging, amicus curiae.

Michael F. Easley, Attorney General, by George W. Boylan, Special Deputy Attorney General, for the State, amicus curiae.

FRYE, Justice.

The issue in this case is whether N.C.G.S. § 105-275(32) is unconstitutional and, if so, whether the allegedly unconstitutional subpart (v) may be severed, allowing the remainder of the statute to stand.

Springmoor, Inc. (Springmoor) is a nonprofit North Carolina corporation which manages and operates a self-contained residential community for the elderly, also called Springmoor, in Raleigh, North Carolina. Springmoor leases all of the real property on which it is located from Ammons, Inc. (Ammons) under a lease which provides that Springmoor will pay all *ad valorem* taxes assessed on the property.

On 27 January 1994, taxpayers Ammons and Springmoor applied for property tax exemptions for this real property and for personal property used in the operation of the retirement community. On 22 February 1994, the Wake County Tax Assessor denied both requests. Subsequently, the Wake County Board of Equalization and Review agreed with the assessor and denied the requests for exemption. Both parties appealed to the North Carolina Property Tax Commission (Commission).

The Commission concluded that Springmoor met all the requirements for exclusion under N.C.G.S. § 105-275(32) except that of religious or Masonic affiliation as required by subpart (v). The Commission affirmed Wake County's denial of tax relief, but noted that it did not have the authority to act upon constitutional challenges to tax statutes. Springmoor and Ammons filed timely notice of appeal to the Court of Appeals and excepted to the Commission's order on the ground that N.C.G.S. § 105-275(32)(v) is unconstitutional. Wake County cross-assigned error, asserting that the Commission's order denying the tax exclusion is sustainable on the basis that the entire statutory provision N.C.G.S. § 105-275(32) is unconstitutional.

The Court of Appeals concluded that N.C.G.S. § 105-275(32)(v) violates the prohibition against the establishment of religion found in Article I, Section 13 of the North Carolina Constitution and the Establishment Clause of the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment. The Court of Appeals applied the doctrine of severability, however, and allowed the remaining provisions of N.C.G.S. § 105-275(32) to stand.

N.C.G.S. § 105-275 is entitled "Property classified and excluded from the tax base." The constitutional challenge in this case is solely against N.C.G.S. § 105-275(32) and, more specifically, subpart (v) of that subsection. N.C.G.S. § 105-275(32) provides that the following property "shall not be listed, appraised, assessed, or taxed":

> Real and personal property owned by a home for the aged, sick, or infirm, that is exempt from tax under Article 4 of this Chapter, and used in the operation of that home. The term "home for the aged, sick, or infirm" means a self-contained community that (i) is designed for elderly residents; (ii) operates a skilled nursing facility, an intermediate care facility, or a home for the aged; (iii) includes residential dwelling units, recreational facilities, and service facilities; (iv) the charter of which provides that in the event of dissolution, its assets will revert or be conveyed to an entity organized exclusively for charitable, educational, scientific, or religious purposes, and which qualifies as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986; *(v) is owned, operated, and managed by one of the following entities:*

a. A congregation, parish, mission, synagogue, temple, or similar local unit of a church or religious body;

b. A conference, association, division, presbytery, diocese, district, synod, or similar unit of a church or religious body;

c. A Masonic organization whose property is excluded from taxation pursuant to G.S. 105-275(18); or

d. A nonprofit corporation governed by a board of directors at least a majority of whose members elected for terms commencing on or before December 31, 1987, shall have been elected or confirmed by, and all of whose members elected for terms commencing after December 31, 1987, shall be selected by, one or more entities described in A., B., or C. of this subdivision, or organized for a religious purpose as defined in G.S. 105-278.3(d)(1); and

(vi) has an active program to generate funds through one or more sources, such as gifts, grants, trusts, bequests, endowment, or an annual giving program, to assist the home in serving persons who might not be able to reside at the home without financial assistance or subsidy.

N.C.G.S. § 105-275(32) (1997) (emphasis added). Under this statute, a "home for the aged, sick, or infirm" "shall not be listed, appraised, assessed, or taxed," meaning that it is excluded from the tax base. In order to be excluded from the tax base, such a home for the aged, sick, or infirm, under subpart (v) of N.C.G.S. § 105-275(32), must be owned, operated, and managed by a religious or Masonic organization, in addition to meeting the other requirements of subsection (32).

Both Wake County, appellant in this case, and Ammons and Springmoor, appellees, contend that subpart (v) of N.C.G.S. § 105-275(32) constitutes a law respecting an establishment of religion. For this reason, this Court, on 16 October 1997, instructed the Attorney General to file a brief, pursuant to N.C.G.S. § 1-260, addressing the constitutionality of N.C.G.S. § 105-275(32). The Attorney General filed a brief, on 17 November 1997, taking the position that N.C.G.S. § 105-275(32) is unconstitutional. However, a group of continuing-care homes for the elderly which are owned and operated by churches argues as *amicus curiae* in this case that N.C.G.S. § 105-275(32) is constitutional. Because we do not lightly strike down

an enactment of the General Assembly, we address the issue of constitutionality.

Article I, Section 13 of the North Carolina Constitution guarantees that

> [a]ll persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

N.C. Const. art. I, § 13. Article I, Section 19 guarantees that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of . . . religion." N.C. Const. art I, § 19. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

This Court has previously stated that "[t]aken together, these provisions . . . coalesce into a singular guarantee of freedom of religious profession and worship, '*as well as an equally firmly established separation of church and state.*' " *Heritage Village Church & Missionary Fellowship, Inc. v. North Carolina*, 299 N.C. 399, 406, 263 S.E.2d 726, 730 (1980) (quoting *Braswell v. Purser*, 282 N.C. 388, 393, 193 S.E.2d 90, 93 (1972)) (emphasis added). "Stated simply, the constitutional mandate is one of secular neutrality toward religion." *Id.* We have recognized that while the religion clauses of the state and federal Constitutions are not identical, they secure similar rights and demand the same neutrality on the part of the State. *Id.* at 406 n.1, 263 S.E.2d at 730 n.1. Thus, we may utilize Establishment Clause jurisprudence to examine legislation for "aspects of religious partiality" prohibited by both constitutions. *Id.* at 406, 263 S.E.2d at 730.

Amicus curiae homes contend that N.C.G.S. § 105-275(32) does not breach the required separation of church and state and that the Court of Appeals erred in holding otherwise. They rely on *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 25 L. Ed. 2d 697 (1970), which held that a New York statute granting tax exemptions to religious organizations for property used solely for religious worship did not violate the religion clauses of the First Amendment. The United States Supreme Court explained that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the

church support the state." *Id.* at 675, 25 L. Ed. 2d at 705. However, we conclude that *Walz* does not control the outcome of this case because N.C.G.S. § 105-275(32) differs in purpose, function, and constitutional authority from the statute analyzed and upheld in *Walz*.

The New York statute at issue in *Walz* provided in pertinent part:

> "Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

Id. at 667 n.1, 25 L. Ed. 2d at 700 n.1 (quoting N.Y. Real Prop. Tax Law § 420(1)) (alterations in original).

The authority for granting these property tax exemptions was a provision of the New York Constitution which stated in relevant part:

> "Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

Id. at 666-67, 25 L. Ed. 2d at 700 (quoting N.Y. Const. art. 16, § 1).

Central to the Supreme Court's holding in *Walz* was that New York had "not singled out one particular church or religious group or even churches as such; rather, it ha[d] granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations." *Id.* at 673, 25 L. Ed. 2d at 703-04. The Court therefore found that the tax exemption for houses of worship "simply spare[d] the exercise of religion from the burden of property taxation levied on private profit institutions." *Id.* at 673, 25 L. Ed. 2d at 704.

North Carolina has similar constitutional and statutory provisions that allow the General Assembly to exempt from property tax properties used for religious purposes. Article V, Section 2(3) of the North Carolina Constitution reads in relevant part:

> *Exemptions.* Property belonging to the State, counties, and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes . . . . Every exemption shall be on a State-wide basis and shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

N.C. Const. art. V, § 2(3). Under this authority, the General Assembly has enacted the following statutory tax exemptions: N.C.G.S. §§ 105-278.2(a) (burial property), -278.3 (real and personal property used for religious purposes), -278.4 (real and personal property used for educational purposes), -278.5 (real and personal property of religious educational assemblies used for religious and educational purposes), -278.6 (real and personal property used for charitable purposes), -278.7 (real and personal property used for educational, scientific, literary, or charitable purposes), and -287.8 (real and personal property used for charitable hospital purposes). These statutes require whole and exclusive use of the property for the constitutionally authorized purpose and disallow the exemption to the extent that any part of the property is used for other purposes.

This group of statutes, like the statute challenged in *Walz*, exempts from taxation a broad range of property based upon usage. It is not challenged that the North Carolina property tax exemption equivalent to that challenged in *Walz*, N.C.G.S. § 105-278.3 (1997), is constitutional under the analysis used by the United States Supreme Court in *Walz*. Religious organizations whose property is *used exclusively for religious or other constitutionally authorized purposes* may share in the benefit bestowed upon other groups which the State has determined have a "beneficial and stabilizing influence[] in community life." *Walz*, 397 U.S. at 673, 25 L. Ed. 2d at 704. Indeed, all of the fifty states have similar tax exemptions for property used for religious purposes. *See id.* at 676, 25 L. Ed. 2d at 705; *see also* John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 Cumb. L. Rev. 521, 547 (1992). Such tax exemptions constitute an acceptable accommodation of religion, which has been called "benevolent neutrality." *Walz*, 397 U.S. at 669, 25 L. Ed. 2d at 702. As the Court in *Walz* noted, tax exemption for *churches* "tends to complement and reinforce the desired separation" of church and state. *Id.* at 676, 25 L. Ed. 2d at 705.

However, the statute at issue in this case, N.C.G.S. § 105-275(32), is of an entirely different character from the one analyzed and upheld

in *Walz*. N.C.G.S. § 105-275 designates special classes of property that are excluded from the tax base and that "shall not be listed, appraised, assessed, or taxed." The constitutional authority for this statute is Article V, Section 2(2), which gives the General Assembly the power of "classification," as distinguished from "exemption." N.C.G.S. § 105-275. The relevant provision of Article V, Section 2(2) reads:

> *Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule . . . .

N.C. Const. art. V, § 2(2).

Under this authority, the General Assembly has enacted a broad range of classifications from tangible personal property imported and stored in the state for further shipment (subsection (2)) to computer software (subsection (40)). N.C.G.S. § 105-275. Included among these classifications is subsection (32), "property owned by a home for the aged, sick, or infirm." However, subsection (32) goes on to define such homes to include only those owned, operated, and managed by religious or Masonic organizations.

This statute's function is to describe a separate class of property for exclusion from the tax base, rather than to provide a tax exemption to religious organizations for property used for religious purposes. The relevant class of property at issue here is "property owned by a home for the aged, sick, or infirm." N.C.G.S. § 105-275(32). It is entirely appropriate to consider, in the context of determining whether this classification is proper, only the legislative treatment of all similarly situated nonprofit homes for the aged, sick, or infirm.

We conclude that our Court of Appeals correctly distinguished *Walz* from the instant case. As explained by the Court of Appeals:

> Unlike *Walz*, the broad classification of property addressed by the statute in question here is "[r]eal and personal property owned by a home for the aged, sick, or infirm, . . . and used in the operation of that home." G.S. 105-275(32). This broad classification, standing alone without further qualification, would undeniably be a constitutionally permissible classification. The alleged constitutional infirmity here arises because G.S. 105-275(32) distinguishes, within this class of "home[s] for the aged, sick and

> infirm," between those that are religiously affiliated and those that perform essentially the same functions but lack any religious affiliation, and G.S. 105-275(32) grants exemption to the former while denying exemption to the latter.

In re Springmoor, Inc., 125 N.C. App. 184, 191, 479 S.E.2d 795, 799 (1997) (alterations in original). We agree with the Court of Appeals that the classification drawn by N.C.G.S. § 105-275(32) is "narrowly divided so as to prefer religion over non-religion" and that there is "no legitimate secular objective sufficient to justify this preference." *Id.* (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17, 103 L. Ed. 2d 1, 14 (1989)).

Without question, the power to classify property for tax purposes belongs to the General Assembly. N.C. Const. art. V, § 2(2); *see, e.g., Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543, *appeal dismissed*, 368 U.S. 289, 7 L. Ed. 2d 336 (1961). However, the limitation upon this power of classification is that "it must be reasonable and not capricious or arbitrary." *Leonard v. Maxwell*, 216 N.C. 89, 93, 3 S.E.2d 316, 320, *appeal dismissed*, 308 U.S. 516, 84 L. Ed. 439 (1939). The classification must bear a " 'substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " *Id.* at 94, 3 S.E.2d at 321 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 64 L. Ed. 989, 990-91 (1920)); *see also In re Appeal of Martin*, 286 N.C. 66, 76, 209 S.E.2d 766, 773 (1974).

Clearly, promoting the safety and welfare of the aged and infirm is a legitimate, secular legislative purpose. *See In re Appeal of Barbour*, 112 N.C. App. 368, 379, 436 S.E.2d 169, 177 (1993); *Tripp v. Flaherty*, 27 N.C. App. 180, 185, 218 S.E.2d 709, 712 (1975). Appellees Springmoor and Ammons urge, and the Court of Appeals determined, that by enacting N.C.G.S. § 105-275(32) the General Assembly "clearly intended 'to promote communities for the elderly without giving a tax windfall to all residential property owners.' " *Springmoor*, 125 N.C. App. at 192, 479 S.E.2d at 800 (quoting *Barbour*, 112 N.C. App. at 378, 436 S.E.2d at 176). However, the case cited for this assertion, *In re Appeal of Barbour*, did not address the specific issue in controversy here. The Court of Appeals in *Barbour* specifically declined to address a constitutional challenge on the basis of discrimination against nonreligious, non-Masonic homes for the aged, sick, or infirm. *Barbour*, 112 N.C. App. at 374, 436 S.E.2d at 173-74. The court in *Barbour* merely held that N.C.G.S. § 105-275(32) was not uncon-

stitutionally discriminatory against individual residential property owners. *Id.* at 378, 380, 436 S.E.2d at 176, 177.

The classification made by N.C.G.S. § 105-275(32) is challenged in the instant case because it makes preferential tax treatment contingent upon religious (or Masonic) ownership, operation, and management. It treats similarly situated, but competing, communities for the elderly differently. On this basis, the parties, in addition to their Establishment Clause challenge, also contend that N.C.G.S. § 105-275(32) offends the uniformity and the "law of the land" clauses of the North Carolina Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. However, the Court of Appeals did not decide the case on this basis, and we likewise find it unnecessary to address this issue in order to decide this case.

The United States Supreme Court has decreed that "the *Lemon v. Kurtzman* 'tests' are intended to apply to laws affording a uniform benefit to *all* religions." *Larson v. Valente*, 456 U.S. 228, 252, 72 L. Ed. 2d 33, 52-53 (1982) (referring to the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745 (1971), but applying strict scrutiny to laws which discriminate among religions or denominations). In this case, the classification made by N.C.G.S. § 105-275(32) affords "a uniform benefit" to all religious organizations which undertake to operate a home for the aged, sick, or infirm. Thus, the appropriate mode of analysis is an Establishment Clause inquiry, which utilizes the *Lemon* tests.

The *Lemon* requirements are that: (1) the law must serve a secular legislative purpose, (2) the principal or primary effect of the law must be one that neither advances nor inhibits religion, and (3) the law must not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13, 29 L. Ed. 2d at 755; *see also Heritage Village Church*, 299 N.C. at 407-08, 263 S.E.2d at 731. We conclude that because N.C.G.S. § 105-275(32) excludes from property tax only those homes for the elderly that are owned and operated by religious or Masonic entities, while denying a similar benefit to identically situated secular homes, it has the "principal or primary effect" of advancing religion in violation of the second prong of the *Lemon* test.

In *Texas Monthly*, 489 U.S. 1, 103 L. Ed. 2d 1, the United States Supreme Court struck down, as a violation of the Establishment Clause, a sales tax exemption for religious publications where other

publications were subject to the tax. The Court stated that "the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or *of religion generally.*" *Id.* at 8, 103 L. Ed. 2d at 9 (emphasis added). N.C.G.S. § 105-275(32) impermissibly creates the same sort of specialized tax treatment based upon religious affiliation. This Court has likewise stated that the legislature "oversteps the bounds of [the] separation [of church and state] when it enacts a regulatory scheme which, whether in purpose, substantive effect, or administrative procedure, tends . . . to 'discriminate' along religious lines." *Heritage Village Church*, 299 N.C. at 406, 263 S.E.2d at 730. The property tax exclusion at issue here "discriminates" on its face in favor of religious organizations.

We recognize that "[i]t does not follow, of course, that government policies with secular objectives may not incidentally benefit religion." *Texas Monthly*, 489 U.S. at 10, 103 L. Ed. 2d at 10. However, while N.C.G.S. § 105-275(32) arguably has the objective of promoting and encouraging homes for the aged, sick, or infirm, it goes beyond "incidentally benefitting" those homes which are religiously owned and operated. Religiously affiliated homes are singled out for a tax benefit denied to others that are similarly capable of carrying out the secular objectives which the State may wish to encourage.

Religiously and Masonically affiliated organizations may indeed have a "long and proud history" of providing housing for the elderly. However, this is an insufficient basis upon which to confer a tax benefit that amounts to a "subsidy" to these homes, without providing a similar benefit to other organizations that desire to provide housing and care for the aged and that meet all of the statute's other requirements. *See id.* at 14, 103 L. Ed. 2d at 13 ("Every tax exemption constitutes a subsidy that affects non-qualifying taxpayers, forcing them to become 'indirect and vicarious "donors." ' " (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 591, 76 L. Ed. 2d 157, 173 (1983))). To exclude from the tax base property owned only by religious (and Masonic) organizations which are carrying out this function " 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community." *Id.* at 15, 103 L. Ed. 2d at 13 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348, 97 L. Ed. 2d 273, 290-91 (1987) (O'Connor, J., concurring)).

To put this case in perspective, it is helpful to examine a decision of the Florida Supreme Court when it was faced with a converse situation. A Florida statute provided a tax exemption for

> "[a]ll property, real and personal, of any bona fide home for the aged, licensed by the state board of health, owned and operated by Florida corporations not for profit, which has been and is currently exempt from the payment of taxes to the United States . . . and used by such home for the aged for the purposes for which it was organized. . . ."

Johnson v. Presbyterian Homes of Synod of Florida, Inc., 239 So. 2d 256, 258 (Fla. 1970) (quoting Fla. Stat. Ann. § 192.06(14)(a) (1967)). The defendant tax collectors contended that the statute was unconstitutional as applied to homes for the aged owned by religious organizations. In upholding the tax exemption, the Florida Supreme Court stated:

> It is apparent that [the statute] was enacted to promote the general welfare through encouraging the establishment of homes for the aged and not to favor religion, *since it is not limited to homes for the aged maintained by religious groups*, but applies to any which are owned and operated in compliance with the terms of the statute by Florida corporations not for profit. Under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose.

Id. at 261 (emphasis added).

Unlike the Florida case, North Carolina's statute excludes from taxation not *all* bona fide nonprofit homes for the aged but only homes for the aged owned by religious or Masonic bodies. The tax benefit bestowed on religious entities by N.C.G.S. § 105-275(32) is not "merely incidental," but rather is an exclusive benefit denied to other similarly situated nonprofit homes for the aged. To differentiate between those homes for the elderly which are religiously affiliated and those which are not so affiliated, in this case, results in the favoring of the religious over the secular.

For the foregoing reasons, we agree with the Court of Appeals that N.C.G.S. § 105-275(32)(v) "violates the constitutional prohibition against the establishment of religion as found in both the federal and [s]tate constitutions." *Springmoor*, 125 N.C. App. at 190, 479 S.E.2d at 799.

We now address the issue of severability. While the Court of Appeals correctly stated the doctrine of severability, we do not agree with its application in this case. When determining whether an unconstitutional portion of a statute may be severed and the remainder of the statute enforced, we look to the intent of the General Assembly. *Fulton Corp. v. Faulkner*, 345 N.C. 419, 421, 481 S.E.2d 8, 9 (1997). Courts may sever unconstitutional portions of statutes when consistent with the legislature's intended goal and when the remaining portions of the statute are " 'sufficient to accomplish their proper purpose.' " *State v. Fredell*, 283 N.C. 242, 245, 195 S.E.2d 300, 302 (1973) (quoting 16 Am. Jur. 2d *Constitutional Law* § § 181-182 (1964)). However, where the unconstitutional portion of a statute " 'is of such import that the other sections without it would cause results not contemplated or desired by the [l]egislature, then the entire statute must be held inoperative.' " *American Exch. Nat'l Bank v. Lacy*, 188 N.C. 25, 28, 123 S.E. 475, 476 (1924) (quoting *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565, 46 L. Ed. 679, 692 (1902)). Thus, severance may be applied to save the remainder of a statute "if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone." *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 168, 166 S.E.2d 78, 87 (1969). The inclusion of a severability clause within a statute will be interpreted as a clear statement of legislative intent to strike an unconstitutional provision and to allow the balance to be enforced independently. *Fulton Corp.*, 345 N.C. at 422, 481 S.E.2d at 9.

Thus, our inquiry is not only whether the unconstitutional provision may be severed leaving a statute which is capable of enforcement, but also whether enforcement of the remainder, minus the offending provision, would be true to the legislative intent. We conclude that subpart (v), which sets out the requirement of religious or Masonic affiliation, is an integral part of the definition of a qualifying "home for the aged, sick, or infirm" contained in N.C.G.S. § 105-275(32) and may not be severed.

The Act was passed under the title "An Act to Classify Property Owned by Certain Nonprofit Homes for the Aged, Sick or Infirm and Exclude this Property from Taxation." Act of June 12, 1987, ch. 356, 1987 N.C. Sess. Laws 461. The language and title of the Act clearly indicate the General Assembly's intent to make this tax exclusion available only to certain rest homes, those which meet all six of the enumerated requirements. We note that homes for the aged, sick, or

infirm that own property used exclusively for "charitable" purposes qualify for a tax exemption under N.C.G.S. § 105-278.6(a)(2). Indeed, the Court of Appeals has pointed out that N.C.G.S. § 105-275(32) was enacted to grant tax-exempt status to certain communities which had lost their status as charitable as a result of a series of earlier Court of Appeals' decisions. *Barbour*, 112 N.C. App. at 378-79, 436 S.E.2d at 176-77. We conclude that the General Assembly carefully crafted the specific definition of a qualifying "home for the aged, sick, or infirm" found in N.C.G.S. § 105-275(32) and that it intended every element of the definition to be operative. We find no evidence that the General Assembly intended, by enacting this subsection, to provide a blanket exclusion for all nonprofit homes for the elderly. However, nothing in this opinion should be taken as suggesting that the General Assembly may not, in its wisdom, enact such an exclusion.

We further note that the approach taken by the Court of Appeals has the effect of broadening the tax exclusion. It has long been established that

> "[i]f by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part."

Keith v. Lockhart, 171 N.C. 451, 458, 88 S.E. 640, 643 (1916) (holding that a discriminatory provision of a tax levy could not be severed) (quoting 1 J.G. Sutherland, *Statutes and Statutory Construction* § 306, at 597 (John Lewis ed., 2d ed. 1904)).

Finally, while the absence of a severability clause is not necessarily conclusive, it does provide evidence of legislative intent. *Cf. Fulton Corp.*, 345 N.C. at 422-24, 481 S.E.2d at 9-10 (holding that the presence of a severability clause demonstrated legislative intent). The General Assembly did not include a severability clause within N.C.G.S. § 105-275(32), nor is there any language within this subsection which would indicate an intent to allow the severance of any element from the definition of a "home for the aged, sick, or infirm." Therefore, we conclude that subpart (v) of N.C.G.S. § 105-275(32) may not be severed and that the entire subsection must fail.

Because we determine that the General Assembly did not intend to provide a blanket exclusion for all nonprofit homes for the elderly and that the Court of Appeals thus erred in severing subpart (v) from

N.C.G.S. § 105-275(32), we find it unnecessary to address the issue of whether severance was proper under Article V, Section 2 of the North Carolina Constitution.

For the foregoing reasons, we hold that N.C.G.S. § 105-275(32) is unconstitutional and that severance of the offending subpart (v) is not permissible.

AFFIRMED IN PART, REVERSED IN PART.

Justice LAKE dissenting.

The effective result of the majority's opinion, ensconced in the Establishment Clause, is to hold that the granting of a tax exemption to entities which do wholly secular work amounts to an unconstitutional state establishment of religion merely because *some* of them may be overseen by religious organizations. I must respectfully dissent for several reasons. First, such an interpretation of the Establishment Clause travels so far beyond its original purpose that it strains credulity. Second, even under current Establishment Clause jurisprudence, the tax exemption at issue in this case passes constitutional scrutiny. Finally, to the extent the parties in this case may raise a legitimate constitutional question, such claim would lie properly within the realm of Equal Protection and Due Process jurisprudence, not Establishment Clause jurisprudence.

An examination of the debates surrounding the adoption of the Establishment Clause, and the historical context within which it was framed, reveals that contrary to much popular belief, the founders were not opposed to but actually supported governmental aid to religion. The members of the First Congress, where the Bill of Rights was passed, were all too familiar with the established Church of England and the preferred position its members held in civic life. For these reasons, the First Congress sought to protect citizens of the new republic from the power of an established church and included in the First Amendment a prohibition against laws "respecting an establishment of religion." U.S. Const. amend. I.

This does not mean, however, that the authors of the Establishment Clause necessarily intended to prevent any state aid to religion or religiously affiliated groups. The debates over the adoption of the Establishment Clause reveal quite the contrary. The father of the Constitution himself, James Madison, opened the debates by preparing an amendment forbidding the establishment of "any

national religion." The House Select Committee worded Madison's proposal to read, "no religion shall be established by law." However, Benjamin Huntington of Connecticut objected on the grounds that such language might be construed as forbidding state laws that required contributions to support ministers and places of worship. Moreover, Huntington stated he was anxious to avoid any language that might "patronize those who professed no religion at all." 1 Abridgment of the Debates of Congress 137, 138 (15 August 1789). Similar concerns for the right of states to foster religion were raised and embodied in several different proposals for the Establishment Clause. For example, the Senate passed an amendment to the House version that would have only prohibited any law "establishing one religious sect or society in preference to others." The final version sent by the Senate to the House would have permitted the states and Congress to assist religious groups in various ways, so long as it was done on a nondiscriminatory basis. It read, "Congress shall make no law establishing articles of faith or a mode of worship." Further, when Peter Sylvester of New York objected to a version of the Establishment Clause because "it might be thought to have a tendency to abolish religion altogether," Madison replied that the language merely meant "Congress should not establish *a religion*, and enforce the legal observation of it by law." 1 Abridgment of the Debates of Congress 137 (emphasis added). The present language of the Establishment Clause was the result of a conference committee on which Madison served. It thus is clear that there was overwhelming support among the members of the First Congress for the ability of government to aid religion, albeit in a nondiscriminatory way, and that the language of the ratified Establishment Clause was intended to permit such assistance.

Many modernist and more trendy scholars and jurists have concluded that the drafters of the Establishment Clause sought to construct a high and impenetrable "wall of separation" against any state support or interaction with religion. In support of this contention, however, proponents of this view cite not the actual debates over the Establishment Clause, but primarily two outside sources, Madison's "Memorial and Remonstrance" and Thomas Jefferson's "An Act for Establishing Religious Freedom." *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 797, 132 L. Ed. 2d 650, 695 (1995) (Stevens, J., dissenting); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16, 91 L. Ed. 711, 723 (1947). However, Jefferson was not a member of the First Congress, and Madison's "Memorial" was not

written in reference to the First Amendment, but rather to a bill proposed in the Virginia legislature several years earlier that would have established funding for teachers of the Christian religion. In any event, the Establishment Clause was the product of a majority of members who plainly supported state aid of religion in general, and Madison participated in drafting a clause that allowed as much. Further, the same First Congress that passed the Establishment Clause also readopted, with Madison's approval, the Northwest Ordinance of 1787, of which the third article reads, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged." *See* Act of Aug. 7, 1789, Sess. I, ch. 8, 1 U.S. Statutes at Large 50 (an act to provide for the government of the territory northwest of the River Ohio). It hardly seems plausible that the same Congress which promoted religious and moral education by a territorial government under its federal authority could have intended the Establishment Clause to prevent any and all forms of assistance to religion.

With regard to modern Establishment Clause jurisprudence, perhaps the best that can be said is that it is far from being settled. For over 150 years after its passage, the Establishment Clause lay essentially dormant. It was not until 1947 in the case of *Everson*, 330 U.S. 1, 91 L. Ed. 711, that the current shape of Establishment Clause jurisprudence began to take form. After citing Madison's "Memorial and Remonstrance" and Jefferson's "An Act for Establishing Religious Freedom" for support, *id.* at 12-13, 91 L. Ed. at 721-22, the Court in *Everson* enunciated its frequently quoted interpretation of the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force [or] influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly,

participate in the affairs of any religious organizations or groups and vice versa.

Id. at 15-16, 91 L. Ed. at 723. In applying these principles, however, the Court went on to hold that a New Jersey program which used tax-raised funds to pay the bus fares of parochial school students did not violate the Establishment Clause. *Id.* at 17, 91 L. Ed. at 724.

In *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745 (1971), the Court sought to establish a test by which the principles of *Everson* could be applied in particular cases. Under the "three-part test" of *Lemon*, a statute must meet three criteria in order to survive scrutiny under the Establishment Clause: (1) the law must have a secular purpose, (2) its primary purpose or effect must neither advance nor inhibit religion, and (3) it must not foster excessive entanglement with religion. *Id.* at 612-13, 29 L. Ed. 2d at 755. The *Lemon* test has been applied fairly regularly since its enunciation, but it has come under substantial criticism by scholars and members of the Court alike for its less than clear or consistent application. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 636-40, 96 L. Ed. 2d 510, 553-56 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-13, 86 L. Ed. 2d 29, 76-80 (1985) (Rehnquist, J., dissenting); *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736, 768-69, 49 L. Ed. 2d 179, 200-01 (1976) (White, J., concurring in judgment).

In the course of this constant reexamination and reformulation, the Court has paid particularly close attention of late to the second prong of *Lemon*, whether the primary purpose or effect of a law is to advance or to inhibit religion. This has led to the "endorsement" and the "coercion" analyses. The endorsement test examines whether the primary purpose or effect of the law is to endorse, promote or favor religious belief. *County of Allegheny v. ACLU*, 492 U.S. 573, 593, 106 L. Ed. 2d 472, 494-95 (1989) (display of creche in courthouse endorsed religious belief); *Texas Monthly*, 489 U.S. at 17, 103 L. Ed. 2d at 14 (tax exemption limited to religious periodicals "effectively endorses religious belief"). The coercion inquiry focuses on whether the activity advances religion by coercing individuals into listening to or participating in religious beliefs. *Lee v. Weisman*, 505 U.S. 577, 599, 120 L. Ed. 2d 467, 488 (1992). However, Establishment Clause jurisprudence is less than clear as a result of these two additional tests, since they have suffered from much of the same criticisms as their forebears, the three-part test of *Lemon*. *See, e.g., id.* at 636-39, 120 L. Ed. 2d at 512-14 (Scalia, J., dissenting) (criticizing coer-

cion test); *Allegheny*, 492 U.S. at 655-63, 106 L. Ed. 2d at 535-40 (Kennedy, J., dissenting) (criticizing endorsement test).

In its most recent examination of the Establishment Clause, the Court has further muddied the *Lemon* waters by, in essence, collapsing the effects and entanglement prongs into a single test. *Agostini v. Felton*, — U.S. —, 138 L. Ed. 2d 391 (1997). This signals a return to an analysis applied by the Court prior to *Lemon* in the case of *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 25 L. Ed. 2d 697 (1970), discussed more fully *infra*. In *Agostini*, the Court recently stated:

> Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." Similarly, we have assessed a law's "effect" by examining the character of the institutions benefitted (*e.g.*, whether the religious institutions were "predominantly religious"), and the nature of the aid that the State provided (*e.g.*, whether it was neutral and nonideological). Indeed, in *Lemon* itself, the entanglement that the Court found "independently" to necessitate the program's invalidation also was found to have the effect of inhibiting religion. Thus, it is simplest to recognize why entanglement is significant and treat it— as we did in *Walz*— as an aspect of the inquiry into a statute's effect.
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> *Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause.*

Agostini, — U.S. at —, 138 L. Ed. 2d at 420 (citations omitted) (emphasis added). To the extent the Court's present analysis of the Establishment Clause can be distilled into a coherent framework, it appears the Court will undertake a two-part analysis. The first inquiry will be whether the state action has a secular purpose, and the second will be whether the primary purpose or effect of the state's action is to advance or inhibit religion. Among the factors to be considered in determining "effect" will be such things as entanglement, endorsement and coercion.

Notwithstanding the confused state of Establishment Clause jurisprudence, it seems clear that the statute at issue in the present case passes constitutional scrutiny for two primary reasons. First, I believe the Supreme Court's holding in *Walz* clearly controls the outcome of this case, and the majority's analysis reflects an unduly narrow application of the statute at issue to *Walz*. Second, I believe the majority's reliance on the second prong of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, as grounds for striking down the statute represents a misapplication of current Establishment Clause jurisprudence.

In *Walz*, the Supreme Court examined the constitutionality of a New York statute that in part granted religious organizations an exemption from real and personal property taxes. *Walz*, 397 U.S. at 666, 25 L. Ed. 2d at 700. The exemption was authorized by a provision in the New York Constitution which permitted the legislature to pass general laws exempting religious, educational or charitable nonprofit organizations from real or personal property taxes. *Id.* Pursuant to this authorization, the New York legislature enacted an exemption statute that

> includes churches *in a long list* of nonprofit organizations: for the moral or mental improvement of men and women (§ 420); for charitable, hospital, or educational purposes (ibid.); for playgrounds (ibid.); for scientific or literary objects (ibid.); for bar associations, medical societies, or libraries (ibid.); for patriotic and historical purposes (ibid.); for cemeteries (ibid.); for the enforcement of laws relating to children or animals (ibid.); for opera houses (§ 426); for fraternal organizations (§ 428); for academies of music (§ 434); for veterans' organizations (§ 452); for pharmaceutical societies (§ 472); and for dental societies (§ 474).

Id. at 707-08, 25 L. Ed. 2d at 723-24 (emphasis added). The Supreme Court held that such an exemption did not constitute a violation of the Establishment Clause of the First Amendment to the United States Constitution. *Id.* at 680, 25 L. Ed. 2d at 708.

In reaching this conclusion, the Supreme Court began its analysis by recognizing that to the framers of the First Amendment, and to their contemporaries, "the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity," as was the situation in England at the time of our Revolution. *Id.* at 668, 25 L. Ed. 2d at 701. More recently, the

Court noted, Establishment Clause jurisprudence has sought a position of neutrality toward religion. *Id.* at 668-69, 25 L. Ed. 2d at 701. " 'The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State,' " *id.* at 669, 25 L. Ed. 2d at 701 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312, 96 L. Ed. 954, 961 (1952)), and "the constitutional neutrality imposed on us 'is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation,' " *id.* (quoting *Sherbert v. Verner*, 374 U.S. 398, 422, 10 L. Ed. 2d 965, 981 (1963) (Harlan, J., dissenting)). Thus, the Court recognizes that a determination of whether the principle of neutrality has been obviated turns on whether a statute intends to, or has the effect of, either advancing or interfering with religious beliefs or practices. *Id.* at 669, 25 L. Ed. 2d at 702.

In so determining, however, the *Walz* Court concludes that "[t]he legislative purpose of a property *tax exemption* is *neither* the advancement nor the inhibition of religion; it is *neither* sponsorship nor hostility." *Id.* at 672, 25 L. Ed. 2d at 703 (emphasis added). The reasons the Court gives for this conclusion are several. First, governments have not always been tolerant of religious activity, and "[g]rants of *exemption* historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes." *Id.* at 673, 25 L. Ed. 2d at 704 (emphasis added). Another is the deeply rooted and long-established practice of providing tax exemptions for religious organizations. *Id.* at 676-78, 25 L. Ed. 2d at 705-07. As stated by Justice Brennan in his concurrence, "Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming." *Id.* at 681, 25 L. Ed. 2d at 709 (Brennan, J., concurring). The third, and arguably most important, reason given by the Court for its holding was that "New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes." *Id.* at 672, 25 L. Ed. 2d at 703. The Court then recognized that in so doing, the legislature had not singled out religious organizations, but had included them within a statute exempting a multitude of organizations it deemed as beneficial to the state. *Id.* at 672-73, 25 L. Ed. 2d at 703-04. Justice Brennan expanded on this concept in his concurrence by recognizing that "[g]overnment has *two basic secular purposes* for granting real property tax exemptions to religious

organizations." *Id.* at 687, 25 L. Ed. 2d at 712 (Brennan, J., concurring) (emphasis added).

> First, these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone to the detriment of the community. . . .
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> Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.

Id. at 687-89, 25 L. Ed. 2d at 712-13 (Brennan, J., concurring). "The very breadth of [New York's] scheme of exemptions negates any suggestion that the State intends to single out religious organizations for special preference." *Id.* at 689, 25 L. Ed. 2d at 713 (Brennan, J., concurring).

In the case *sub judice*, the situation is almost identical to that faced in *Walz*. Here, N.C.G.S. § 105-275(32) exempts from real and personal property taxation certain religiously or Masonically affiliated nonprofit continuing care facilities for the elderly. It is significant that subsection (32) does not favor any particular religion or denomination therein, nor does it favor religious groups alone, as Masonically affiliated homes for the elderly are also exempt. More importantly, subsection (32) is only one part of the much larger statutory exemption scheme of section 105-275 which, like the one in *Walz*, is authorized by our state Constitution. Also, like the statute in *Walz*, section 105-275 exempts from taxation a multitude of other secular organizations and activities.

Section 105-275 is entitled "Property classified and excluded from the tax base," and it provides, "The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2) of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed." N.C.G.S. § 105-275 (1997). The statute then proceeds to define in excess of thirty-two classes of property in

some forty subsections (several having been repealed) that are exempt from taxation. Included are such things as: tangible personal property that has been imported and is being stored in the state for further shipment (for the purpose of enhancing our ports) (subsection (2)); nonprofit water or sewer associations (subsection (3)); vehicles given to disabled veterans (subsection (5)); real and personal property for public parks (subsection (7)); real and personal property used for pollution control (subsection (8.a.)) and recycling (subsection (8.b.)); real property used for protected nature reserves (subsection (12)); real and personal property belonging to fraternal organizations such as the Masons (subsection (18)), Moose, and Elks (subsection (19)), or belonging to Goodwill Industries (subsection (20)); personal property held in a Foreign Trade Zone (subsection (23)); real property and easements held for historic preservation (subsections (29)-(30)); poultry and livestock feed (subsection (37)); and even computer software (subsection (40)). The inclusion here of a tax exemption for religiously affiliated homes for the elderly within a broad range of other secular beneficial organizations and activities is virtually indistinguishable from the situation and statute in *Walz*, where the United States Supreme Court emphatically found no violation of the Establishment Clause. It is abundantly clear that *Walz* should control this case.

The majority attempts to distinguish *Walz* on the ground that the "classification of property addressed by the statute in question here is '[r]eal and personal property owned by a home for the aged, sick, or infirm' " and that this is dissimilar from the "broad class of properties" at issue in *Walz*. *In re Springmoor, Inc.*, 348 N.C. 1, 8, 498 S.E.2d 177, 182 (1998). By this light brush, the majority totally overlooks the similarly broad sweep and purpose of section 105-275 and severely restricts, as with blinders, the scope of the Court's inquiry to examine only the favoring of religiously affiliated homes for the elderly and not the broad secular purpose of the statute as a whole. What the majority fails to realize is that the appellants in *Walz* also attempted a similar tack and did not succeed. In discussing the broad secular purposes behind the exemption statute in *Walz*, Justice Brennan noted that "[a]ppellant seeks to avoid the force of this secular purpose of the exemptions by *limiting* his challenge to 'exemptions from real property taxation to religious organizations on real property used exclusively for religious purposes.' " *Walz*, 397 U.S. at 688, 25 L. Ed. 2d at 712 (Brennan, J., concurring) (emphasis added). In the instant case, it is inappropriate, if not implausible, to separate out subsection (32) and consider its constitutionality in isolation. In

fact, subsection (32) has no meaning or effect when considered in isolation. Subsection (32) is merely one subsection among many that simply define, within the overall purpose, the classes of property exempted by the general exemption authorization language of section 105-275.

The majority attempts to distinguish this case from *Walz* on the ground that Article V, Section 2(2) of the North Carolina Constitution "gives the General Assembly the power of 'classification,' as distinguished from 'exemption,' " and therefore "[t]his statute's function is to describe a separate class of property for exclusion from the tax base, rather than to provide a tax exemption to religious organizations for property used for religious purposes." *Springmoor*, 348 N.C. at 8, 498 S.E.2d at 181-82. This seems to me to be a distinction without a difference. The power of exemption *is* the power to classify things for exclusion from taxation. Further, the Court's decision in *Walz* did not rest on state constitutional granting power, but rather on the broad classification of properties and organizations in the *statute itself*.

When subsection (32) is properly considered within the larger statutory structure and purpose of section 105-275, two things are evident. First, subsection (32) is just one of many classes of property, and the only class of a religious character, that has been exempted from property taxation by the legislature under the authority of our state Constitution. Second, and more important, subsection (32) is but one class among a broad class of properties and activities whose purpose for exemption is the general and secular benefit of the state at large, whether it be commerce, parks, fraternal organizations or housing for the elderly. These considerations bring the statute at issue squarely within the reasoning of the Supreme Court in *Walz*.

The majority next cursorily concludes that there is "no legitimate secular objective sufficient to justify" the tax exemption for only religiously and Masonically affiliated homes. *Springmoor*, 348 N.C. at 9, 498 S.E.2d at 182. This ignores the "two basic secular purposes for granting real property tax exemptions to religious organizations" as stated in *Walz*: (1) the contribution of religious organizations to the community in nonreligious ways, and (2) their contribution to the pluralism of American society. *Walz*, 397 U.S. at 687, 25 L. Ed. 2d at 712 (Brennan, J., concurring). These two purposes are plainly evident in the case *sub judice*. Religiously and Masonically affiliated organizations have a long and proud history of providing housing for the

elderly in North Carolina. In fact, the legislature's denomination of religious and Masonic homes as those qualifying for exemption was an explicit recognition of the prominent past and present work done by these two specific classifications of organizations in the housing of the elderly. As the Supreme Court recently noted, "Justice Holmes' aphorism that 'a page of history is worth a volume of logic' applies with particular force to our Establishment Clause jurisprudence." *Weisman*, 505 U.S. at 632, 120 L. Ed. 2d at 510 (Scalia, J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 65 L. Ed. 963, 983 (1921)). Providing housing that would otherwise have to be provided by the government is an important secular role that gains importance daily in this era of shrinking government funding. Further, the ability of religious and Masonic organizations to provide housing to the elderly in faith-based or ideal-based environments substantially contributes to the "diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society," and does so in ways not possible by other public or private homes for the elderly. *Walz*, 397 U.S. at 689, 25 L. Ed. 2d at 713 (Brennan, J., concurring). These secular purposes for the exemptions found in subsection (32) bring the statute squarely within the constitutional parameters of *Walz*. *See also Texas Monthly*, 489 U.S. at 10, 103 L. Ed. 2d at 10 (the Supreme "Court has *never* required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals *merely because* they would thereby relieve religious groups of costs they would otherwise incur") (emphasis added).

The majority next holds that subsection (32) violates the second prong of the *Lemon* test. This is based on the conclusion that, "because [the subsection] excludes from property tax only those homes for the elderly which are owned and operated by religious or Masonic entities, while denying a similar benefit to identically situated secular homes," the subsection has the primary effect of advancing religion. *Springmoor*, 348 N.C. at 10, 498 S.E.2d at 183. This conclusion is at odds with *Walz* and the Supreme Court's more recent pronouncements in this regard. The Supreme Court has consistently held that tax exemptions do not have the primary effect of advancing religion. In *Walz*, Justice Brennan recognized that tax exemptions are "qualitatively different" from tax subsidies because they "[assist] the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes." *Walz*, 397 U.S. at 690, 25 L. Ed. 2d at 713-14 (Brennan, J., con-

curring). While, as the *Walz* Court noted, "[g]ranting tax exemptions . . . necessarily operates to afford an indirect economic benefit[,] . . . [t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 674-75, 25 L. Ed. 2d at 705. The Supreme Court recently reaffirmed the *Walz* Court's finding of a "constitutionally significant difference between subsidies and tax exemptions." *Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, — U.S. —, —, 137 L. Ed. 2d 852, 873-74 (1997). To reiterate, the exemption of religious organizations from taxes is neither advancement nor sponsorship of religion. *Walz*, 397 U.S. at 672, 25 L. Ed. 2d at 703. It is thus inconceivable to me just how the granting of such an exemption, especially such a denominationally neutral and secularly goal-oriented one as we have here, can have the primary effect of advancing religion in violation of the second prong of *Lemon*.

Moreover, the majority misapprehends the proper focus of the effects test. Recent Court decisions make it clear that, in order to fail the effects test, a state law or action must have the primary purpose or effect of advancing religious *beliefs*, not just religion or religious groups. This is evident from a comparison of recent applications of the Establishment Clause. In *Agostini*, the Supreme Court overturned its own earlier decision and held that a program for providing public remedial education teachers in parochial schools did not violate the Establishment Clause. The Court's primary reasoning was that there was no concern the public teachers would "indoctrinate" the students with religious beliefs. *Agostini*, — U.S. at —, 138 L. Ed. 2d at 414-16. Likewise, in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 125 L. Ed. 2d 1 (1993), the Court upheld the public provision of sign-language interpreters accompanying deaf students at parochial schools on the ground that the interpreters were not likely to indoctrinate the students with religious ideas. In *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 104 L. Ed. 2d 766 (1989), the Court upheld section 170 of the Internal Revenue Code, which allows deductions for contributions to religious organizations, on the ground that the primary effect of section 170 is to encourage gifts to charitable organizations, not to advance religious beliefs.

In comparison, the Court's recent holdings that find violations of the Establishment Clause involve the promotion of religious beliefs by the state. In *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 129 L. Ed. 2d 546 (1994), the Court struck down

the drawing of school district lines to coincide with an almost exclusively Hasidic Jewish community in part on the ground that it impermissibly advanced the religious ideas of one specific religious sect. In *Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, the Court held that a graduation prayer impermissibly supported religious belief by coercing students to listen to a religious message. Similarly, in *County of Allegheny v. ACLU*, 492 U.S. 573, 106 L. Ed. 2d 472, the Court struck down the erection of a creche in a courthouse on the ground that it endorsed the particular religious message conveyed therein. Finally, in *Texas Monthly*, 489 U.S. 1, 103 L. Ed. 2d 1, a case cited as authority by the majority, the Court struck down a tax exemption exclusively for periodicals that promulgated teachings of religious faith because the exemption impermissibly supported religious belief.

What distinguishes those cases held not to have the "effect" of advancing religion from those that do is that the former deal with state action that benefits religion only secondarily, while the latter deal with state action promoting a particular religious belief or religious beliefs as a whole. In the case *sub judice*, the primary purpose and effect of the statute is to promote housing for the elderly, *not* to advance any religious beliefs held by the groups overseeing the homes. The majority points to no evidence that state indoctrination of religion is taking place in these facilities, or that the residents are being coerced by the state to listen to religious or Masonic messages. It cannot be seriously contended that the state, by this statutory scheme, is endorsing any religious, Masonic or other belief by the exemption here involved any more than it does by exempting the Elks, Moose or other fraternal organizations. The granting of a property tax exemption, especially for a secular activity, simply does not even approach the same implication of state endorsement of religious belief that could be inferred by the official placing of a religious symbol on a city seal or in a courthouse.

Finally, to the extent the parties in this case *might* have a cognizable claim, it properly lies within the purview of the Equal Protection and Due Process Clauses, not the Establishment Clause. The majority's primary "bone of contention," as well as its reason for finding the "effect" of advancing religion, is that religiously and Masonically affiliated homes for the elderly are granted exemptions while other similarly situated homes are not. This obviously arises out of the majority's reading of Supreme Court cases requiring the state to show "neutrality" toward religion. *Springmoor*, 348 N.C. at 5, 498 S.E.2d at 180. However, neutrality in this context does not

mean completely ignoring or severing all ties with religion, as the cases referenced above illustrate. As Justice Goldberg recognized in *School Dist. of Abington v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844 (1963),

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Id. at 306, 10 L. Ed. 2d at 905-06 (Goldberg, J., concurring). So long as the state does not act with the primary purpose or effect of advancing religious belief, it does not run afoul of the Establishment Clause even though it may obliquely aid religion in general in some way that it does not aid secular persuasions. Claims seeking redress for apparent inequalities in state treatment belong within the Equal Protection and Due Process guarantees. Neither the Court of Appeals nor the majority addressed this issue, and it therefore is beyond the scope of this dissent to do so.

Because this decision extends well beyond the original meaning and purpose of the Establishment Clause, and since we are dealing here with a tax exemption which is part of a statute designed to encourage a broad class of organizations and activities whose overall purposes are secular, I cannot sanction the majority's finding of an Establishment Clause violation. As Justice Brennan stated, "I must conclude that the exemptions do not 'serve the *essentially religious activities* of religious institutions.' Their principal effect is to carry out *secular purposes*—the encouragement of public service activities and of a pluralistic society." *Walz*, 397 U.S. at 692, 25 L. Ed. 2d at 715 (Brennan, J., concurring) (emphasis added). The exemption at issue comports with the principles established in *Walz*, *Lemon* and *Lemon's* progeny, and the Court of Appeals should be reversed.

The majority opinion correctly states that "we do not lightly strike down an enactment of the General Assembly," and we should not do so in this instance, with this important part of the taxing scheme of this state, especially upon a false premise.

Justices Parker and Orr join in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOSEPH EARL BATES

No. 145A91-3

(Filed 3 April 1998)

1. Criminal Law § 112 (NCI4th Rev.)— capital post-conviction review—discovery of State's files—work product included

The trial court did not err by ordering that a capital defendant have available to him in the post-conviction review process the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes or prosecution of defendant, including files regarding the prosecution of codefendants. Although the State contends that it is not required to disclose work product, case law applying the work-product privilege to pretrial discovery and statutes governing pretrial discovery in criminal cases do not control the interpretation or application of N.C.G.S. § 15A-1415(f), which contains no express provision for withholding work product. The phrase "to the extent allowed by law" allows the State to exclude only specific types of information which the State is elsewhere prohibited by law from disclosing and nothing in existing law prohibits disclosure to a defendant of the State's complete files, including work-product materials.

2. Criminal Law § 98 (NCI4th Rev.)— capital post-conviction review—discovery of all investigative and prosecution files—general discovery rules not applicable

The only mechanism by which the State may withhold any portion of its complete files on post-conviction capital review, apart from information which it is not allowed by law to disclose, is contained within N.C.G.S. § 15A-1415(f). The general rule governing pretrial discovery is not applicable to that statute because its clear language demands disclosure in post-conviction proceedings. The argument that organizing and producing work product in a capital case would be onerous and time-consuming is unpersuasive, as the effort to remove all work-product materials prior to making files available would be equally time consuming, and allowing the State to unilaterally purge its files of work-product materials would render meaningless the provisions in the statute for *in camera* review by the court. Although the State contends that disclosure of work product will have a

chilling effect on the preparation of capital cases, the clear and unambiguous meaning of the statute contemplates disclosure of the complete files and this argument only challenges the wisdom of the enactment. Finally, the broad and complete discovery required by this statute logically fits into a statutory scheme to expedite the post-conviction process by providing early and full disclosure to counsel for capital defendants so that they may raise all potential claims in a single motion for capital relief.

3. Criminal Law § 98 (NCI4th Rev.)— capital post-conviction review—discovery of all investigation and prosecution files—agencies not served

The trial court did not lack jurisdiction on a capital post-conviction motion for discovery to order discovery from independent constitutional agencies not represented by that district attorney where the court ordered disclosure of the complete files of all prosecutorial and investigatory agencies involved in the investigation of the crimes or the prosecution of defendant, irrespective of prosecutorial districts and including files from the SBI and other counties' sheriffs' departments. Although the State contended that the various sheriffs' departments and the SBI were not served with the motion for discovery or otherwise notified of the hearing and that service upon the district attorney and the Attorney General is insufficient to confer jurisdiction over these independent constitutional agencies, there is no statutory requirement to serve each entity which holds material subject to disclosure under N.C.G.S. § 15A-1415(f) and the State has not presented compelling evidence to justify individual service in this case, although, as a matter of practicality, it may be advisable to do so in some circumstances.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 13 June 1997 by Morgan (Melzer A., Jr.), J., in Superior Court, Yadkin County, granting defendant's motion for discovery under N.C.G.S. § 15A-1415(f). Heard in the Supreme Court 16 December 1997.

Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State-appellant.

Walter K. Burton and David K. Williams, Jr., for defendant-appellee.

FRYE, Justice.

On 21 June 1996, the General Assembly ratified "An Act to Expedite the Postconviction Process in North Carolina." Ch. 719, 1995 N.C. Sess. Laws 389, 397. Among other things, the Act amended N.C.G.S. § 15A-1415 to add this new subsection:

> (f) In the case of a defendant who has been convicted of a capital offense and sentenced to death, the defendant's prior trial or appellate counsel shall make available to the capital defendant's counsel their complete files relating to the case of the defendant. The State, to the extent allowed by law, shall make available to the capital defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel for the capital defendant would not be in the interest of justice, the State may submit for inspection by the court those portions of the files so identified. If upon examination of the files, the court finds that the files could not assist the capital defendant in investigating, preparing, or presenting a motion for appropriate relief, the court in its discretion may allow the State to withhold that portion of the files.

N.C.G.S. § 15A-1415(f) (1997).

The sole question presented here is the extent of disclosure of prosecution and law enforcement investigative files mandated by N.C.G.S. § 15A-1415(f). We emphasize at the outset that N.C.G.S. § 15A-1415(f) applies only to the post-conviction process and only to defendants who have been convicted of a capital crime and sentenced to death.

Defendant, Joseph Earl Bates, was indicted on 29 October 1990 for the kidnapping and murder of Charles Edwin Jenkins. He was tried capitally in February 1991, found guilty on one count of first-degree murder and one count of first-degree kidnapping, and sentenced to death for the murder conviction. On appeal, this Court found error and ordered a new trial. *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693, *cert. denied*, 510 U.S. 984, 126 L. Ed. 2d 438 (1993). Defendant was retried capitally in October 1994 and was found guilty on one count of first-degree kidnapping and one count of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. The jury again recommended, and the trial court

imposed, a sentence of death. On appeal, this Court found no error. *State v. Bates*, 343 N.C. 564, 473 S.E.2d 269 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 873 (1997). For the purpose of reviewing the issue presented here, it is unnecessary to further recite the circumstances of the crimes or the evidence presented at defendant's two trials.

On 10 April 1997, Judge Melzer A. Morgan appointed defendant's present counsel to represent defendant in post-conviction proceedings. On 1 May 1997, defendant's counsel filed a motion for discovery of all investigative and prosecution files pursuant to N.C.G.S. § 15A-1415(f); Article I, Sections 19 and 23 of the North Carolina Constitution; and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The State filed a response in opposition to this motion, arguing that the qualifying language in N.C.G.S. § 15A-1415(f), "to the extent allowed by law," manifested a legislative intent to require disclosure, upon request, only of evidence favorable to a defendant and did not require the disclosure of all investigative files. The State also argued that this language shielded from discovery the work product of the attorney for the State and his agents.

Following a hearing on defendant's motion and arguments by the parties, Judge Morgan entered an order on 13 June 1997 that contained the following findings of fact and conclusions of law:

> 1) That the North Carolina General Assembly recently enacted revisions to the post conviction review process in this state, part of which revision included the addition of paragraph (f) to N.C.G.S. § 15A-1415. The provisions of subsection (f) became effective June 21, 1996, and apply to this case.
>
> 2) N.C.G.S. § 15A-1415(f) provides for broader discovery for a capital defendant's counsel in the post conviction review process than previously existed, specifically including the discovery of the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.
>
> 3) That if the State has a reasonable belief that allowing inspection of any portion of the State's files by counsel for the capital defendant would not be in the interest of justice the State may submit for inspection by the court those portions of the files so identified for the court's review, pursuant to N.C.G.S. § 15A-1415(f).

4) The defendant is entitled to have made available to his present counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant, including but not limited to any files in possession of the Forsyth County Sheriff's Department, the Yadkin County Sheriff's Department, the Iredell County Sheriff's Department, the State Bureau of Investigation, and any other law enforcement or investigative agencies involved in the investigation into the death and alleged kidnapping of Charles Jenkins, irrespective of the prosecutorial district involved, including the District Attorney's files regarding the prosecutions of Joseph Earl Bates' codefendants Hal "Tink" Eddleman (who was prosecuted by the District Attorney for the 23rd Prosecutorial District for his involvement in the events which led to the conviction of Joseph Earl Bates in the present matter) and Gary Shavers, who was prosecuted in Iredell County.

The order decreed that a full and complete copy of the above-referenced files would be made available at the office of the Yadkin County Clerk of Superior Court for inspection by defendant's counsel, subject to *in camera* review of those portions of the files for which the State reasonably believes that inspection by defendant would not be in the interest of justice.

The State petitioned for a writ of certiorari on 18 June 1997 for review of the discovery order entered by Judge Morgan. This Court allowed the State's petition on 27 June 1997.

The State presents to this Court two challenges to Judge Morgan's order for discovery under N.C.G.S. § 15A-1415(f): that the trial court erred by ordering the State to produce its work product and that, in the absence of service upon the individual agencies involved, the trial court did not have jurisdiction to order such discovery. We address these challenges *seriatim*.

[1] The State asserts that its work product is not subject to disclosure pursuant to N.C.G.S. § 15A-1415(f) because the General Assembly, by including the phrase "to the extent allowed by law," meant to retain the established common law and statutory rules against the production of work product. Although the plain language of the statute refers to the "complete files," the State contends that it is not required to disclose materials that are privileged or otherwise protected by law, specifically work product. The State further

argues that there is no exception to the policy objectives of the work-product doctrine for capital cases and that disclosure of the State's complete files in post-conviction would have a chilling effect on the preparation of capital cases. Finally, the State contends that the process of preparing and producing the files for inspection would be onerous and time-consuming. After carefully examining the statute and considering each of the State's arguments, we conclude that the language of N.C.G.S. § 15A-1415(f) is clear and unambiguous and that Judge Morgan's order must be affirmed in its entirety.

While no right of discovery in criminal cases existed at common law, *see State v. Taylor*, 327 N.C. 147, 153, 393 S.E.2d 801, 806 (1990), limited rights of pretrial discovery for both the defendant and the State exist under the United States Constitution, *see Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), and by statute, N.C.G.S. §§ 15A-901 to -910 (1997). The work-product doctrine is a qualified privilege against discovery that applies in criminal as well as civil cases. *See State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 840 (1977); *see also United States v. Nobles*, 422 U.S. 225, 236-39, 45 L. Ed. 2d 141, 152-54 (1975). In codifying pretrial discovery rules, the General Assembly explicitly protected "reports, memoranda, or other internal documents made by the prosecutor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of the case." N.C.G.S. § 15A-904(a). In other words, pretrial discovery statutes do not require the State to produce its work product or investigative files. *See, e.g., State v. Heatwole*, 344 N.C. 1, 23, 473 S.E.2d 310, 321 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 339 (1997). However, the statute at issue in the instant case was enacted to address the specific circumstance of a capitally sentenced defendant in post-conviction proceedings. Case law applying the work-product privilege to pretrial discovery and statutes governing pretrial discovery in criminal cases do not control the interpretation or application of N.C.G.S. § 15A-1415(f).

It is well settled that the meaning of any legislative enactment is controlled by the intent of the legislature and that legislative purpose is to be first ascertained from the plain language of the statute. *See Electric Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991); *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990); *State ex rel. Hunt v. N. C. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). "When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded . . .

under the guise of construction." *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977).

The statute at issue here provides that "[t]he State, *to the extent allowed by law, shall make available* to the capital defendant's counsel *the complete files* of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant." N.C.G.S. § 15A-1415(f) (emphasis added). The statute contains no express provision for withholding work product. On the contrary, the statute mandates that the State "shall make available . . . the complete files" of prosecution and law enforcement agencies. However, the State contends that the phrase "to the extent allowed by law" must protect work product from disclosure at post-conviction. Thus, we will address each of the State's specific arguments for this position.

A statute must be construed, if possible, so as to give meaning to all its provisions. *See Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). The State argues that to give full effect to all parts of N.C.G.S. § 15A-1415(f), the phrase "to the extent allowed by law" must limit the required disclosure so as to exclude materials traditionally protected by the work-product doctrine. We agree that this language is intended as some limitation on the information which the State is required to make available to the capital defendant in post-conviction proceedings. However, we read this phrase as allowing the State to exclude from its "complete files" only specific types of information which the State is elsewhere prohibited by law from disclosing. For example, N.C.G.S. § 7A-675 prohibits the disclosure without court order of confidential juvenile court records. Nothing in existing law prohibits disclosure to a defendant of the State's complete files, including work-product materials. *See* N.C.G.S. § 15A-904(b) ("Nothing in this section prohibits a prosecutor from making voluntary disclosures in the interest of justice."); *Hardy*, 293 N.C. at 124, 235 S.E.2d at 840 (holding that N.C.G.S. § 15A-904(a) does not bar discovery of prosecution witnesses' statements *at trial*).

[2] The only mechanism by which the State may withhold any portion of its complete files, apart from information which it is not allowed by law to disclose, is contained within N.C.G.S. § 15A-1415(f) itself. If the State has a reasonable belief that inspection of any part of its files by the capital defendant would not be in the interest of justice, the State may submit those portions of the files for inspection by

the court. The court may allow the State to withhold those portions of its files upon a finding that the material could not assist the capital defendant in investigating, preparing, or presenting a motion for appropriate relief. This mechanism permits the State the opportunity to protect certain sensitive information, but it carves out no special exception for work product. As Judge Morgan correctly stated in his order, "N.C.G.S. § 15A-1415(f) provides for broader discovery for a capital defendant's counsel in the post conviction review process than previously existed." Such a change is well within the General Assembly's authority.

The State contends that "the general rule that the work product or investigative files of the district attorney, law enforcement agencies, or others assisting in the preparation of the case are not open to discovery," *Heatwole*, 344 N.C. at 23, 473 S.E.2d at 321, applies with equal force in capital cases. We do not disagree that the general rule protecting work product from pretrial discovery contains no exception for capital cases. However, the State's contention is inapposite to the specific issue before us. The superior court in this case entered an order in post-conviction proceedings pursuant to the specific provisions of N.C.G.S. § 15A-1415(f), which mandate in explicit language that the prosecution and investigative files of the State shall be made available to counsel for a defendant who has been sentenced to death. Because the clear language of this statute demands disclosure in post-conviction proceedings, the "general rule" governing pretrial discovery is not applicable.

We must also reject the State's final policy arguments for granting some work-product protection within the scope of N.C.G.S. § 15A-1415(f). The State contends that the burden of organizing and producing work product in a capital case would be onerous and time-consuming and, thus, would frustrate the goal of expediting post-conviction review. This argument is unpersuasive, as we can imagine equally time-consuming efforts to remove all work-product materials from prosecution and law enforcement files prior to making them available to defendant's counsel. Moreover, allowing the State to unilaterally purge its files of work-product materials would render meaningless the provisions in N.C.G.S. § 15A-1415(f) for *in camera* review by the court.

The State also argues that permitting disclosure of work product at the post-conviction phase of a capital case would have a chilling effect on the preparation of capital cases. We note that the essence of

the work-product privilege in criminal cases is that the "interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." *Nobles*, 422 U.S. at 238, 45 L. Ed. 2d at 153. The State asserts that the policy concerns for protecting work product are equally relevant in the post-conviction setting. However, as we have stated above, the clear and unambiguous meaning of N.C.G.S. § 15A-1415(f) contemplates disclosure of the complete files, and this argument by the State only challenges the wisdom of the enactment. This Court, even if persuaded by the State's concerns, may not substitute its judgment for that of the General Assembly and craft a work-product exception into this statute where the Legislative Branch has clearly mandated disclosure of the complete files. Moreover, the interest of the State in protecting its work product once the case has reached post-conviction review is diminished.

Viewing subsection (f) of N.C.G.S. § 15A-1415 in light of other amendments enacted as part of "An Act to Expedite the Postconviction Process in North Carolina," we discern an intent on the part of the General Assembly to expedite the post-conviction process in capital cases while ensuring thorough and complete review. In addition to N.C.G.S. § 15A-1415(f), we note several newly enacted provisions which apply only to capital cases. For example, the Act sets a 120 day time limitation for filing a post-conviction motion for appropriate relief in capital cases, N.C.G.S. § 15A-1415(a); gives priority of review to capital cases in both direct appeal and post-conviction proceedings, N.C.G.S. § 15A-1441 (1997); requires appointment of two counsel to prepare a motion for appropriate relief for indigent capital defendants, N.C.G.S. § 7A-451(c) (Supp. 1997); and requires the State to file an answer to defendant's motion for appropriate relief in capital cases within sixty days, N.C.G.S. § 15A-1420(b1)(2) (1997). The broad post-conviction discovery required by N.C.G.S. § 15A-1415(f) logically fits into this statutory scheme by providing early and full disclosure to counsel for capital defendants so that they may raise all potential claims in a single motion for appropriate relief.

For the foregoing reasons, we conclude that the post-conviction disclosure contemplated by N.C.G.S. § 15A-1415(f) for capitally sentenced defendants does not provide an express or implied protection for work product of the prosecutor or law enforcement agencies. We hold that N.C.G.S. § 15A-1415(f) requires the State to make available

to counsel for a capital defendant in post-conviction proceedings the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant, subject only to the specific withholding mechanism contained within that statute and specific prohibitions against disclosure contained in other law.

[3] The State also challenges Judge Morgan's order on the grounds that the court had no jurisdiction to order discovery from independent constitutional agencies not represented by the district attorney. The State's position is that the various sheriffs' departments and the State Bureau of Investigation (SBI) were not served with defendant's motion for discovery or otherwise notified of the hearing on the motion, thus denying them notice and an opportunity to be heard in order to defend their respective positions. Service of defendant's motion upon the district attorney and the Attorney General is insufficient to confer jurisdiction over these independent constitutional agencies, so the State contends.

N.C.G.S. § 15A-1415(f) requires "the State" to make the complete files of all law enforcement and prosecutorial agencies available to the capital defendant's counsel. It does not further describe the procedure by which this is to be accomplished. We note, however, that, under our constitution, the district attorneys are responsible for the prosecution of criminal cases "on behalf of the State." N.C. Const. art. IV, § 18. For purposes of disclosing exculpatory evidence pursuant to *Brady v. Maryland*, the State's liability is "not limited to information in the actual possession of the prosecutor and certainly extends to any in the possession of state agencies subject to judicial control." *Love v. Johnson*, 57 F.3d 1305, 1314 (4th Cir. 1995); *see also Kyles v. Whitley*, 514 U.S. 419, 437, 131 L. Ed. 2d 490, 508 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

The disclosure requirement of N.C.G.S. § 15A-1415(f) was enacted by the General Assembly in order to assist counsel for the capitally sentenced defendant in investigating, preparing, and presenting a motion for appropriate relief. We note that, in a capital case, a motion for appropriate relief must be served on both the district attorney for the district where the defendant was indicted and the Attorney General. N.C.G.S. § 15A-1420(b1)(1). In this case, defendant served the District Attorney for the Twenty-Third Judicial District

and the Attorney General with his motion for discovery of investigative and prosecution files. As a matter of practicality it may be advisable, in some circumstances, to serve each entity which holds material subject to disclosure under N.C.G.S. § 15A-1415(f). However, we can find no statutory requirement for doing so, nor has the State presented any compelling reason to justify individual service in this case. We hold that the superior court did not lack jurisdiction for its discovery order.

For the reasons stated herein, the order of the superior court is affirmed.

AFFIRMED.

PAUL L. WHITFIELD, P.A., A NORTH CAROLINA PROFESSIONAL ASSOCIATION v. PETER S. GILCHRIST, III, AS DISTRICT ATTORNEY OF THE 26TH JUDICIAL DISTRICT OF THE STATE OF NORTH CAROLINA; AND THE STATE OF NORTH CAROLINA, A SOVEREIGN GOVERNMENTAL ENTITY

No. 287PA97

(Filed 3 April 1998)

State § 27 (NCI4th)— outside legal counsel—quantum meruit—sovereign immunity

The trial court correctly dismissed plaintiff's claims against the State where plaintiff is a professional legal corporation which has brought various public nuisance actions within the City of Charlotte; the district attorney for the district which includes Charlotte engaged plaintiff to file two public nuisance actions; plaintiff worked with the district attorney and the police department and the public nuisances were abated; plaintiff filed complaints alleging that it was entitled to recover attorney fees and the costs of legal services in each action on the basis of *quantum meruit*; and the cases were consolidated and dismissed, on the theory that sovereign immunity is a complete defense. It has long been accepted that the State cannot be sued except with its consent or upon its waiver of immunity and, while the State implicitly consents to be sued for damages in the event it breaches a valid contract expressly entered into by an authorized agent, a contract implied in law will not form a sufficient basis for a court

to make a reasonable inference that the State has intended to waive its sovereign immunity. N.C.G.S. § 19-8 is the proper source of compensation for an attorney representing a prevailing party in a public nuisance action where the State has not expressly entered into a valid contract for such services.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 126 N.C. App. 241, 485 S.E.2d 61 (1997), affirming in part, reversing in part, and remanding an order entered by Winner, J., on 9 February 1996 in Superior Court, Mecklenburg County. Heard in the Supreme Court 18 November 1997.

Whitfield and Whitfield, P.A., by Paul L. Whitfield; and Odom & Groves, P.C., by T. LaFontine Odom, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Charles J. Murray, Special Deputy Attorney General, for defendant-appellant State of North Carolina.

MITCHELL, Chief Justice.

The question presented for review is whether the doctrine of sovereign immunity bars recovery in *quantum meruit* upon an action based on a contract implied in law against the State of North Carolina. We conclude that a contract implied in law is insufficient to constitute a waiver of sovereign immunity. We therefore reverse the decision of the Court of Appeals.

Plaintiff made the following allegations in the complaints filed for this action. Plaintiff is a professional association, and plaintiff's attorney, Paul F. Whitfield, is the principal attorney in the professional association. Defendant Peter S. Gilchrist is the District Attorney for the Twenty-Sixth Judicial District of North Carolina, which includes the City of Charlotte. Since 1967, Mr. Whitfield has brought various public nuisance actions within the City of Charlotte under chapter 19 of the General Statutes of North Carolina. Defendant Gilchrist engaged plaintiff Whitfield to file two public nuisance actions, one of which was against the Downtown Motel Corporation, a North Carolina corporation, known as the Downtown Motor Inn and located on North Tryon Street in the City of Charlotte (Downtown Motel action). The second action was against Ashak Patel, Mani, Inc., a North Carolina corporation, doing business as Alamo Plaza Hotel Courts, Alamo Plaza Courts & Alamo Amusements, *et al.*, in the City of Charlotte (Alamo action). In the investigation and preparation for

both of these actions, plaintiff worked continuously with defendant Gilchrist as District Attorney and with members of the Charlotte Police Department. As a consequence of plaintiff's legal efforts, the public nuisances were abated. The Charlotte-Mecklenburg community, the public at large, and the State have benefitted, and plaintiff expected to be paid for its legal services.

On 28 July 1995, plaintiff filed a complaint alleging that it was entitled to recover from defendants, on the basis of *quantum meruit*, attorney's fees and costs for legal services it provided in the Downtown Motel public nuisance action. On 20 September 1995, defendants filed an answer and a motion to dismiss.

On 23 October 1995, plaintiff filed a second complaint with similar allegations seeking recovery in *quantum meruit* for its services in the Alamo action. Defendants filed a motion to consolidate the two cases on 26 October 1995. On 20 November 1995, defendants filed an answer and a motion to dismiss in the Alamo action.

The motions were heard at the 18 January 1996 Civil Session of Superior Court, Mecklenburg County. On 9 February 1996, the trial court entered an order allowing the consolidation of the two cases. In that same order, the trial court dismissed both actions, concluding that sovereign immunity is a complete defense to plaintiff's actions. Plaintiff then appealed to the Court of Appeals.

The Court of Appeals affirmed the trial court's dismissal of plaintiff's claims against defendant Gilchrist. *Paul L. Whitfield, P.A. v. Gilchrist*, 126 N.C. App. 241, 251, 485 S.E.2d 61, 67 (1997). The Court of Appeals reversed the trial court's dismissal of plaintiff's claims against defendant State of North Carolina and remanded the case for further proceedings with regard to those claims against the State. *Id.*

On 23 June 1997, defendant State petitioned this Court for discretionary review seeking to have this Court resolve a single issue: "Did the Court of Appeals err in holding that sovereign immunity is not available to the State as a defense to a pleading alleging a claim based on a quasi-contract implied in law which totally fails to comply with the applicable statutory requirements?" On 23 July 1997, this Court entered an order allowing discretionary review. Our appellate review here is limited solely to the single issue brought forward by defendant State in its petition for discretionary review.

Defendant State contends that the Court of Appeals erred in reversing the trial court's dismissal of plaintiff's claims against the

State of North Carolina because sovereign immunity bars recovery on the basis of *quantum meruit* in an action against the State upon a quasi contract or contract implied in law. We agree.

It has long been the established law of North Carolina that the State cannot be sued except with its consent or upon its waiver of immunity. *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983). This Court has held, however, that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). In the decision below, the Court of Appeals improperly expanded *Smith* to hold that sovereign immunity does not bar an action seeking recovery in *quantum meruit* based on an implied-in-law contract theory. *Whitfield*, 126 N.C. App. at 248, 485 S.E.2d at 67.

Quantum meruit is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. *Potter v. Homestead Preservation Ass'n*, 330 N.C. 569, 578, 412 S.E.2d 1, 7 (1992); *see also* Dan B. Dobbs, *Dobbs Law of Remedies* § 4.2(3) (2d ed. 1993). It operates as an equitable remedy based upon a quasi contract or a contract implied in law. *Potter*, 330 N.C. at 578, 412 S.E.2d at 7. "A quasi contract or a contract implied in law is not a contract." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). An implied contract is not based on an actual agreement, and *quantum meruit* is not an appropriate remedy when there is an actual agreement between the parties. *Id.* Only in the absence of an express agreement of the parties will courts impose a quasi contract or a contract implied in law in order to prevent an unjust enrichment. *Id.*

We will not imply a contract in law in derogation of sovereign immunity. In *Smith*, we held that when the State, acting through officers and agencies authorized by law, enters into a *valid* contract, it implicitly waives its sovereign immunity and consents to be sued for damages upon its breach of the contract. *Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24. We emphasized, however, that "[t]he State is liable only upon contracts *authorized by law*. When it enters into a contract it does so voluntarily and authorizes its liability. Furthermore, the State may, with a fair degree of accuracy, estimate the extent of its liability for a breach of contract." *Id.* at 322, 222 S.E.2d at 425 (emphasis added). Consistent with the reasoning of *Smith*, we will not first imply a contract in law where none exists in fact, then use that implication to support the further implication that the State has intention-

ally waived its sovereign immunity and consented to be sued for damages for breach of the contract it never entered in fact. Only when the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach. *Id.*

The State has not authorized its district attorneys to contract for payment of fees for attorneys' services of any type. To the contrary, as we explain hereinafter, the legislature has provided that such contracts may be entered only by, or with the approval of, other agents of the State. We certainly will not imply a contract in law where there is a statute to the contrary.

It is important to recognize that there are situations in which a district attorney may obtain the assistance of private counsel. For example, an elected district attorney has the discretion to permit a private attorney to appear with him to represent the State's interest in an action, subject to the court's approval. *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991). Historically, however, private counsel functioning in this prosecutorial capacity either have been paid by private parties or have appeared *pro bono publico*. *See State v. Best*, 280 N.C. 413, 186 S.E.2d 1 (1972). A district attorney's discretion to permit an attorney to act as a private prosecutor on behalf of the State in the prosecution of a particular case does not expressly or implicitly include the authority for the district attorney to bind the State to pay the attorney for performing the historic role of a private prosecutor.

More recently, the General Assembly has expressly provided authority for the State's district attorneys to employ private attorneys to exercise a more expansive prosecutorial power than that historically exercised under our common law by private prosecutors who were empowered to act only in individual cases. N.C.G.S. § 7A-64(2) sets out the mandatory procedure for a district attorney to follow to appoint private counsel to provide temporary assistance when criminal dockets are overcrowded. N.C.G.S. § 7A-64(2) (1995). Approval by the Administrative Officer of the Courts is required before a district attorney may make any such appointment. Significantly, N.C.G.S. § 7A-64 also mandates that "[t]he length of service and compensation of such temporary appointee shall be fixed by the Administrative Officer of the Courts in each case." *Id.*, para. 2. The district attorney has no power to provide for compensation of an attorney appointed under this statute. The statute is public notice

that compliance with its terms is required before such an attorney will be compensated by the State.

Another important statute, N.C.G.S. § 147-17 (1993), sets out the procedure required for the State to enter a valid contract to employ outside counsel for purposes other than those contemplated by N.C.G.S. § 7A-64. Only after the provisions of N.C.G.S. § 147-17 have been followed will the State be deemed to have entered a valid contract for attorney's fees and thereby to have implicitly waived its sovereign immunity and consented to be sued in the event of its breach.

N.C.G.S. § 147-17 directs that no State official or agency may employ outside counsel without the Governor's approval. That statute also mandates that before such counsel may be employed, the Attorney General must provide the Governor with a determination that it is impractical for the Attorney General to render the necessary legal services for the State. Finally, the Governor must determine the amount of compensation that the attorney to be employed will receive and may determine the source of State funds for the compensation. All of these specific requirements must be satisfied in order for the State to have entered a valid contract with outside counsel to represent the State's interest. Otherwise, no valid contract exists. The State's sovereign immunity will be waived by implication only once all of the requirements of N.C.G.S. § 147-17 are met and a valid contract has been entered. This statute serves as public notice of its requirements.

Even though plaintiff could not expect to recover from the State on a theory based upon the State's implicit waiver of sovereign immunity, parties bringing such actions are not left without a means of compensation for maintaining civil nuisance actions. N.C.G.S. § 19-8 provides the procedure for the award of attorney's fees and costs in a public nuisance action. The enactment of N.C.G.S. § 19-8 indicates that the legislature contemplated only one noncontractual method of payment for attorneys who undertake to maintain, on behalf of anyone, a civil action to abate a nuisance as authorized by N.C.G.S. § 19-2.1. Under N.C.G.S. § 19-8, a prevailing party is awarded, in the trial court's discretion, attorney's fees as part of the costs of maintaining the action. N.C.G.S. § 19-8 gave plaintiff statutory notice of the sole method of compensation of private attorneys maintaining public nuisance actions for other persons. The fact that a district attorney may permit an attorney to bring a public nuisance action in his name does not mean that the district attorney may, acting alone, also enter into a valid contract binding the State to pay

attorney's fees. In public nuisance actions, an attorney for the party maintaining the action receives compensation from the costs awarded that party should the party prevail. Surely, plaintiff knew this, as it alleges in its complaint that it has brought more than one hundred such actions in the past.

Neither of plaintiff's two complaints allege compliance with N.C.G.S. § 147-17, nor has the State in any other manner entered into a valid contract with plaintiff for legal services. A contract implied in law—as opposed to an express valid contract—simply will not form a sufficient basis for a court to make a reasonable inference that the State has intended to waive its sovereign immunity. N.C.G.S. § 19-8 is the proper source of compensation for an attorney representing a prevailing party in a public nuisance action, at least when the State has not expressly entered into a valid contract for such legal services.

For the foregoing reasons, the trial court correctly dismissed plaintiff's claims against defendant State of North Carolina, and the decision of the Court of Appeals to the contrary was in error. The decision of the Court of Appeals on this issue is reversed, and this case is remanded to that court for its further remand to the Superior Court, Mecklenburg County, for reinstatement of the order dismissing all claims against the State.

REVERSED AND REMANDED.

IN THE MATTER OF THE WILL OF WILLIAM SMITH LANYON LAMPARTER, DECEASED

No. 354A97

(Filed 3 April 1998)

Evidence and Witnesses § 2602 (NCI4th)— holographic will—caveat—testimony by interested witnesses—improper

The trial court erred in a caveat to a holographic will by permitting the caveators' five interested witnesses to testify as to conversations they had with decedent in his final years about his plans to write a new will and about specific bequests he planned to include. An exception to the Dead Man's Statute has evolved through case law which allows beneficiaries to testify as to the three material elements of a holographic will, and that exception

has been codified in N.C.G.S. § 31-10. However, this statutory exception is specifically limited to testimony about such material facts as may establish a holographic will as valid; the legislature did not intend to alter the long-standing rule that beneficiaries under a contested will are not competent witnesses to testify as to oral communications with the deceased which tend to answer the ultimate question for the jury. N.C.G.S. § 8C-1, Rule 601(c).

Appeal by respondents pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 126 N.C. App. 593, 486 S.E.2d 458 (1997), affirming a judgment entered by Caldwell, J., on 15 December 1995, in Superior Court, Catawba County. Heard in the Supreme Court 15 December 1997.

Tate, Young, Morphis, Bach & Taylor, L.L.P., by Terry M. Taylor, Thomas C. Morphis and T. Dean Amos; and Hunter, Wharton & Stroupe, L.L.P., by John V. Hunter, III, for caveator-appellees.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for respondent-appellants.

LAKE, Justice.

This appeal presents the single issue of whether beneficiaries under a holographic will may testify in a caveat proceeding as to oral communications between themselves and the decedent with regard to the testator's intent to make a new will or about specific bequests to be contained in a new will. The Court of Appeals majority concluded that Rule 601(c) of the North Carolina Rules of Evidence, the Dead Man's Statute, does not disqualify interested beneficiaries from testifying with regard to oral communications between themselves and the decedent. The Court of Appeals thus sustained the judgment of the trial court, thereby invalidating the original will under which the respondents, Duke University and Rutgers Preparatory School, were principal beneficiaries. For the reasons stated below, we reverse the decision of the Court of Appeals.

Decedent, William Smith Lanyon Lamparter, was born 1 July 1926. He graduated from Rutgers Preparatory School and Duke University. The decedent never married and had no children. He died with an estate valued at approximately one million dollars. On 10 March 1980, decedent executed an attested will in which he provided support for his mother during her lifetime. Duke University and Rutgers were the primary residuary beneficiaries. Mr. Lamparter also

made bequests to many friends and relatives including his cousin, Nadine Lanyon Smith Rogel; her son; and other caveators in this action. Decedent kept a copy of his will in his home and provided copies to Rogel and C. Walton Hamilton, the named co-executors in the will; his attorney, F. Gwynn Harper, Jr.; and his accountant, Joanne Linda Waxman.

Decedent's mother died in 1980. In 1985, decedent prepared a document entirely in his own handwriting entitled, "Codicil to My Will," which was dated and signed. In 1986, decedent made some minor modifications to his 1985 codicil, dating and signing each modification. In the late 1980s, decedent underwent surgery for cancer and thereafter spent his time in a chair in his study surrounded by his papers, bills, books and mail. In the latter years of decedent's life, he had discussions with his attorney and with Ms. Waxman with regard to changing his will and with regard to what would be legally necessary to prepare a new will.

In January 1992, decedent's cancer returned, and he was hospitalized for the last time. Several of his friends and relatives, including Michael Koch and Nadine Rogel, went to decedent's home and found beside his chair in the study eight handwritten pages appearing to be a holographic will (hereinafter "undated memorandum"), which revoked all previously executed testamentary documents including the 1985 handwritten codicil. Decedent died two days later.

On 9 April 1992, the executrix named in the will, Nadine Rogel, filed with the Clerk of Superior Court, Catawba County, for probate the following documents: (1) the decedent's typed will dated 10 March 1980; (2) the handwritten document entitled "Codicil to My Will"; and (3) the eight-page undated memorandum, expressly revoking all previous wills and testaments. The clerk admitted the 1980 will to probate and issued Letters Testamentary to Ms. Rogel, as Executrix of the Estate of William Smith Lanyon Lamparter. On 15 September 1992, the executrix filed a declaratory judgment action, seeking a determination as to whether the decedent died testate and the effect of the two handwritten documents. The trial court held that the typed will and the handwritten codicil were valid and that the undated memorandum was invalid. On appeal, the Court of Appeals held that the trial court did not have subject matter jurisdiction to determine the validity of the will and vacated the judgment. *Rogel v. Johnson*, 114 N.C. App. 239, 441 S.E.2d 558, *disc. rev. denied*, 336 N.C. 609, 447 S.E.2d 401 (1994).

On 13 October 1994, the caveators, nine individuals who were named beneficiaries under the undated memorandum, including decedent's cousins, friends and longtime housekeeper, filed this proceeding alleging that the undated memorandum was the decedent's last will and testament. The caveators amended their complaint to allege, in the alternative, that the purported handwritten codicil was a valid codicil to the probated 1980 will. Respondents, Duke University and Rutgers Preparatory School, filed a Rule 12(b)(6) motion to dismiss, and the caveators filed a motion for summary judgment. Both of these motions were denied.

At the commencement of trial, respondents made a motion *in limine*, pursuant to Rule 601 of the North Carolina Rules of Evidence, to prohibit the caveators from testifying as to conversations they had with decedent about his will. The trial court denied the motion on the ground that the intent of the testator is a relevant, material and competent fact to which the beneficiaries may testify in order to establish a valid holographic will, pursuant to N.C.G.S. § 31-10(b). At trial, for the purpose of showing the decedent's intent, the five witnesses for the caveators all testified to conversations they had with decedent in his final years about his plans to write a new will, and they further testified with regard to specific bequests he planned to include in this new will. Respondents repeatedly objected to such testimony. Over objection, Nadine Rogel was permitted to testify that in 1990, Mr. Lamparter "said he was going to change his will drastically, that there were people who were very, very caring to him through his illness, and that he wanted to remember them." Ms. Rogel continued to testify that Mr. Lamparter told her he would be including Frances Davenport, Rick Berry, and Terry and Rebekah Henderson in his will. In addition to this testimony, four caveators and beneficiaries under the undated memorandum—Frances Davenport, the housekeeper; Richard Berry; Terry Henderson; and Michael Koch—were also allowed to testify with regard to conversations they had with Mr. Lamparter concerning his intent to make a new will and his proposed specific bequests to be made therein.

At the close of the caveators' evidence, and again at the close of all the evidence, the parties moved for a directed verdict. All motions were denied. The jury found that the eight-page undated memorandum was indeed the last will and testament of the decedent, and on 15 December 1995, judgment was entered reflecting this verdict. Respondents appealed to the Court of Appeals, a majority of which upheld this judgment.

The North Carolina "Dead Man's Statute," formerly N.C.G.S. § 8-51 and now codified in Rule 601(c) of the Rules of Evidence, N.C.G.S. § 8C-1, Rule 601(c), has traditionally prohibited testimony involving both "transactions" and "communications" by individuals who would potentially benefit from the alleged statements of a deceased individual. *See In re Will of Lomax*, 226 N.C. 498, 39 S.E.2d 388 (1946); *In re Will of Brown*, 194 N.C. 583, 140 S.E. 192 (1927). The statute, or rule as now codified, is applicable only to oral communications between the party interested in the event and the deceased. The Dead Man's Statute was intended "as a shield to protect against fraudulent and unfounded claims." *Carswell v. Greene*, 253 N.C. 266, 270, 116 S.E.2d 801, 804 (1960). As this Court stated in *Carswell*:

> The reasoning behind G.S. 8-51 and the decided cases thereunder, is succinctly stated by Stacy, J., later C.J., in *Sherrill v. Wilhelm*, [182 N.C. 673, 675, 110 S.E. 95, 96 (1921)]: "Death having closed the mouth of one of the parties, (with respect to a personal transaction or communication) it is but meet that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the Legislature, in its wisdom, has declared that an *ex parte* statement of such matters shall not be received in evidence."

Carswell, 253 N.C. at 269, 116 S.E.2d at 803.

As to matters "forbidden by the statute," Rule 601(c) provides in pertinent part:

> (c) *Disqualification of interested persons.*—Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event . . . shall not be examined as a witness in his own behalf . . . concerning any oral communication between the witness and the deceased person . . . .

N.C.G.S. § 8C-1, Rule 601(c) (1992). In a proceeding for the probate of a will, both propounders and caveators are parties "interested in the event" within the meaning and spirit of this statute. *In re Will of Brown*, 194 N.C. at 595, 140 S.E. at 199; *accord In re Will of Hester*, 84 N.C. App. 585, 595, 353 S.E.2d 643, 650, *rev'd on other grounds*, 320 N.C. 738, 360 S.E.2d 801 (1987).

On its face, Rule 601(c) clearly prohibits persons "interested in the event," including caveators generally, from testifying as to oral communications between themselves and the decedent. It is equally clear from our case law regarding the Dead Man's Statute that the "event," about which a party or person would be interested in the context of a caveat to a will, would include the decedent's intent, desire or plan to make a new will, or with regard to specific bequests to be contained therein, *i.e.*, the decedent's desired disposition of his properties. However, with regard to a holographic will, an exception to the Dead Man's Statute has evolved through our case law which allows beneficiaries to testify as to the three material elements of such a will: (1) the testator's handwriting, (2) the testator's signature, and (3) what the testator considered to be his place for keeping valuable papers. *See In re Will of Westfeldt*, 188 N.C. 702, 125 S.E. 531 (1924); *Cornelius v. Brawley*, 109 N.C. 542, 14 S.E. 78 (1891).

The North Carolina General Assembly has more recently codified this exception to the Dead Man's Statute for holographic wills. N.C.G.S. § 31-10 provides in part:

> (b) A beneficiary under a holographic will may testify to such competent, relevant and material facts as tend to establish such holographic will as a valid will without rendering void the benefits to be received by him thereunder.

N.C.G.S. § 31-10(b) (1984). The legislature has also specifically defined "holographic will," setting forth its three material elements. N.C.G.S. § 31-3.4(a) provides in relevant part:

> (a) A holographic will is a will
>
> (1) Written entirely in the handwriting of the testator . . . and
>
> (2) Subscribed by the testator, or with his name written in or on the will in his own handwriting, and
>
> (3) Found after the testator's death among his valuable papers or effects, or in a safe-deposit box or other safe place where it was deposited . . . for safekeeping.

N.C.G.S. § 31-3.4(a)(1)-(3) (1984).

The caveators contend that the provisions of N.C.G.S. § 31-10(b) when properly construed are broad enough to permit interested par-

ties to testify as to oral communications with a deceased regarding the essential element of any will, and the ultimate question for the jury in a caveat proceeding—whether the testator intended the document to be his last will and testament. We disagree. This statutory exception, relating to the holographic will, is specifically limited to testimony about such material facts as may "establish" such will "as a *valid will.*" Obviously, this relates, and only relates, to the three elements required to make a valid holographic will, as set forth in N.C.G.S. § 31-3.4(a). In *In re Will of Crawford,* 246 N.C. 322, 98 S.E.2d 29 (1957), this Court held that a beneficiary under a purported holographic will could testify to the handwriting of the testator. *Id.* at 325, 98 S.E.2d at 31. Similarly, this Court has held that the beneficiary under a purported holographic will could testify that the document was found among the testator's valuable papers and effects. *In re Will of Wilson,* 258 N.C. 310, 311, 128 S.E.2d 601, 602 (1962).

In caveat proceedings, in the absence of a clear exception to the Dead Man's Statute, this Court has not permitted testimony as to oral communications between the decedent and a beneficiary under the purported will. To the contrary, we have held that testimony of a witness is incompetent under the provisions of the Dead Man's Statute when it appears "(1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest." *Godwin v. Wachovia Bank & Trust Co.,* 259 N.C. 520, 528, 131 S.E.2d 456, 462 (1963). We thus hold that the legislature, in enacting N.C.G.S. § 31-10(b), did not intend to alter the long-standing rule in this jurisdiction that beneficiaries under a contested will are not competent witnesses to testify as to oral communications with the deceased which tend to answer the ultimate question for the jury in such cases—the testator's desired disposition of his properties through the document at issue.

Accordingly, we hold that the Dead Man's Statute, N.C.G.S. § 8C-1, Rule 601(c), prohibits beneficiaries from testifying as to oral communications they had with the decedent about his intent to make a new will or with regard to specific bequests to be contained in that will, and the trial court erred in permitting the caveators' five interested witnesses to so testify. The decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to

the Superior Court, Catawba County, for a new caveat proceeding at which such testimony shall be excluded.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. RICHARD ALLEN JACKSON

No. 12A96

(Filed 3 April 1998)

1. **Evidence and Witnesses § 1240 (NCI4th)— inculpatory statements—defendant in custody**

Defendant was in custody when he stated that he thought he needed a lawyer present and when he made incriminating statements where the evidence showed that, at the request of two deputy sheriffs, defendant accompanied them to the sheriff's office; defendant was in the interrogation room for three hours, during which time he was questioned about a murder, was fingerprinted, and had hair and blood samples taken; defendant told the officers that he was eager to return to work; he was never told that he was free to leave or that he would be given a ride to his home or place of work if he decided to leave; and defendant made the statement about the need for a lawyer after the sheriff asked him what he had done with the rifle he had used to kill the victim, which informed defendant that the sheriff thought he had committed murder. A reasonable man in defendant's position who had been interrogated for approximately three hours and thought the sheriff believed he had committed a murder would not have thought he was free to leave.

2. **Evidence and Witnesses § 1252 (NCI4th)— custodial interrogation—invocation of right to counsel—subsequent inculpatory statements—inadmissibility**

Defendant invoked his right to counsel during custodial interrogation when he stated, "I think I need a lawyer present," and an officer made a note that at "2:02 P.M. on 12-20-94, wants a lawyer present." Inculpatory statements made to officers after defendant invoked his right to counsel should have been excluded where defendant did not initiate the communication that led to his statements and his attorney was not present.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Downs, J., at the 6 November 1995 Criminal Session of Superior Court, Buncombe County, upon a jury verdict of guilty of first-degree murder. The defendant's motion to bypass the Court of Appeals as to additional judgments for first-degree rape and first-degree kidnapping was allowed 17 July 1997. Heard in the Supreme Court 18 December 1997.

On 31 October 1994, Karen Styles went jogging and did not return. On 25 November 1994, her body was found nude from the waist down and taped to a tree. The defendant became a suspect in the commission of the crime, and on 20 December 1994, members of the Sheriff's Department requested that the defendant come to the sheriff's office with them. At the sheriff's office, the defendant made inculpatory statements. Subsequently, the defendant was charged in Buncombe County with the first-degree murder, first-degree kidnapping, and first-degree rape of Karen Styles.

Prior to the trial, the defendant made a motion to suppress his inculpatory statements. At the hearing on this motion, the testimony revealed the following essentially undisputed facts. Two detectives went to the defendant's place of work at 11:00 a.m. on 20 December 1994 and, after telling him he was not under arrest, requested that he accompany them to the sheriff's office to answer some questions. The defendant agreed and was then driven for a period of ten to twelve minutes from his place of work to the sheriff's office. The defendant was told he was a suspect in the murder of Karen Styles. The defendant denied any implication in the murder.

At the sheriff's office, the defendant was taken to the interview room and warned of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). He was again told he was not under arrest. The defendant then consented to a search of his person and to have fingerprints and blood and hair samples taken. The defendant was again told he was not under arrest. The defendant stated he wanted to cooperate and told the officers that he had a chemical imbalance in his brain and that he had been abused as a child.

In response to questioning, the defendant again stated he knew nothing about the murder of Karen Styles and denied owning a gun. The jail nurse came and took fingerprints and blood and hair samples from the defendant. After this, the defendant told the officers of his psychiatric problems—his nervous breakdown, his discharge from

the Navy for mental illness, his attempted suicides, and his depression. After the defendant had been questioned for approximately three hours, the sheriff entered the room at approximately 2:00 p.m. The sheriff asked the defendant, "What did you do with the rifle that Karen Styles was shot with?" A detective present at the time stated that the defendant replied by stating, "I think I need a lawyer present." The detective's handwritten notes, taken during the interview, read, "2:04 P.M. on 12-20-94, wants a lawyer present." The sheriff testified that the defendant said, "I think I might need a lawyer." The trial court found that the defendant stated, "I think I need a lawyer present."

In response to this statement, the sheriff told the defendant he did not want the defendant to answer any more questions, but he wanted to tell him something. The detective testified that the sheriff stated, "Son, I know you bought the rifle and the duct tape at K-Mart on the 28th of October. I know you were in Bent Creek on the day she was killed, and that's fine, but you need help." According to the detective, the defendant then began crying and stated, "But I didn't mean to kill nobody. I didn't." He continued crying, "I'm sorry; I didn't mean to kill her." The detective advised the defendant he needed to calm down, and after he did so, the sheriff and the detective left the defendant in the room and went to call an assistant district attorney for advice as to how to proceed. After speaking with the assistant district attorney, the detective and a captain with the Sheriff's Department returned and readvised the defendant of his *Miranda* rights. The defendant waived those rights and then made a statement admitting he killed Karen Styles.

The court concluded that there were no threats or inducements to make the statements; that the statements were made voluntarily and understandingly; and that the defendant knowingly, intelligently, and voluntarily waived his constitutional rights before making the statements to the officers. The motion to suppress the statement was denied.

The defendant was convicted of first-degree murder, first-degree rape, and first-degree kidnapping. Upon the jury's recommendation, the court imposed the death penalty for the murder conviction. The trial court imposed additional sentences of imprisonment for the rape and kidnapping convictions. The defendant appealed.

Michael F. Easley, Attorney General, by Jill Ledford Cheek, Assistant Attorney General, and Tina A. Krasner, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.

WEBB, Justice.

The defendant contends that at the time his inculpatory statements were made, he was in custody and had invoked his right to counsel. He assigns error to the admission into evidence of these statements. This assignment of error has merit.

The State argues that the defendant's statement was properly admitted into evidence at trial because: (1) the defendant was not in custody at the time he stated he thought he needed a lawyer; and (2) even if the defendant was in custody, his statement was not an invocation of his Fifth Amendment right to counsel. We disagree.

If at any time during an interrogation of a person in custody the person invokes his right to counsel, the interrogation must cease, and it cannot be resumed without an attorney being present unless the defendant initiates a further discussion with the officers. *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981); *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694. A suspect is in custody when, considering the totality of circumstances, a reasonable person in the suspect's position would not feel free to leave. "This test is necessarily an objective one to be applied on a case-by-case basis considering all the facts and circumstances." *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993).

We are faced with two questions. The first question is whether the defendant was in custody at the time he made his incriminating statements. The second question is whether the defendant, during the interrogation, invoked his right to counsel before he incriminated himself.

[1] In determining the custody issue, we first note that the trial court made no finding as to whether the defendant was in custody when he made his statement in regard to needing a lawyer. However, the lack of such a finding does not prevent this Court from evaluating the evidence and deciding whether the defendant was in custody. *State v. Torres*, 330 N.C. 517, 525, 412 S.E.2d 20, 24 (1992).

In this case, we conclude that a reasonable person in the defendant's position when he was confronted by the sheriff would have felt he was in custody and would not have felt free to leave. The evidence showed that, at the request of two deputy sheriffs, the defendant accompanied them to the sheriff's office. While at the sheriff's office, the defendant consented to fingerprinting and gave blood and hair samples. He was under constant supervision. The defendant had told the officers he was anxious to return to work, and despite answering all questions from them and telling them he had no knowledge of the crime, he was never told that he was free to leave or that he would be given a ride to his home or place of work if he decided to leave.

After being in the interrogation room for a period of approximately three hours, during which time he was questioned by the officers in regard to the murder, had hair and blood samples taken, and was fingerprinted, a reasonable man at the least would have wondered whether he was free to leave. When the sheriff asked him what he had done with the rifle he had used to kill the victim, this informed the defendant that the sheriff thought he had committed murder. A reasonable man in the defendant's position who had been interrogated for approximately three hours and thought the sheriff believed he had committed murder would not have thought he was free to leave. He would have thought the sheriff intended to hold him for prosecution for murder. Thus, we hold that the defendant was in custody when he inquired about an attorney.

[2] Having held that the defendant was in custody when he made his statement in regard to counsel, we must now determine whether the defendant articulated his desire for counsel sufficiently that a reasonable officer in the circumstances would have understood the statement to be a request for an attorney. *Davis v. United States*, 512 U.S. 452, 129 L. Ed. 2d 362 (1994). The trial court found, based on sufficient evidence, that the defendant said, "I think I need a lawyer present." The State, relying on *Davis*, says that this statement was ambiguous and that the officers were not required to stop questioning the defendant. In *Davis*, the defendant said, "Maybe I should talk to a lawyer." *Id.* at 455, 129 L. Ed. 2d at 368. The United States Supreme Court held this was not a request for counsel.

Davis is not precedent for this case. The use of the word "[m]aybe" by the defendant in *Davis* connotes uncertainty. There was no uncertainty by the defendant. When he said, "I think I need a

lawyer present," he told the officers what he thought. He thought he needed a lawyer. This was not an ambiguous statement. The interrogation should have stopped at that time.

We are reinforced in our decision by the notes of one of the officers which were made during the interrogation. The notes say, "2:04 P.M. on 12-20-94, wants a lawyer present." Although not binding on us, this is an indication of how a reasonable officer conducting an interrogation would have interpreted the defendant's statement.

We have held that the defendant was in custody and had invoked his right to counsel when he made his inculpatory statements. The inculpatory statements made to the detectives should have been excluded because they were made after the defendant invoked his right to counsel. The defendant did not initiate the communication that led to his statements, nor was his attorney present when they were made. Therefore, once the defendant had invoked his right to counsel, no further interrogation could occur.

We cannot hold beyond a reasonable doubt that the admission of this testimony was harmless. N.C.G.S. § 15A-1443(b) (1988). Therefore, for this error, there must be a new trial.

In light of the fact that the defendant will receive a new trial, we do not discuss the defendant's other assignments of error, for the questions they raise may not recur at a new trial. For the reasons stated in this opinion, the defendant must have a new trial.

NEW TRIAL.

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

DAVID C. VAN EVERY v. KELLY W. McGUIRE (FORMERLY KELLY DIANE WEBB VAN EVERY)

No. 159PA97

(Filed 3 April 1998)

Divorce and Separation § 552 (NCI4th)— attorney fees—child custody—estates of parties

The Court of Appeals correctly reversed a trial court order requiring plaintiff to pay defendant's attorney's fees in a child support action where the trial court made findings regarding the relative estates of the parties, but the trial judge's order was entered prior to *Taylor v. Taylor*, 343 N.C. 50. The Court of Appeals correctly concluded that the evidence before the trial court fails to show that defendant did not have ample income to defray the expenses of the action and would have been required to unreasonably deplete her estate to pay these expenses; however, the Court of Appeals' statement that the trial court is not permitted to compare the relative estates of the parties extends the holding in *Taylor* further than intended. The fact that N.C.G.S. § 50-13.6 does not require the trial court to compare the relative estates of the parties does not automatically mean that it does not allow or permit the trial court to do so in a proper case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 125 N.C. App. 578, 481 S.E.2d 377 (1997), affirming in part and reversing in part the trial court's order entered by Jones (William G.), J., on 20 December 1995 in District Court, Mecklenburg County, and remanding for further proceedings. Heard in the Supreme Court 18 November 1997.

The Tryon Legal Group, by Jerry Alan Reese, for plaintiff-appellee.

Casstevens, Hanner, Gunter & Conrad, P.A., by Nelson M. Casstevens, Jr., for defendant-appellant.

FRYE, Justice.

The Court of Appeals, relying on this Court's decision in *Taylor v. Taylor*, 343 N.C. 50, 468 S.E.2d 33 (1996), reversed an order requiring plaintiff to pay defendant's attorney's fees and remanded that issue to the trial court for reconsideration based on the evidence in the

record and without a consideration of the relative estates of the parties. In this case, we examine the parameters of our recent decision in *Taylor* in order to assure that our decision in that case will be applied with "fairness to litigants and fulfillment of perceived legislative intent." *Id.* at 58, 468 S.E.2d at 38.

In *Taylor*, the question before this Court was whether a trial court, in ruling on a motion for attorney's fees in a child custody and support action, may determine that a party has sufficient means to defray the costs of the action without considering the estate of the other party. We answered in the affirmative, stating that "we do not believe that the determination of whether a party has sufficient means to defray the necessary expenses of the action *requires* a comparison of the relative estates of the parties." *Id.* at 57, 468 S.E.2d at 37 (emphasis added).

We come now to the facts and circumstances of the instant case. Plaintiff David Van Every and defendant Kelly McGuire were married in 1988. Their only child was born in 1989. The two were separated in 1991 and divorced in 1992. This action was instituted on or about 11 July 1991 when plaintiff brought suit against defendant for custody of their child, David Christopher Van Every. The parties have been in dispute over child custody and support since that time. On 27 July 1994, the trial court, finding it "in the child's best interests," appointed a guardian *ad litem* to represent the child in this action. On 19 December 1994, the trial court appointed two psychologists to "assist the Court in determining what custodial placement would be in the best interest of" the child. On 27 September 1995, the trial court entered an order granting the "care, custody and control" of the child to defendant. The trial court granted plaintiff extensive visitation privileges.

On 20 December 1995, following a hearing, the trial court ordered plaintiff to pay directly to defendant's attorney the sum of $55,688.35 in payment of the attorney's "out of pocket expenses" and the "services" performed by the attorney on behalf of defendant. With reference to the award of attorney's fees to defendant, the trial court, *inter alia*, found the following: (1) plaintiff's annual income in 1991, 1992, and 1993 was well over $1,000,000, and his net estate is worth $15,000,000; (2) until April 1995, defendant had no income, but from April until December 1995, defendant's income per month was $10,000, which was used to "pay for food and other household expenses"; (3) defendant's estate consisted of three automobiles worth a total of $60,000, a savings account containing $3,000, and a

gaming machine, the value of which is unknown, from which she received her monthly income; and (4) defendant had no debts. The trial court then concluded as a matter of law that defendant was an interested party acting in good faith who had insufficient means to defray the expenses of the litigation.

Plaintiff appealed to the Court of Appeals, contending, *inter alia*, that the trial court erred in awarding attorney's fees to defendant under N.C.G.S. § 50-13.6 because defendant has substantial means with which to defray the costs of the litigation, has few if any monthly expenses, and would not have to deplete her estate substantially in order to pay her own fees. Plaintiff also contended that the trial court erred in determining defendant's entitlement to attorney's fees under a comparison of estates approach rather than based on defendant's ability to defray the expenses of the litigation.

In reversing the trial court on the question of defendant's entitlement to an award of attorney's fees, the Court of Appeals, citing *Taylor*, said: "As a general proposition, the trial court is not permitted to compare the relative estates of the parties in assessing a party's ability to employ 'adequate' counsel." *Van Every v. McGuire*, 125 N.C. App. 578, 581, 481 S.E.2d 377, 378 (1997). This extends our holding in *Taylor* further than intended. The fact that N.C.G.S. § 50-13.6 does not *require* the trial court to compare the relative estates of the parties does not automatically mean that it does not *allow* or *permit* the trial court to do so in a proper case.

In the instant case, the trial judge's order was entered prior to this Court's decision in *Taylor*. The transcript shows that the Court of Appeals' decision in *Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 442 (1995), was presented to the trial court as "the most recent case that sets forth the standard." In *Taylor*, the Court of Appeals held that the trial court erred by not considering plaintiff's estate in determining that defendant had sufficient means to defray the expenses of the action. The Court of Appeals explained:

> [T]he record reveals that the court made its determination on this issue without considering the relative estates of the parties. The trial court only made findings on the value of defendant's estate. Whether a party has insufficient means to defray the expenses of the action *requires* a consideration of the estates of the parties.

Id. at 365, 455 S.E.2d at 448 (emphasis added).

In reversing the Court of Appeals and reinstating the trial court's order, this Court stated the issue and answer as follows:

> The sole question on this appeal is whether a trial court, in ruling on a motion for attorney's fees in a child custody and support action, may determine that a party has sufficient means to defray the cost of the action without considering the estate of the other party. We answer in the affirmative and reverse the Court of Appeals' decision to the contrary.

343 N.C. at 51, 468 S.E.2d at 34. In discussing the issue, we said:

> The trial judge made findings pursuant to N.C.G.S. § 50-13.6 for a child custody and support suit. The trial court found that defendant was an interested party and that she was acting in good faith, and plaintiff does not challenge these findings. However, after considering the testimony on defendant's financial condition, the trial court found that defendant had sufficient means to defray the expense of the action. Defendant contends, essentially, that the trial court cannot make this determination without considering the relative estates of the parties. Plaintiff, on the other hand, contends that such a determination can be made without a comparison of the estates of the parties. We agree with plaintiff.

Id. at 54, 468 S.E.2d at 36. We then examined the record and concluded:

> The evidence supported the trial court's finding that defendant had the means to defray her litigation expenses. Defendant's estate, which is primarily liquid, was sufficient to pay these expenses; and no unreasonable depletion of her estate would be required to pay them. The trial court's findings of fact thus support the conclusion that an award of attorney's fees was not necessary to make it possible for defendant to employ adequate counsel to enable her, as litigant, to meet plaintiff in the suit.

Id. at 55, 468 S.E.2d at 36.

In the instant case, the Court of Appeals examined the record and concluded that the evidence before the trial court "fails to show that [defendant] did not have ample income to defray the expenses of this action and [that defendant] would have been required to [unreasonably] deplete her estate to pay these expenses." *Van Every*, 125 N.C. App. at 581, 481 S.E.2d at 379. Based on this conclusion, with

which we agree, the Court of Appeals reversed the order requiring plaintiff to pay defendant's attorney's fees and remanded for reconsideration "on the basis of the evidence in the record and without a consideration of the relative estates of the parties." *Id.* at 582, 481 S.E.2d at 379.

While we agree with the Court of Appeals that the case must be remanded for reconsideration of defendant's entitlement to attorney's fees, we believe that the order of remand is too restrictive in two respects: (1) since the trial court did not have the benefit of this Court's *Taylor* decision, it should not be prohibited from ordering such additional evidence, if any, as the trial court, in its discretion, may determine is necessary to permit a proper finding by the trial court as to defendant's ability, or lack thereof, to pay her expenses from income or from her estate or from some combination thereof without unreasonable depletion of her estate; and (2) while the trial court should focus on the disposable income and estate of defendant, it should not be placed in a straitjacket by prohibiting any comparison with plaintiff's estate, for example, in determining whether any necessary depletion of defendant's estate by paying her own expenses would be reasonable or unreasonable. Accordingly, the order of remand must be modified to remove these restrictions.

Upon remand, if the trial court finds from the evidence that defendant has sufficient means to defray the expense of the suit, then defendant's request for attorney's fees shall be denied. If the trial court finds from the evidence that defendant has insufficient means to defray the expense of the suit, then it shall exercise its discretion in determining whether it shall order payment of reasonable attorney's fees to defendant.

For the reasons stated herein, the decision of the Court of Appeals is modified as to the conditions of remand and, as modified, is affirmed.

MODIFIED AND AFFIRMED.

JAMES E. WALKER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SARAH S. WALKER, PETITIONER v. THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, RESPONDENT

No. 482PA97

(Filed 3 April 1998)

1. Administrative Law and Procedure § 65 (NCI4th)— interpretation of statutory term—de novo review

When the issue on appeal is whether a state agency erred in interpreting a statutory term, an error of law is asserted, and an appellate court may employ *de novo* review.

2. Retirement § 10 (NCI4th)— local government employee—death benefit—employment terminated upon retirement—last day of service

Under the statutory death benefit plan for local government employees, when an employee retires, that employee's "employment has been terminated" within the meaning of N.C.G.S. § 128-27(1)(2)(a). As such, the retired employee's last day of actual service is the "last day the [employee] actually worked." N.C.G.S. § 128-27(1)(2)(a).

3. Retirement § 10 (NCI4th)— local government employee—death benefit—disability retirement—death not within 180 days of last day worked

Petitioner's decedent terminated her employment within the meaning and intent of N.C.G.S. § 128-27(1)(2)(a) when she went on disability retirement. Because decedent's employment had been terminated at the time of her death, petitioner was not entitled to receive the statutory death benefit where decedent died more than 180 days from the last day she actually worked. N.C.G.S. § 128-27(1)(2)(a).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 127 N.C. App. 156, 487 S.E.2d 839 (1997), reversing an order entered by Gray, J., at the 29 January 1996 Civil Session of Superior Court, Mecklenburg County, that reversed a final agency decision and remanded for reinstatement of the Administrative Law Judge's recommended decision. Heard in the Supreme Court 10 March 1998.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for petitioner-appellant.

Michael F. Easley, Attorney General, by Alexander McC. Peters, Special Deputy Attorney General, for respondent-appellee.

WHICHARD, Justice.

On 5 October 1993 James E. Walker, petitioner, filed a petition for a contested case hearing with the Office of Administrative Hearings. Petitioner challenged a decision of the Board of Trustees of the North Carolina Local Governmental Employees' Retirement System (the Board) denying petitioner a benefit based upon the death of his wife while in local government service.

Petitioner's wife began work for Mecklenburg County in December 1977. Thirteen years later she was diagnosed with cancer. She last worked for Mecklenburg County on 1 June 1990. On that date she went on paid sick leave. On 12 March 1991 with .23 of a day of paid sick leave remaining, petitioner's wife went on medical leave without pay.

On 17 June 1991 petitioner's wife applied for disability retirement; this application was approved effective 1 August 1991. Petitioner's wife received a final compensation payment, including compensation for .23 of a day of paid sick leave, on 31 July 1991. She died 18 October 1991. Petitioner sought a statutory death benefit under N.C.G.S. § 128-27(1) following his wife's death. The Board denied this benefit. Petitioner challenged this decision.

After a hearing, Administrative Law Judge (ALJ) Brenda Becton recommended that respondent Board award the death benefit to petitioner. The Board rejected the recommendation and entered a final agency decision in its favor. Petitioner sought judicial review of the Board's decision in the Superior Court, Mecklenburg County. Judge Marvin K. Gray entered an order reversing the final agency decision and remanding the matter for reinstatement of the ALJ's recommended decision. The Court of Appeals reversed that order. *Walker v. Board of Trustees of the N.C. Local Governmental Employees' Retirement Sys.*, 127 N.C. App. 156, 487 S.E.2d 839 (1997). The Court of Appeals concluded that although the trial court properly interpreted N.C.G.S. § 128-27(1), the statutory death benefit plan for county employees, such that retirement did not "terminate" employment within the meaning of the statute, the court improperly calculated decedent's "last day of actual service" under the statute. Thus,

the Court of Appeals held that no death benefit was due to petitioner under N.C.G.S. § 128-27(1). *Id.* at 161, 487 S.E.2d at 842. This Court granted petitioner's petition for discretionary review.

[1] Article 4 of chapter 150B of the North Carolina General Statutes governs judicial review of the Board's administrative decisions and provides that courts may review an agency's decision when that decision is "[a]ffected by . . . error of law." N.C.G.S. § 150B-51(b)(4) (1995). When the issue on appeal is whether a state agency erred in interpreting a statutory term, an error of law is asserted, and an appellate court may employ *de novo* review. *In re Appeal of N.C. Savings & Loan League*, 302 N.C. 458, 465, 276 S.E.2d 404, 410 (1981). Here, we address two such issues of statutory interpretation. First, does retirement "terminate" employment under N.C.G.S. § 128-27(1)? Second, when was decedent's "last day of actual service" under N.C.G.S. § 128-27(1)(2)?

N.C.G.S. § 128-27(1) details the terms of the "Death Benefit Plan" available to employees of counties within North Carolina. This legislation permits payment of a death benefit to the beneficiary of a member of the Death Benefit Plan who dies "within 180 days from the last day of [the member's] actual service." N.C.G.S. § 128-27(1) (1991).[1] The "[l]ast day of actual service shall be: a. When employment has been terminated, the last day the member actually worked[; or] b. When employment has not been terminated, the date on which an absent member's sick and annual leave expire." N.C.G.S. § 128-27(1)(2).

Petitioner contends that his wife's retirement did not terminate her employment and that her last day of actual service was 31 July 1991, the date on which her sick and annual leave expired under N.C.G.S. § 128-27(1)(2)(b). The Board asserts that the decedent's retirement terminated her employment and that her last day of actual service was 1 June 1990, the last day she actually worked under N.C.G.S. § 128-27(1)(2)(a). We agree with the Board.

"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 [the statute] its plain and definite meaning, and are without

1. There are later versions of this statute. This is the version that was in effect at the time of petitioner's decedent's death and is thus the controlling one.

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)).

The word "terminate" is undefined in chapter 128 of the North Carolina General Statutes. As this word is unambiguous, however, we accord it its plain meaning. *Poole v. Miller*, 342 N.C. 349, 352, 464 S.E.2d 409, 411 (1995). Terminate means "[t]o put an end to; to make to cease; to end." *Black's Law Dictionary* 1471 (6th ed. 1990). When "employment has been terminated" under N.C.G.S. § 128-27(1)(2)(a), employment has ended. Likewise, when "employment has not been terminated" under N.C.G.S. § 128-27(1)(2)(b), employment has not ended.

Retirement ends employment. *See Pritchett v. Clapp*, 288 N.C. 329, 337, 218 S.E.2d 406, 411 (1975) (recognizing that "any cessation of employment . . . includ[ing] resignation, discharge, disability and service retirement" constitutes a "termination from service" as an employee). Retirees do not actively serve their employers. They maintain no employment responsibilities. Rather, they "withdraw[] from active service," N.C.G.S. § 128-21(19) (1991), and terminate their employment obligations.

[2] Thus, under the plain meaning of N.C.G.S. § 128-27(1)(2)(a), when an employee retires, that employee's "employment has been terminated." As such, the retired employee's last day of actual service is "the last day the [employee] actually worked." N.C.G.S. § 128-27(1)(2)(a).

[3] Here, petitioner's decedent terminated her employment within the meaning and intent of N.C.G.S. § 128-27(1)(2)(a) when she went on disability retirement effective 1 August 1991. Because decedent's "employment had been terminated" at the time of her death on 18 October 1991, petitioner could receive the statutory death benefit only if his decedent died within 180 days from 1 June 1990, "the last day [decedent] actually worked." N.C.G.S. § 128-27(1)(2)(a). Well over 180 days expired between 1 June 1990, the last day decedent actually worked, and 18 October 1991, the date decedent died. Thus, although we disagree with the reasoning of the Court of Appeals, for the reasons stated herein, we affirm its conclusion that petitioner cannot recover a death benefit under N.C.G.S. § 128-27(1).

AFFIRMED.

JAMES KEVIN CISSELL, ADMINISTRATOR OF THE ESTATE OF CARLA T. CISSELL v. GLOVER LANDSCAPE SUPPLY, INC. AND ROBERT C. GLOVER

No. 356A97

(Filed 3 April 1998)

Automobiles and Other Vehicles § 563 (NCI4th)— parking truck on highway—instruction on gross negligence not required

The trial court in an action arising from the collision of an automobile with a parked truck and trailer did not err by refusing to instruct the jury on willful or wanton conduct (gross negligence) by the truck driver in parking his eight-foot wide truck and trailer on a sunny morning on the right-hand side of a thirty-six-foot wide straight and level rural paved road for the purpose of unloading equipment.

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 126 N.C. App. 667, 486 S.E.2d 472 (1997), setting aside a judgment entered on 7 May 1996 by Stephens (Donald W.), J., in Superior Court, Vance County, and awarding a new trial. Heard in the Supreme Court 10 March 1998.

Perry, Kittrell, Blackburn & Blackburn, by Charles F. Blackburn, for plaintiff-appellee.

Broughton, Wilkins, Webb & Sugg, P.A., by Charles P. Wilkins, for defendant-appellants.

PER CURIAM.

For the reasons stated in the dissenting opinion for the Court of Appeals by John, J., the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Superior Court, Vance County, for reinstatement of the judgment entered on the jury verdict in favor of defendants.

REVERSED AND REMANDED.

ANNIE C. SWANN AND CAROLYN D. SMITH v. LEN-CARE REST HOME, INC., ANDREW STEWART, AND SHELBIA NORRIS

No. 522A97

(Filed 3 April 1998)

Hospitals and Medical Facilities or Institutions § 62 (NCI4th)— rest home—failure to restrain resident—insufficient evidence of negligence

The evidence was insufficient for the jury on the issue of negligence by defendant rest home and its employees in failing to restrain a ninety-eight-year-old resident at the time she fell and was seriously injured.

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 127 N.C. App. 471, 490 S.E.2d 572 (1997), affirming in part and reversing in part a judgment, entered by Brewer, J., 29 May 1996 in Superior Court, Cumberland County, directing a verdict for defendants on plaintiff Smith's claim for negligent infliction of emotional distress and on plaintiff Swann's claim for negligence. Heard in the Supreme Court 11 March 1998.

The Lee Law Firm, P.A., by C. Leon Lee, II, for plaintiff-appellee Swann.

Wishart, Norris, Henninger & Pittman, P.A., by Jim H. Joyner, Jr., for defendant-appellants.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge John C. Martin, *Swann v. Len-Care Rest Home*, 127 N.C. App. 471, 475-76, 490 S.E.2d 572, 575-76 (1997), the decision of the Court of Appeals reversing the directed verdict as to plaintiff Swann's claim is reversed; and the case is remanded to the Court of Appeals for further remand to the Superior Court, Cumberland County, for reinstatement of the trial court's judgment.

REVERSED AND REMANDED.

STATE v. GOODE

[348 N.C. 69 (1998)]

STATE OF NORTH CAROLINA v. GEORGE EARL GOODE, JR.

No. 10A94-2

(Filed 3 April 1998)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 30 May 1997 by Stanback, J., in Superior Court, Johnston County, allowing defendant's motion for discovery under N.C.G.S. § 15A-1415(f). Heard in the Supreme Court 16 December 1997.

Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, and R. Kendrick Cleveland, Assistant Attorney General, for the State-appellant.

Diane M. B. Savage and Leslie Laufer for defendant-appellee.

Paul M. Green and Samuel L. Bridges on behalf of codefendant Eugene DeCastro, amicus curiae.

PER CURIAM.

Pursuant to this Court's opinion in *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998), the order of the trial court is affirmed.

AFFIRMED.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DERRICK ALLEN	)	
	)	
IN RE ANDREW CURLISS	)	

No. 88P98

(Filed 11 March 1998)

Upon consideration of Petitioner's Emergency Petition for Writ of Supersedeas and Petitioner's Petition for Writ of Certiorari to Review the Order of the Superior Court, the following order is entered.

Petitioner's Emergency Petition for Writ of Supersedeas is allowed. Petitioner's Petition for Writ of Certiorari to Review the Order of the Superior Court is allowed.

It is further ordered that the Attorney General is directed to appear on behalf of the Superior Court, Durham County, to defend the verbal order directing Petitioner to provide his notes of a conversation held with Derrick Allen, the defendant in this case, to the State. Said order was issued from the bench by the Honorable Orlando Hudson on 6 March 1998 in the case of State of North Carolina v. Derrick Allen, No. 98 CRS 5208.

The parties are hereby ordered to file the record on appeal on or before 20 March 1998. Briefs of the respective parties shall be submitted to this Court as follows: Petitioner's brief shall be due on or before 15 April 1998. The State's brief shall be due on or before 5 May 1998.

By order of the Court in Conference, this the 11th day of March, 1998.

Orr, J.
For the Court

CARTER v. ONE PRICE CLOTHING STORE

No. 18P98

Case below: 126 N.C.App. 221

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 April 1998.

CROSS v. PRIDGEN

No. 580P97

Case below: 127 N.C.App. 750

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

FISK v. KELLY SPRINGFIELD TIRE CO.

No. 557P97

Case below: 127 N.C.App. 750

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

FLOYD AND SONS, INC. v. CAPE FEAR FARM CREDIT

No. 27A98

Case below: 127 N.C.App. 753

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 2 April 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

HOME INDEMNITY CO. v. HOECHST CELANESE CORP.

No. 43P98

Case below: 128 N.C.App. 260

Petition by defendant (Hoechst) for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

HOME INDEMNITY CO. v. HOECHST CELANESE CORP.

No. 44P98

Case below: 128 N.C.App. 226

Petition by defendant (Certain Underwriters at Lloyd's) for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

HOUPE v. CITY OF STATESVILLE

No. 68P98

Case below: 128 N.C.App. 334

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

HOWARD v. SQUARE-D CO.

No. 46PA98

Case below: 128 N.C.App. 303

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 April 1998.

IN RE ALLRED

No. 73PA98

Case below: 128 N.C.App. 604

Petition by petitioner (Randolph County) for discretionary review pursuant to G.S. 7A-31 allowed 2 April 1998.

IN RE CONLEY

No. 7P98

Case below: 128 N.C.App. 185

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

IN RE SMITH

No. 558P97

Case below: 127 N.C.App. 750

Petition by respondent (Cindy Smith) for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

JEFFREYS v. SNAPPY CAR RENTAL

No. 25P98

Case below: 128 N.C.App. 171

Petition by defendant (Atlantic) for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

LIN v. LIN

No. 76P98

Case below: 128 N.C.App. 533

Notice of appeal by plaintiff pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 2 April 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

LIPTRAP v. CITY OF HIGH POINT

No. 67P98

Case below: 128 N.C.App. 353

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

MCCARN v. BEACH

No. 64P98

Case below: 128 N.C.App. 435

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

POLAROID CORP. v. OFFERMAN

No. 70PA98

Case below: 128 N.C.App. 422

Petition by Attorney General for Secretary of Revenue for discretionary review pursuant to G.S. 7A-31 allowed 2 April 1998.

RINALDI v. NORFOLK SOUTHERN RAILWAY CO.

No. 56P98

Case below: 128 N.C.App. 332

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

ROUSSELO v. STARLING

No. 92P98

Case below: 128 N.C.App. 439

Motion by Attorney General to dismiss notice of appeal allowed 2 April 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

SHARP v. BAKER

No. 603P97

Case below: 127 N.C.App. 754

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

SMITH v. N.C. DEPT. OF LABOR

No. 59P98

Case below: 128 N.C.App. 533

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

STATE v. BARNES

No. 74P98

Case below: Rockingham County Superior Court

Defendant's pro se petition for writ of certiorari is allowed 2 April 1998 for the limited purposes of entering the following order: This case is remanded to the Superior Court, Rockingham County, for the purpose of conducting an evidentiary hearing pursuant to G.S. 15A-1420(c) and further proceedings consistent therewith.

STATE v. DAVIS

No. 549P97

Case below: 127 N.C.App. 561

Motion by the Attorney General to dismiss the notice of appeal allowed 2 April 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

STATE v. ELLIS

No. 501P97

Case below: 120 N.C.App. 648

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 April 1998.

STATE v. HATFIELD

No. 57P98

Case below: 128 N.C.App. 294

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

STATE v. JORDAN

No. 529P97

Case below: 127 N.C.App. 557

Motion by Attorney General to dismiss appeal allowed 2 April 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

STATE v. KILPATRICK

No. 8P98

Case below: 127 N.C.App. 554

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 April 1998.

STATE v. LEE

No. 81P98

Case below: 128 N.C.App. 506

Motion by Attorney General to dismiss appeal allowed 2 April 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

STATE v. MALETTE

No. 79P98

Case below: 128 N.C.App. 749

Motion by defendant (Malette) for temporary stay allowed 2 April 1998.

STATE v. ROBINSON

No. 261A92-4

Case below: Bladen County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Bladen County denied 2 April 1998. Petition by defendant for writ of mandamus denied 2 April 1998.

STATE v. TAYLOR

No. 71P98

Case below: 128 N.C.App. 394

Motion by Attorney General to dismiss appeal allowed 2 April 1998 as to due process issue only; otherwise denied. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

STATE v. THOMPSON

No. 80P98

Case below: 128 N.C.App. 547

Motion by defendant (Thompson) for temporary stay allowed 9 March 1998.

STATE v. WASHINGTON

No. 55P98

Case below: 128 N.C.App. 333

Motion by Attorney General to dismiss appeal allowed 2 April 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

STATE v. WEAVER

No. 42P98

Case below: 128 N.C.App. 333

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

STATE v. WILSON

No. 97P98

Case below: 128 N.C.App. 688

Motion by Attorney General for temporary stay allowed 16 March 1998.

STATE v. WOOTEN

No. 208A94-2

Case below: Pitt County Superior Court

Petition by defendant for writ of supersedeas allowed 2 April 1998. Petition by defendant for writ of certiorari allowed 3 April 1998 for the limited purpose of entering the following order: This case is remanded to the Superior Court, Pitt County, for reconsideration of the orders entered on 5 January 1998 and 9 February 1998 in light of this Court's opinion in *State v. Bates*, 348 N.C. 29, ——, S.E.2d —— (1998).

STATE ex rel. UTILITIES COMM'N v. N.C. GAS SERVICE

No. 54P98

Case below: 128 N.C.App. 288

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

VIRMANI v. PRESBYTERIAN HEALTH SERVICES CORP.

No. 62PA97-2

Case below: 127 N.C.App. 629

Motion by plaintiff to dismiss notice of appeal denied 19 March 1998.

WEATHERFORD v. KEENAN

No. 614P97

Case below: 128 N.C.App. 178

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

WILLIAMS v. BOWDEN

No. 17P98

Case below: 128 N.C.App. 318

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

WOOTEN v. TOWN OF TOPSAIL BEACH

No. 593P97

Case below: 127 N.C.App. 739

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 April 1998.

PETITION TO REHEAR

STONE v. N.C. DEPT. OF LABOR

No. 81PA97

Case below: 347 N.C. 473

Petition by plaintiffs to rehear pursuant to Rule 31 denied 2 April 1998.

STATE OF NORTH CAROLINA v. LESLEY EUGENE WARREN

No. 116A96

(Filed 8 May 1998)

1. Constitutional Law § 264 (NCI4th)— first-degree murder—request for counsel for prior offense—Sixth Amendment—offense specific

A first-degree murder defendant's Sixth Amendment right to counsel was not violated where he was arrested in High Point on a South Carolina warrant for first-degree murder, taken to Asheville and questioned about a murder there as well as murders in South Carolina and New York, and he first confessed to those murders, then confessed to the murder in High Point of Katherine Johnson which was the subject of this trial. Although defendant had been questioned about the disappearance of the Asheville victim, had requested counsel, and had been represented by counsel at a bond hearing for misdemeanor larceny of the Asheville victim's pocketbook and failure to produce title to a motor vehicle, the Sixth Amendment is offense-specific and had not attached to any of the homicides when defendant was arrested because no adversarial judicial proceedings had been instituted in the murder cases.

2. Evidence and Witnesses § 1254 (NCI4th)— first-degree murders—Sixth Amendment right to counsel—invoked for prior crime—confession admissible

There was no bar to the admission of the statement of a capital first-degree murder defendant under the Sixth Amendment, Article I, Section 23 of the North Carolina Constitution, or N.C.G.S. § 15-4 where defendant was under investigation for several murders; the murder in this case was the last in the sequence and occurred in High Point; defendant had been charged with misdemeanor larceny of the pocketbook of one of the other victims in Asheville; he had requested counsel and had been represented by counsel at a bond hearing for offenses in Asheville; and the confession to all of the murders was made after he had been released on bond and the High Point murder committed. Although the Sixth Amendment right to counsel is offense specific, defendant contends that the murder in High Point is inextricably intertwined with the crime for which the Sixth Amendment right to counsel had attached; however, even assum-

ing that the pocketbook larceny in Asheville was inextricably intertwined with the murder of the Asheville victim so that the confession to that murder was barred, any Sixth Amendment right related only to that murder. Defendant could not have invoked his Sixth Amendment right to counsel as to this murder in High Point because it had not yet been committed when the right to counsel was invoked.

3. Evidence and Witnesses § 1235 (NCI4th)— first-degree murders—Fifth Amendment right to counsel invoked—break in custody—further interrogation—confession admissible

A capital first-degree murder defendant's motion to suppress his statement to officers under the Fifth Amendment right to counsel was properly denied where defendant invoked his Fifth Amendment right to counsel on 29 May 1990 during custodial interrogation for a murder in Asheville, he was released from custody on 7 June, the murder in this case occurred in High Point on 15 July 1990, defendant was arrested on 20 July, and he waived his rights and confessed to this murder. The break in custody renders inapplicable the rule in *Edwards v. Arizona*, 451 U.S. 477, regarding police initiated custodial interrogation after a request for counsel.

4. Criminal Law § 1348 (NCI4th Rev.)— capital sentencing—instructions—1990 murder—life without parole—motion for jury to consider—denied

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion to have the jury consider life without the possibility of parole as a sentencing option. The intent of the legislature to apply N.C.G.S. § 15A-2002 prospectively has been acknowledged in previous cases, and retroactive application of the amendment would violate the *ex post facto* prohibition because it increases the punishment for first-degree murder despite defendant's offer to waive this constitutional protection.

5. Criminal Law §§ 1363, 948 (NCI4th Rev.)— capital sentencing—motion for appropriate relief in prior murder—appointment of counsel—denial not prejudicial

The trial court did not abuse its discretion by denying a capital first-degree murder defendant's motion for appointment of counsel to prosecute a motion for appropriate relief regarding a

prior conviction for first-degree murder where defendant believed that his guilty plea and prior murder conviction were unreliable and that the State would use that conviction as an aggravating circumstance in this case, but the trial court stated that the appropriate jurisdiction for the motion was the North Carolina Supreme Court since the case was on appeal. Although the trial court had the authority to grant the motion, defendant did not show how the denial of the motion prejudiced him or how use of the prior guilty plea violated his constitutional rights in this case. Moreover, defendant may still file a motion for appointment of counsel to prosecute a motion for appropriate relief.

6. Jury § 218 (NCI4th)— capital first-degree murder—jury selection—juror excluded—religious opposition to death penalty

The trial court did not err in a capital prosecution for first-degree murder by excusing a juror for cause based on her religious opposition to the death penalty. Although defendant argues that her exclusion from the jury violated constitutional principles regarding the free exercise of religion, she was excused for her inability to follow the law and the fact that her religion provided the basis of her views does not alter the propriety of her exclusion.

7. Jury § 218 (NCI4th)— capital first-degree murder—jury selection—juror excluded—religious opposition to death penalty—North Carolina Constitution

A capital first-degree murder defendant's liberty interest under Article I, section 26 of the North Carolina Constitution was not violated by excusing for cause a juror who was unable to vote for the death penalty for religious reasons. Although Article I, section 26 provides that no person shall be excluded from jury service on account of sex, race, color, religion, or national origin, the juror here was excluded based solely on her inability to perform her lawful duties as a juror.

8. Jury § 218 (NCI4th)— capital first-degree murder—jury selection—jurors opposed to death penalty on religious grounds—excluded for inability to follow law

There was no merit to a capital first-degree murder defendant's contention that if *State v. Davis*, 325 N.C. 607, is not overturned, then N.C.G.S. § 15A-2000 is unconstitutional in that it permits jurors opposed to the death penalty for religious reasons

to be excluded based on their religious beliefs. The juror here was excluded under *Wainwright v. Witt*, 469 U.S. 412, for views which would substantially impair performance of duties as a juror, and no constitutional provisions were implicated.

9. Jury § 64 (NCI4th)— first-degree murder—jury selection—judge's comment—no excusals for business reasons—not chilling

The trial court did not err during jury selection for a capital first-degree murder prosecution by admonishing jurors that no juror would be excused for business reasons. Defendant's argument that the judge's comment had a chilling effect on jurors' responses is not borne out by the record; two potential alternate jurors asked and were excused with consent of counsel after the judge's remarks.

10. Homicide § 253 (NCI4th)— first-degree murder—sufficiency of evidence—premeditation and deliberation

There was no error in a capital first-degree murder prosecution in the denial of defendant's motion to dismiss the charge for insufficient evidence of premeditation and deliberation where the State's evidence showed a lack of provocation by the victim, that defendant manually strangled the victim to death, that he crammed her body into the car trunk, that he parked the car in a parking deck, and that he fabricated a story to conceal the murder. These facts permit the inference that defendant acted with premeditation and deliberation.

11. Criminal Law § 471 (NCI4th Rev.)— capital first-degree murder—defendant's argument—reasonable doubt—moral certainty

The trial court did not err during a capital prosecution for first-degree murder by sustaining an objection and later objecting *ex mero motu* to defense counsel's attempts in his closing argument to explain proof beyond a reasonable doubt and to his use of a quotation from a jury instruction from *State v. Phillip*, 261 N.C. 263, involving "moral certainty." *Cage v. Louisiana*, 498 U.S. 39, and its progeny are not controlling in this case in that here the objectionable statements were not contained in jury instructions. Defense counsel was informed that any references to "moral certainty" as regards proof of reasonable doubt could not be disassociated from the evidence and, having instructed defense counsel, the judge did not abuse his discretion in sustaining the

prosecutor's objection or by intervening *ex mero motu* in defense counsel's closing argument. Even assuming error, the trial judge correctly instructed the jury on reasonable doubt after closing arguments.

12. Criminal Law § 433 (NCI4th Rev.)— capital first-degree murder—prosecutor's closing argument—reference to defendant's failure to testify—reference to what defense counsel often do

The trial court did not err in the closing argument of the guilt phase of a capital first-degree murder prosecution by overruling defendant's objection to the prosecutor's arguments that "You're going to hear a lot from the defendant—well, from the defense counsel, I beg your pardon . . ." and that ". . . lots of times defendants or counsel try to deflect . . . ." The prosecutor's alleged reference to defendant's failure to testify was a *lapsus linguae* which was promptly corrected and could not have affected the outcome of the trial and the reference to what counsel often do accurately anticipated defense counsel's closing argument and was not a disparagement of defense counsel.

13. Criminal Law § 475 (NCI4th Rev.)— capital first-degree murder—prosecutor's argument—defendant's intent to do something to someone—no error

The trial court did not err during a capital first-degree murder prosecution by overruling defendant's objection to the prosecutor's argument that defendant was bent on doing something to someone, that it would have been some other young woman if not this victim, and that the evidence showed that defendant set out with a fixed purpose or a premeditation and deliberation from start to finish. The prosecutor's arguments were within the wide latitude counsel are given and were reasonable inferences based on the evidence.

14. Criminal Law § 472 (NCI4th Rev.)— first-degree murder—strangled victim—prosecutor's argument—premeditation and deliberation—any point prior to death

There was no prejudicial error in a capital prosecution for first-degree murder where the prosecutor argued that defendant premeditated and deliberated the killing if he intended to kill the victim at any point prior to the victim dying. The evidence was that defendant strangled the victim for several minutes until she was dead and the prosecutor's statement that premeditation and

deliberation can be found at any point prior to the victim dying was an accurate statement of the law. Assuming error, any impropriety was promptly corrected by the prosecutor requiring that the jury find premeditation and deliberation prior to the killing.

15. Criminal Law § 454 (NCI4th Rev.)— first-degree murder—prosecutor's argument—fear and emotions of victim

There was no impropriety in a prosecutor's argument in a capital first-degree murder prosecution where the prosecutor asked the jurors to imagine being there as the victim was strangled and asked them whether they could imagine anything more degrading. An argument asking jurors to put themselves in the place of the victims will not be condoned, but arguments asking the jury to imagine the fear and emotions of a victim have been found proper. The prosecutor's argument here was based on the evidence and did not misstate or manipulate the evidence.

16. Criminal Law § 439 (NCI4th Rev.)— first-degree murder—prosecutor's argument—defendant's character—argument based on facts in evidence

The closing remarks of a prosecutor in a capital first-degree murder prosecution were properly based on facts in evidence where the prosecutor contended that this defendant was not the average killer and didn't care.

17. Criminal Law § 475 (NCI4th Rev.)— first-degree murder—prosecutor's arguments—cumulative effect—no error

There was no error in the cumulative effects of alleged errors in the prosecutor's argument in a capital first-degree murder prosecution.

18. Evidence and Witnesses § 1695 (NCI4th)— first-degree murder—photographs of decomposed body—relevant and probative

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion *in limine* and allowing the admission of seven photographs of the victim's body. The photographs were relevant and had probative value; the first two were used during the testimony of an officer to illustrate the location, position, and condition of the body when it was discovered, and the others illustrated the pathologist's testimony. Although defendant had conceded guilt of second-degree murder and the photographs showed the body in an advanced state of decompo-

sition, defendant had pled not guilty to first-degree murder, the State still bore the burden of proving all the elements of first-degree murder, and the condition of the victim's body, the nature of the wound, and evidence that the murder was done in a brutal fashion are circumstances from which premeditation and deliberation can be inferred.

19. Evidence and Witnesses § 1695 (NCI4th)— first-degree murder—photographs of victim—probative value not outweighed by prejudice

The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting seven photographs showing the victim's badly decomposed body where the photographs were relevant and had probative value but defendant argued that the prejudicial effect outweighed the probative value.

20. Evidence and Witnesses § 1064 (NCI4th)— first-degree murder—concession of second-degree—not a plea—State required to prove elements—instruction on flight—no error

There was no plain error in a capital first-degree murder prosecution where the jury was instructed on flight. Although defendant argues that he had conceded guilt for second-degree murder and that the only issue was whether there was sufficient evidence of premeditation and deliberation, on which flight has no bearing, defendant had not pled guilty to second-degree murder and only conceded guilt in argument, so that the State was still required to prove each element of the charged offense.

21. Homicide § 514 (NCI4th)— second-degree murder—instruction on elements—Pattern Jury Instructions—accurate statement of law

There was no plain error in the trial court's instruction on the elements of second-degree murder where the challenged instruction, taken directly from the Pattern Jury Instructions, was an accurate statement of the law.

22. Criminal Law § 505 (NCI4th Rev.)— first-degree murder—jury—taking notes—prohibited by court

There was no error in a capital first-degree murder prosecution where the trial court prohibited the taking of notes by the jury in the absence of an objection by the parties. The 1993

amendment to N.C.G.S. § 15A-1228, which permitted the prohibition on the judge's own motion, became effective on 1 October 1993 and applies to trials begun after that date. Defendant's trial began on 18 March 1996.

23. Criminal Law § 690 (NCI4th Rev.)— first-degree murder—mitigating circumstances—peremptory instructions—credible and convincing evidence

The trial court did not err in a capital sentencing proceeding in its peremptory instructions on mitigating circumstances where the jury was told that the mitigating circumstance must be established by a preponderance of the evidence and later that it should so indicate if not persuaded that the facts supporting a circumstance were credible and convincing. A preponderance of the evidence is the correct burden of proof for establishing a mitigating circumstance, but a single instruction may not be viewed in isolation and a jury may reject a mitigating circumstance supported by all of the evidence if the evidence is not credible or convincing. As in *State v. Holden*, 346 N.C. 404, the jury would have applied the credible and convincing requirement to mean that it must believe the evidence to find that the circumstance existed.

24. Criminal Law § 934 (NCI4th Rev.)— first-degree murder—issues and recommendation form—one mitigating circumstance—omitted language—no plain error

There was no plain error, and any error was harmless, where the court in a capital sentencing proceeding submitted an issues and recommendation form which stated as to one circumstance "ANSWER ____ One or more of us finds this mitigating," omitting the last three words, "circumstance to exist." Given the court's oral instructions and the other language on the form, there was no reasonable possibility that the omission had an impact upon the jury's verdict.

25. Criminal Law § 1363 (NCI4th Rev.)— first-degree murder—aggravating circumstances—prior conviction of capital felony—timing of murders and convictions

The trial court did not err by submitting to the jury the aggravating circumstance that defendant had been previously convicted of another capital felony, N.C.G.S. § 15A-2000(e)(2), where the two prior murders preceded this murder, but the convictions did not. This argument has recently been rejected in connection

with the (e)(3) aggravating circumstance, a previous conviction of a felony involving the use or threat of violence to the person.

26. Criminal Law § 1363 (NCI4th Rev.)— first-degree murder—aggravating circumstances—prior conviction of capital felony—Pattern Jury Instruction—not the law

The trial court did not err and the defendant's constitutional rights were not violated in a capital sentencing hearing where the court instructed on the aggravating factor of having been previously convicted of first-degree murder by giving the pattern jury instruction in effect during the sentencing proceeding rather than the version in effect on the date of the offense, which included language that defendant had been convicted of first-degree murder "on or about the alleged date". Although defendant argues that the omission of the clause is a change in the law which increased his punishment and violated the *ex post facto* prohibition, the pattern jury instruction is drafted by a committee of the North Carolina Conference of Superior Court Judges and does not itself have the force or effect of the law. The instruction here was merely altered to conform to the law; the "previously convicted" language in N.C.G.S. § 15A-2000(e)(2) includes capital felonies committed before the events out of which the murder charge arose, even though the conviction came after those events, so long as the conviction precedes the capital sentencing proceeding in which it forms the basis of the aggravating circumstance.

27. Criminal Law § 1363 (NCI4th Rev.)— first-degree murder—sentencing—prior conviction of capital felony

The trial court did not provide erroneous instructions to the jury in a capital sentencing proceeding regarding the (e)(2) aggravating circumstance where defense counsel argued in closing that the aggravating circumstance was not available based upon the pattern jury instruction in effect at the date of the offense rather than at trial, the trial court subsequently read to the jury from the instruction in effect at the time of the trial, and the jury requested a copy of the statute and later returned with a question. Although defendant contends that the answer did not require the jury to find that defendant had been previously convicted of first-degree murder, any confusion was most likely caused by defense counsel's reading of the prior pattern jury

instruction and any misunderstanding was clarified by the judge's instructions and answers to the jury's questions. The jury knew that it was required to find that defendant had been previously convicted of first-degree murder in order to find the aggravating circumstance.

28. Criminal Law § 1348 (NCI4th Rev.)— capital sentencing—parole eligibility—instruction denied

The trial court did not err in a capital sentencing proceeding by denying defendant's request for an instruction on parole eligibility where defendant contended that the State argued future dangerousness and that defendant would be parole ineligible if a life sentence were imposed in this case because of a prior conviction and death sentence. The prosecution argued that defendant had committed three murders to show that defendant was a serial killer deserving of the death penalty and did not argue future dangerousness.

29. Criminal Law § 1338 (NCI4th Rev.)— capital sentencing—photographs of prior murder victims—admissible

The trial court did not err in a capital sentencing proceeding by allowing into evidence postmortem photographs of the victims in defendant's previous first-degree murder convictions. The photographs illustrated the testimony of police detectives and supported the existence of the aggravating circumstance that defendant had been previously convicted of another capital felony. Whether photographic evidence is more probative than prejudicial lies within the discretion of the trial court and defendant failed to show that the court abused its discretion.

30. Criminal Law § 472 (NCI4th Rev.)— capital sentencing—reading from judicial opinion—quoting Florida law

The trial court did not err in a capital sentencing proceeding by overruling defendant's objection to the prosecutor's argument quoting from a North Carolina Supreme Court decision which quoted with approval a Florida opinion regarding character analysis of the defendant. Although defendant argued that this was not the law of North Carolina, it has repeatedly been held that the State is entitled to present competent, relevant evidence pertaining to the circumstances of the crime and character of the criminal.

31. Criminal Law § 439 (NCI4th Rev.)— capital sentencing—prosecutor's argument—defendant a coward

The trial court did not err in a capital sentencing proceeding by overruling defendant's objection to the prosecutor calling defendant a coward in his closing argument. The prosecutor's comments were connected to evidence which suggested that defendant preyed on those who were weaker than he and, while not complimentary, in context the use of the word was not disparaging.

32. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's opening argument—reference to prior capital conviction

There was no gross impropriety requiring intervention *ex mero motu* in a capital sentencing proceeding where the prosecutor commented to the jury in his opening statement that the evidence would show that defendant had been convicted of "capital or first-degree murder" in Asheville and noncapital murder in South Carolina. Although it has been held that it is improper for the jury to have knowledge that a capital defendant has been on death row in the same case, the prosecutor accurately depicted the prior convictions, both parties and the judge believed at the time that the South Carolina conviction would be submitted as an (e)(3) aggravating circumstance although defendant subsequently requested that both convictions be submitted under (e)(2), and the prosecutor never mentioned that defendant was sentenced to death for the Asheville conviction. Merely referring to a conviction for "capital or first-degree murder" does not necessarily lead to the conclusion that a death sentence was imposed.

33. Criminal Law § 564 (NCI4th Rev.)— capital sentencing—reference to death row—mistrial denied

The trial court did not err by not declaring a mistrial in a capital sentencing proceeding where defendant's witness testified that defendant was doing as well as one could do on death row. The mention of death row was inadvertently made on direct examination of defendant's witness, was made only once, and was never brought to the attention of the jury. It cannot be said that the comments of defendant's witness constituted a transgression so gross or highly prejudicial that it alone warrants the granting of a mistrial.

34. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not disproportionate

A death sentence was not disproportionate where the record fully supports the jury's finding of the aggravating circumstance submitted, there is no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, this case is not substantially similar to any of the cases in which the death sentence was found disproportionate, and it cannot be said as a matter of law that the sentence is disproportionate when compared with other cases roughly similar with respect to the crime and the defendant.

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 18 March 1996 Criminal Session of Superior Court, Guilford County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 15 October 1997.

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

John Bryson and Stanley F. Hammer for defendant-appellant.

PARKER, Justice.

Defendant Lesley Eugene Warren was indicted on 17 September 1990 for the first-degree murder of Katherine Johnson ("victim"). The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation. Following a capital sentencing proceeding, the jury recommended a sentence of death; and the trial court entered judgment in accordance with that recommendation.

The State's evidence tended to show the following. On 15 July 1990 Terri Quinby attended the Radisson Hotel employees' picnic held at Cedrow Park in High Point, North Carolina, with her two brothers, her sister, and her children and their children. Defendant went with Ms. Quinby and her family to the picnic. Ms. Quinby introduced the victim, whom she knew when the victim worked part-time in the Radisson gift shop, to defendant at the picnic where they played softball, ate, and drank beer.

After the picnic, around 4:00 p.m., many of the Radisson group, including defendant, went to Applebee's. At Applebee's defendant told Ms. Quinby's brother Freddy he would "have her [the victim] by

the end of the night" and that "he would have her [the victim] before the night was over, for us to watch and see." Ms. Quinby and the rest of her family along with defendant and the victim went to the house of Ms. Quinby's sister, Robin, for dinner. The victim rode with defendant on his motorcycle, and Robin drove the victim's car from Applebee's to Robin's house.

At approximately 9:00 p.m. they all went to Ms. Quinby's house. After sitting on the porch for a while, defendant and the victim went for a motorcycle ride. They drove by Ms. Quinby's house around 11:30 p.m. Defendant returned about an hour later to get the victim's car. He said that the victim could not drive it and that they were going to get a room at the Town House Motel.

On the morning of 16 July 1990, defendant was sleeping on Ms. Quinby's couch. He said that he left the victim at the motel and walked back so that she could drive to class that morning. Defendant spent the week at Ms. Quinby's house.

On 20 July 1990 High Point police arrested defendant at the Quinby house on a South Carolina warrant. When he was arrested and searched, the police found a set of keys which defendant claimed were his; the police later discovered that the keys were to the victim's car.

Defendant was transported to Asheville, in Buncombe County, North Carolina, and was questioned about murders in Asheville and South Carolina. Defendant confessed to the victim's murder in High Point and told Asheville police that he had placed the victim's body in the trunk of her car and had parked it in a parking deck near the Radisson. High Point police located the victim's car and found the victim's naked, decaying body in the trunk, with a bra wrapped around her neck. Defendant's fingerprints were found outside the driver's side door, and his right palm print was found on the outside of the trunk. Defendant had further stated that he and the victim had had sex in a soccer field. High Point officers searched the athletic field and found the victim's shoes near an unmown grass embankment.

The autopsy revealed areas of hemorrhage indicating strangulation by pressure to the neck. The pathologist determined that the cause of death was asphyxia due to strangulation. The victim's decomposed body was identified by using dental records.

Defendant presented no evidence at the guilt phase.

Additional facts will be presented as needed to discuss specific issues.

PRETRIAL ISSUES

By his first assignment of error, defendant contends that his confession was obtained in violation of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. Defendant bases his argument on the following facts.

On 28 May 1990 Asheville Police Department Detective Lambert questioned defendant about the disappearance of Jayme Hurley. Defendant admitted he saw Hurley on 24 May 1990, the day she disappeared, and consented to leaving his van at the Police Department so that it could be searched.

Upon returning on 29 May 1990 to pick up his van, defendant was advised of his *Miranda* rights and signed a rights waiver form. He was informed that the police had found a pocketbook in his van which defendant first said belonged to his wife, but Detective Lambert then told defendant that the pocketbook was identified as belonging to Hurley. After this conversation defendant stated that he may need or may want to get an attorney. Despite defendant's request for counsel, the officers decided that because Hurley might still be alive, they would continue the questioning. During the questioning defendant stated that Hurley had died from a cocaine overdose and that defendant had thrown her body into the French Broad River.

Upon conclusion of the questioning, defendant was arrested on an outstanding arrest warrant for failure to produce title to a motor vehicle and for misdemeanor larceny of Hurley's pocketbook. Defendant was represented by Scott Jarvis at the bond hearing on the misdemeanor charges. At this hearing on 7 June 1990, the district attorney anticipated additional charges; but at the time he was not ready to file these charges. The judge reduced defendant's bond, and defendant was released.

On 7 June 1990 defendant went to the Police Department to get his van. Detective Lambert asked for and defendant consented to give blood, hair, and urine samples. After the samples were collected, defendant agreed to return the next day to talk to Detective Lambert about Hurley. Defendant did not return on 8 June 1990; instead, his mother and Keith Cochrane, Mr. Jarvis' investigator, both left messages that Mr. Jarvis wanted to be present for anything further concerning the misdemeanor charges or the Hurley disappearance.

As a result of Detective Lambert's investigation in South Carolina to obtain background information on defendant from his family, Detective Lambert learned that the South Carolina authorities suspected defendant of a homicide in the Spartanburg area. Through the use of a trap and trace device on the phone of defendant's wife, South Carolina officials located defendant in High Point and issued a warrant for his arrest for first-degree murder and kidnapping.

On 20 July 1990 the High Point Police Department was notified that there was an outstanding South Carolina warrant for defendant's arrest. Defendant was arrested at Terri Quinby's house at 2:44 p.m. by High Point police; he was taken to the police station until Asheville police arrived; and about 6:30 p.m., an officer of the Asheville Police Department took him back to Asheville. Although Mr. Cochrane asked Asheville police to notify Mr. Jarvis when defendant arrived in Asheville, he was never contacted. Defendant arrived in Asheville and was interviewed by Detective Lambert at 9:10 p.m. after defendant was advised of and waived his rights without ever invoking his Fifth Amendment right to have counsel present. Detective Lambert questioned defendant about the South Carolina and Asheville homicides as well as another murder for which defendant was implicated in New York. Defendant willingly discussed the murders and confessed to committing all three murders, including the murder of Hurley in Asheville. Then Detective Lambert told defendant he thought there were more killings and that now would be a good time to admit to them. Defendant then confessed to killing Katherine Johnson in High Point—the case *sub judice*—and explained the events leading up to and following her death. The High Point Police Department was informed of these facts, and from this information High Point officers discovered the body of Katherine Johnson in the trunk of her car. At approximately 12:09 a.m. on 21 July 1990, defendant signed a statement confessing to the four murders. Subsequent to that statement defendant willingly discussed the murders with investigators from other agencies.

On the morning of 21 July 1990, an arrest warrant was issued for defendant by a Guilford County magistrate. That afternoon Lieutenant Dunn of the High Point Police Department served the warrant on defendant in Asheville. Defendant told Lieutenant Dunn that he would like to speak with High Point investigators concerning the victim's murder.

On Monday, 23 July 1990, Detectives Grubb and McNeill of the High Point Police Department and Special Agent Bob Padgett with

the State Bureau of Investigation ("SBI") went to Asheville to interview defendant. Defendant was again given the *Miranda* warnings and willingly waived his rights. During this interview someone poked his head in the door and closed the door when defendant made an arm motion at him as if to say "go on and leave us alone." Defendant said, "my lawyer," and continued talking to the officers. This person was later identified as Mr. Cochrane. Defendant never asked to have an attorney present during the interview. At the conclusion of the interview, defendant stated he would be glad to talk to the officers again.

Prior to trial defendant moved to suppress his confession to the Johnson murder on the grounds that his Sixth Amendment and Fifth Amendment rights had been violated. The trial court denied defendant's motion, finding no constitutional violations surrounding his confession to the murder in this case. On appeal defendant assigns error to the trial court's finding; we reject defendant's argument.

[1] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. Further, the police may not interrogate a defendant whose Sixth Amendment right has attached unless counsel is present or the defendant expressly waives his right to assistance of counsel. *State v. Nations*, 319 N.C. 318, 324, 354 S.E.2d 510, 513 (1987). The United States Supreme Court has stated that "once this right to counsel has attached and been invoked," any subsequent waiver of this right by a defendant during a police-initiated custodial interrogation is a nullity; thus, any inculpatory statements made by a defendant to police during such interrogation must be suppressed. *Michigan v. Jackson*, 475 U.S. 625, 636, 89 L. Ed. 2d 631, 642 (1986). A defendant's Sixth Amendment right to counsel attaches only when adversary judicial proceedings have been initiated, either "by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417 (1972); *see generally United States v. Gouveia*, 467 U.S. 180, 81 L. Ed. 2d 146 (1984).

However, the Sixth Amendment is offense-specific and "cannot be invoked once for all future prosecutions." *McNeil v. Wisconsin*, 501 U.S. 171, 175, 115 L. Ed. 2d 158, 166-67 (1991). Thus, the holding in *Michigan v. Jackson*, invalidating post-attachment waivers in police-initiated interviews, is likewise offense-specific. *Id.* at 175, 115 L. Ed. 2d at 167.

> The police have an interest . . . in investigating new or additional crimes . . . [in which they may be seeking evidence on] individuals already under indictment. . . . [T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.

Maine v. Moulton, 474 U.S. 159, 179-80, 88 L. Ed. 2d 481, 498 (1985). The Court went on to note that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Id.* at 180 n.16, 88 L. Ed. 2d at 499 n.16. In this case, when defendant was arrested in High Point, his Sixth Amendment right to counsel had not attached to any of the homicides because no adversary judicial proceedings had been instituted in the murder cases. Therefore, we must overrule defendant's assignment of error.

[2] Defendant further contends that, notwithstanding the offense-specific nature of the Sixth Amendment right to counsel, the confession should have been suppressed because the offense in this case is inextricably intertwined with crimes for which the Sixth Amendment right had attached at the time of his confession. While recognizing that some jurisdictions have enunciated a "very closely related crime" exception, this exception has very limited application. *See Bromfield v. Freeman*, 923 F. Supp. 783, 787 (E.D.N.C. 1996) ("where the offense to which the right has attached is a lesser-included offense of the uncharged offense . . . there can only be a single offense for purposes of the Sixth Amendment"), *appeal dismissed*, 121 F.3d 697 (4th Cir. 1997). Even assuming *arguendo* that the misdemeanor pocketbook larceny offense, to which defendant's Sixth Amendment right had attached, was "inextricably intertwined" with the Hurley murder in Asheville such that defendant's confession to the Hurley murder was barred under the holding in *Michigan v. Jackson*, any Sixth Amendment right related only to that murder. Because defendant had yet to commit the Johnson murder in High Point at the time his Sixth Amendment rights attached with respect to the misdemeanor larceny, he could not have invoked his Sixth Amendment right to counsel as to that murder. Accordingly, there is no bar to the admission of defendant's statements in this case. Likewise, we reject defendant's argument that pursuant to Article I, Section 23 of the North Carolina Constitution and N.C.G.S. § 15-4, his state constitutional and statutory rights have been violated.

[3] Defendant also argues a Fifth Amendment violation of his right to counsel. The Fifth Amendment of the United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the United States Supreme Court determined that the prohibition against self-incrimination requires that prior to a custodial interrogation, the alleged defendant must be advised that he has the right to remain silent and the right to the presence of an attorney. *Id.* at 479, 16 L. Ed. 2d at 726. The Court further held that the accused could "knowingly and intelligently waive[] his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475, 16 L. Ed. 2d at 724. However, if he requests counsel, "the interrogation must cease until an attorney is present." *Id.* at 474, 16 L. Ed. 2d at 723.

The question then becomes "whether a reasonable person in [defendant's] position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way." *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 580-81 (1982). In this case the trial court found as fact that defendant was in custody during the questioning on 29 May 1990 at the Asheville Police Department and that defendant invoked his Fifth Amendment right to counsel during that interview. The question then is whether defendant's assertion of his Fifth Amendment rights on 29 May 1990 mandates suppression of his confession on 20 July 1990 to the murder of Katherine Johnson on 15 July 1990.

The United States Supreme Court has established that

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused . . . having expressed his desire to deal with the police only through counsel[] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386 (1981). Defendant argues that by reinitiating custodial interrogation 20 July 1990, the police violated his Fifth Amendment rights. However, defendant does not challenge the trial court's finding that

there had been a break in custody between defendant's assertion of his rights on 29 May 1990 and his confession on 20 July 1990. Therefore, we must overrule defendant's assignment of error on this issue.

Since *Edwards* the Supreme Court has stated that the rule in *Edwards* is applicable only if there has been no break in custody, *McNeil v. Wisconsin,* 501 U.S. at 177, 115 L. Ed. 2d at 167-68, and we have adopted this clarification of *Edwards*:

> "If police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards."

State v. Torres, 330 N.C. 517, 524, 412 S.E.2d 20, 24 (1992) (quoting *McNeil v. Wisconsin,* 501 U.S. at 177, 115 L. Ed. 2d at 167-68); *see McFadden v. Garraghty,* 820 F.2d 654, 661 (4th Cir. 1987) (holding that two breaks in custody served to sever any causal link between the initial unlawful interrogation and the voluntary confessions); *United States v. Skinner,* 667 F.2d 1306, 1309 (9th Cir. 1982) (stating that *Edwards* did not preclude further questioning when defendant was released from custody and had opportunity to contact counsel), *cert. denied,* 463 U.S. 1229, 77 L. Ed. 2d 1410 (1983). Defendant asserted his right to counsel on 29 May 1990; was released from custody on 7 June 1990; and was not in custody again until 20 July 1990 when he was arrested, advised of his rights, and knowingly and intelligently waived them. We hold the "break in custody" makes the rule in *Edwards* inapplicable and defendant's confession to the Johnson murder obtained in the subsequent police-initiated interrogation following his arrest on 20 July 1990 was admissible. Defendant's motion to suppress his confession was properly denied by the trial court.

[4] Defendant next contends that the trial court's denial of his motion to have the jury consider life without the possibility of parole as a sentencing option violated his constitutional rights. We disagree.

Defendant asserts that he was entitled to an instruction that a sentence of life imprisonment "means a sentence of life without parole." At the time defendant committed the murder of Katherine Johnson in 1990, a person serving a life sentence was eligible for parole after twenty years. N.C.G.S. § 15A-1371(a1) (1988). In 1994

the General Assembly repealed this statute and amended N.C.G.S. § 15A-2002 to require the requested instruction for offenses occurring on or after 1 October 1994. This Court has acknowledged the intent of the legislature to apply N.C.G.S. § 15A-2002 prospectively. *State v. Fullwood*, 343 N.C. 725, 741, 472 S.E.2d 883, 891 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 339 (1997).

Further, retroactive application of the amendment would violate the constitutional prohibition of *ex post facto* laws because it increases the punishment for first-degree murder. Defendant recognizes the *ex post facto* problem and offers to waive this constitutional protection. This identical argument was raised and rejected in *State v. Conner*, 345 N.C. 319, 331-32, 480 S.E.2d 626, 631, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 134 (1997), and *State v. Fullwood*, 343 N.C. at 741-42, 472 S.E.2d at 891-92. We see no reason to depart from this sound holding. For the trial court to instruct the jury according to the amended statute would have been improper. Accordingly, the trial court did not err in refusing to do so.

[5] Next, defendant contends that the trial court erred in dismissing defendant's motion for appointment of counsel to prosecute a motion for appropriate relief regarding defendant's prior conviction for first-degree murder in Buncombe County, North Carolina, thereby violating his constitutional rights. Believing that defendant's guilty plea and conviction for the murder of Jayme Hurley in Buncombe County were unreliable and that the State would use that conviction as an aggravating circumstance in this case, defense counsel sought to have counsel appointed to prosecute a motion for appropriate relief in Buncombe County to determine the reliability of the guilty plea and prior conviction prior to having that conviction used as an aggravating circumstance. The trial court denied this pretrial motion stating that since defendant's Buncombe County case was on appeal to this Court, under N.C.G.S. § 15A-1418 the appropriate jurisdiction for the motion was the North Carolina Supreme Court.

While it is true that pursuant to N.C.G.S. § 7A-451(a)(3) the trial court had the authority to grant defendant's motion for appointment of counsel, defendant has not shown how the denial of this motion has prejudiced him. Further, defendant has not shown how the use of the guilty plea and prior conviction in Buncombe County violated his constitutional rights in this case. Moreover, defendant may still file a motion for appointment of counsel to prosecute a motion for appropriate relief. We, therefore, hold that the trial court

did not abuse its discretion by denying defendant's motion for appointment of counsel.

JURY SELECTION ISSUES

[6] Defendant next argues that the trial court erred in excusing for cause juror Alma Larson based on her opposition to the death penalty on religious grounds, thereby denying defendant his rights under the First, Eighth, and Fourteenth Amendments to the United States Constitution.

The test for determining when a juror may be excused for cause is whether his views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The fact that a prospective juror "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" is not sufficient. *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 784-85 (1968).

Defendant does not contend that Larson in fact could perform her duties as a juror in accordance with her oath. In response to the trial court's inquiry as to whether she would always vote against the death sentence and always for life imprisonment, Larson answered in the affirmative. Instead, just as the defendant in *State v. Davis* argued, defendant here argues that because her opposition to capital punishment was based on the teachings of her religion, her "exclusion from the jury violated constitutional principles regarding the free exercise of religion and the right to serve as a juror regardless of one's religion." *State v. Davis*, 325 N.C. 607, 625, 386 S.E.2d 418, 427 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). Since Larson was excused based on her "inability to follow the law[, t]he fact that the prospective juror's religion provided the basis for [her] views did not alter the propriety of excluding [her] for cause." *Id.* at 625-26, 386 S.E.2d at 427. We find no compelling reason to depart from *Davis*.

[7] In addition to the arguments used in *Davis*, defendant submits that Article I, Section 26 of the North Carolina Constitution creates a liberty interest in defendant having prospective jurors not excused due to their religious beliefs and that to do so would result in a violation of due process. Article I, Section 26 of the North Carolina Constitution provides that "[n]o person shall be excluded from jury

service on account of sex, race, color, religion, or national origin," but as stated above, Larson was excluded (as was the juror in *Davis*) under the *Witt* test based solely on her inability to perform her lawful duties as a juror. We find no merit in this assignment of error.

[8] Defendant next contends that if the ruling in *Davis* is not overturned, then N.C.G.S. § 15A-2000 is unconstitutional in that it permits jurors to be excluded based on their religious beliefs. We likewise find no merit to this assignment of error in that Larson was excused under *Witt*, and for this reason no constitutional provisions were implicated.

[9] Defendant next argues that the trial court committed reversible error by admonishing jurors that no juror would be excused for business reasons, thus limiting free and open responses during jury selections and restricting defendant's ability to exercise peremptory and for cause challenges.

"[T]he trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion." *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979). Pursuant to N.C.G.S. § 15A-1212(9) the grounds for challenging a juror for cause include the juror's inability to render a fair and impartial verdict.

The trial court's comment is similar to the one at issue in *Fullwood*. In that case the jurors were warned to "be cautious in what you may say, and do not say, and do not say anything that would tend to taint any other juror." *State v. Fullwood*, 343 N.C. at 734, 472 S.E.2d at 887. The defendant's argument that this instruction tended to inhibit prospective jurors from disclosing prejudicial information was found to have no merit. Similarly, defendant's argument in the present case that the judge's comment had a chilling effect on jurors' responses is not borne out by the record. In fact two potential alternate jurors asked to be and were excused with consent of counsel for business reasons after the judge's remarks. Defendant has failed to show that the trial court abused its discretion or that defendant was prejudiced by the impaneled jury; therefore, we reject defendant's argument on this point.

GUILT PHASE ISSUES

[10] Defendant next argues that the trial court erred in denying his motion to dismiss the first-degree murder charge. Defendant

asserts that the evidence was insufficient to prove premeditation and deliberation.

This Court has repeatedly stated that when determining the sufficiency of the evidence to support a charged offense, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). A defendant's motion to dismiss must be denied if the evidence considered in the light most favorable to the State permits a rational jury to find the existence of each element of the charged crime beyond a reasonable doubt. *See State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993), *sentence vacated on other grounds*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994).

The test for sufficiency is the same whether the evidence presented is direct or circumstantial or both. *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991); *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the evidence supports that a reasonable inference of defendant's guilt may be drawn from the circumstances, then "it is for the [jurors] to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965).

Applying the foregoing rules to the evidence presented in this case, we conclude that there was sufficient evidence from which a rational jury could find that defendant killed Katherine Johnson with premeditation and deliberation.

First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Taylor*, 337 N.C. 597, 607, 447 S.E.2d 360, 367 (1994). Premeditation means that the act was thought over 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 legal provocation or lawful or just cause. *State v. Hamlet*,

312 N.C. 162, 170, 321 S.E.2d 837, 842-43 (1984). In *State v. Taylor*, 337 N.C. 597, 447 S.E.2d 360 (1994), we held that want of provocation on the part of the deceased, the brutality of the murder, and attempts to cover up involvement in the crime are among other circumstances from which premeditation and deliberation can be inferred. *Id.* at 607-08, 447 S.E.2d at 367. In this case the State's evidence showed a lack of provocation by the victim, that defendant manually strangled Katherine Johnson to death, that he crammed her body into the car trunk, that he parked the car in a parking deck, and that he fabricated a story to conceal the murder. These facts permit the inference that defendant acted with premeditation and deliberation, and the trial court properly denied defendant's motion to dismiss.

[11] Defendant next assigns error to the trial court's sustaining an objection and later objecting *ex mero motu* to defense counsel's closing argument. We disagree.

During his closing argument defense counsel attempted to explain the meaning of proof beyond a reasonable doubt and quoted a jury instruction used in *State v. Phillip*, 261 N.C. 263, 134 S.E.2d 386, *cert. denied*, 377 U.S. 1003, 12 L. Ed. 2d 1052 (1964). The prosecutor's initial objection was overruled by the trial court. Defense counsel then quoted from *Phillip* as follows:

> MR. BRYSON [defense counsel]: . . . . "A reasonable doubt is a fair and honest doubt based on common sense and reason[] and one that leaves your mind so that you cannot say that you have an abiding conviction to a moral certainty of the defendant's guilt." [*Id.* at 268, 134 S.E.2d at 391.]

Later on, it [*Phillip*] says this:

> "If the jurors are not satisfied to a moral certainty of the defendant's guilt, they have a reasonable doubt." [*Id.* at 269, 134 S.E.2d at 391.]
>
> MR. KIMEL [the prosecutor]: We object to that.
>
> THE COURT: Objection sustained to that.
>
> MR. KIMEL: It's not the law.
>
> THE COURT: Objection sustained to that.
>
> MR. KIMEL: Request the jury disregard that, your Honor.
>
> THE COURT: Well, I sustained the objection. That's the *Cage* case.

MR. BRYSON: I believe that's been approved in *Bryant.*

THE COURT: If you want to take time, we'll look at it.

MR. BRYSON: No, I won't take the time.

THE COURT: All right.

MR. BRYSON: (Continuing) But you must be convinced to a moral certainty of the defendant's guilt, and that is what proof—

MR. KIMEL: Object. That's not the law.

THE COURT: Overruled. Go ahead.

Later in defense counsel's closing argument, he quoted defendant's confession and said:

> And does that convince you beyond a reasonable doubt? Are you convinced now to a moral certainty that before he acted, he had—-
>
> THE COURT: Objection. I'm going to object to the words "moral certainty."
>
> MR. BRYSON: I think the *Bryant* case says its okay.
>
> THE COURT: You've got to use it with other words. The words "moral certainty" is [sic] objectionable.

Still later in defense counsel's closing, he argued:

> Please listen carefully to the instruction. If you follow the law, you'll say well, his statement gives me problems. There's really no real reason not to believe what he's saying. He's confessing to a murder. He's obviously not trying to create a defense here. He's trying to tell as much as he can about the case. He obviously has blacked out at some time so he can't remember for some reason, whether it was drunkenness or whatever. So I'm not sure about those two elements. And because I'm not convinced to a moral certainty—-
>
> MR. KIMEL: Object to that, your Honor.
>
> THE COURT: Sustained to moral certainty.

Defendant contends that defense counsel was denied the opportunity to argue the law and the facts to the jury. Attorneys from both sides are generally allowed wide latitude in argument and are entitled to argue the facts along with the relevant law. *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009,

85 L. Ed. 2d 169 (1985). Defendant relies on *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994), as support for his contention.

In *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62, 116 L. Ed. 2d 385 (1991), the United States Supreme Court held that a jury instruction which defined reasonable doubt as a "grave uncertainty" or an "actual substantial doubt" suggests a higher degree of doubt than that required for acquittal and that when considered in reference to "moral certainty" rather than evidentiary certainty, a reasonable jury could find the defendant guilty on a degree of proof less than a reasonable doubt. *Id.* at 41, 112 L. Ed. 2d at 342.

In *Victor v. Nebraska*, 511 U.S. 1, 127 L. Ed. 2d 583 (1994), the United States Supreme Court clarified its holding in *Cage*. The *Victor* jury was given the following instruction: "It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." *Id.* at 7, 127 L. Ed. 2d at 592. The Court approved the jury instruction in *Victor* because it explicitly told the jury that its conclusion must be based on the evidence in the case. *Id.* at 16, 127 L. Ed. 2d at 597. In stating that "the moral certainty language cannot be sequestered from its surrounding," *id.* at 16, 127 L. Ed. 2d at 596, the Court was satisfied when it was used "in conjunction with the abiding conviction language," *id.* at 15, 127 L. Ed. 2d at 596.

This Court has had occasion to examine *Cage* and *Victor* and has applied their holdings. *See State v. Taylor*, 340 N.C. 52, 59, 455 S.E.2d 859, 862-63 (1995); *State v. Bryant*, 337 N.C. at 305-06, 446 S.E.2d at 75. However, *Cage* and its progeny are not controlling in this case in that here the objectionable statements were not contained in jury instructions. *State v. Roseboro*, 344 N.C. 364, 377, 474 S.E.2d 314, 321 (1996). In this case defense counsel was informed that any references to "moral certainty" as regards proof of reasonable doubt could not be disassociated from the evidence. Having instructed defense counsel, the trial judge did not abuse his discretion in sustaining the prosecutor's objection or by intervening *ex mero motu* to defense counsel's closing argument.

Assuming the trial judge did err by sustaining the prosecutor's objection or by intervening *ex mero motu* to defense counsel's closing argument, the trial judge correctly instructed the jury after closing arguments as to reasonable doubt, stating:

> A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or the lack of it or insufficiency of that evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

This instruction is a correct statement of the law. *Id.*; N.C.P.I.—Crim. 101.10 (1974). We find no merit in defendant's argument.

[12] Defendant next argues that the trial court committed error by overruling his objections to five comments by the prosecutor during closing argument. Defendant maintains that the first comment impermissibly criticized defendant's exercise of his constitutional right not to testify and further insulted the judicial system by disparaging defense counsel.

Counsel are entitled to wide latitude during jury arguments, but the scope of that latitude is within the discretion of the trial court. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). A prosecutor in a capital trial may argue all the facts in evidence, the law, and all reasonable inferences drawn therefrom. *State v. McCollum*, 334 N.C. 208, 223, 433 S.E.2d 144, 152 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994); *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).

However, "[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, 615, 14 L. Ed. 2d 106, 110 (1965)). "[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 failure to give a curative instruction does not require an automatic reversal; instead, this Court must determine whether the error is harmless beyond a reasonable doubt. *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 923, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 234 (1997); *see also* 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).

In this case, during closing argument, the prosecutor said:

> Now, this case is about this young lady right here, Katherine Noel Johnson. You're going to hear a lot from the defendant—well, from the defense counsel, I beg your pardon—about Lesley Warren. I contend to you, lots of times defendants or counsel try to deflect—
>
> . . . [Objection overruled.]
>
> . . . —the case from the victim onto the defendant. Let's talk about what the defendant did. Let's talk about how he felt. Let's talk about what he knew.

We conclude that the prosecutor's alleged reference to defendant's failure to testify was a *lapsus linguae*, simply an inadvertent mistake, which was promptly corrected and could not have affected the outcome of the trial. Defendant further argues that the prosecutor's reference to what counsel often do was grossly improper. We conclude that there was no disparagement of defense counsel; instead, the statement accurately anticipated defense counsel's closing argument.

[13] Defendant next contends that the trial court should have sustained his objection to the following comment which was an appeal to public sentiment based on evidence outside the record:

> I contend to you it's a case about premeditated and deliberative [sic] murder. From the time he got to town, I contend to you under the evidence, he was bent on doing something to somebody in this town. If it hadn't been, I contend to you under this evidence, Ms. Johnson that he picked up, it would have been another young woman at some other place.
>
> . . . [Objection overruled.]
>
> . . . And the evidence that I contend shows that, that he set out with a fixed purpose or a premeditation and deliberation, it's from start to finish. From the first things he did when he hit town to the last thing he did when he left town.

While counsel are given wide latitude during jury arguments and may draw reasonable inferences from the law and facts in evidence, counsel may not travel outside the record by interjecting facts not included in the evidence and may not place prejudicial matters before the jury. *State v. Syriani*, 333 N.C. at 398, 428 S.E.2d at 144.

The evidence tends to show that upon arriving in High Point defendant checked into a motel under a false name and address.

Shortly after meeting the victim, defendant said, "I'm going to have her tonight. Watch. You'll see. I bet you right now that I'll have her by the end of the night." We conclude that the prosecutor did not travel outside the record. His arguments, demonstrating defendant's premeditation and deliberation, were within the wide latitude counsel are properly given and were reasonable inferences based on the evidence.

[14] Next, defendant argues that the prosecutor misstated the law on premeditation and deliberation when he asserted the following:

> The actions in putting the ligature around her neck [were] continuous, and if you find that he had the intent to kill at any time prior to that five or six minutes, then he killed her, first degree murder, period, open and shut, said and done. We contend he had it before he even put this around there. But if you find that while he was strangling the life out of her that he intended to kill her, at any point prior to her dying, he's guilty—
>
> MR. BRYSON: Object.
>
> MR. KIMEL: —of premeditated and deliberative [sic] murder under this act.
>
> The Court: Overruled.
>
> MR. KIMEL: (Continuing) Any time prior to the killing. Why else would he strangle her?

As previously stated premeditation means that defendant contemplated killing for some period, no matter how short a period of time, before he acted. *State v. Williams*, 334 N.C. at 447, 434 S.E.2d at 592. Deliberation means defendant acted "in a cool state of blood," not under the influence of any violent passion suddenly aroused by some lawful or just cause or legal provocation. *Id.* Based on the evidence presented, defendant strangled the victim for several minutes until she was dead; thus, the prosecutor's statement that premeditation and deliberation can be found "at any point prior to her dying" was an accurate statement of the law. Assuming error, *arguendo*, any impropriety in the argument was promptly corrected by the prosecutor's requiring that the jury find premeditation and deliberation "prior to the killing."

[15] Defendant also contends that the prosecutor inappropriately requested that the jurors put themselves in place of the victim. The prosecutor argued during closing argument:

It would make me nervous if somebody was choking me to death. They have irregular heartbeat. They would lose control—and this is so sad—they would lose control of their bodily functions. That is just so sad, because it is so violently degrading to the person. Can you imagine being there—

[Objection sustained. Jurors instructed to disregard statement about "being there."]

. . . Can you imagine how she must have felt?

. . . [Objection overruled.]

. . . Can you know how she must have felt as she was sitting there, losing control—

. . . [Objection overruled.]

. . . of her bodily functions to the point of where they saw the fecal matter on her body in the car? Can you imagine anything more degrading than being killed to the point that you lose control over your own bowels? That's what he did to her.

In *McCollum* this Court held that we will not condone an argument asking jurors to put themselves in place of the victims. *State v. McCollum*, 334 N.C. at 224, 433 S.E.2d at 152. However, this Court has repeatedly found no impropriety when the prosecutor asks the jury to imagine the fear and emotions of a victim. *State v. Bond*, 345 N.C. 1, 38, 478 S.E.2d 163, 183 (1996), *cert. denied*, —— U.S. ——, 138 L. Ed. 2d 1022 (1997); *State v. Campbell*, 340 N.C. 612, 636, 460 S.E.2d 144, 157 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 871 (1996); *State v. Gregory*, 340 N.C. 365, 426, 459 S.E.2d 638, 673 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Since the prosecutor's argument was based on the evidence and did not misstate or manipulate the evidence, we hold that the argument was not improper.

[16] Finally, defendant asserts that the prosecutor went beyond the evidence by arguing:

They want you to talk, I contend, in generalities and abstracts. Let's talk—you know, about the general case. Let's talk about the average case. She's not average. And quite frankly, Mr. Warren, I contend to you, is not average. He's not your average killer.

. . . [Objection overruled.]

. . . He, under this evidence, is a homicidal person, under this evidence. He doesn't care.

. . . [Objection overruled.]

. . . I contend to you. He didn't care.

Defendant contends these derogatory remarks about defendant's character were not based on the facts in evidence. In *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975), this Court concluded that the prosecutor "should refrain from characterizations of defendant which are calculated to prejudice him in the eyes of the jury when there is no evidence from which such characterizations may legitimately be inferred." *Id.* at 712, 220 S.E.2d at 291. However, we have also stated that the prosecutor may argue inferences reasonably drawn from the evidence. *State v. Huffstetler*, 312 N.C. at 112, 322 S.E.2d at 123. After reading the prosecutor's arguments in context, we hold that they were properly based on the facts in evidence.

[17] We have considered the separate as well as the cumulative effects of the prosecutor's comments to which defendant objects and find them to be without merit.

[18] Defendant next contends that the trial court erred in denying his motion *in limine* and allowing the admission of seven photographs of the victim's body. Defendant argues that the photographs had no probative value. The bases of this argument are that defendant allegedly conceded his guilt to second-degree murder and that the photographs show the victim's body in an advanced state of decomposition. The photographs, therefore, did not have a tendency to prove the murder was premeditated and deliberate or committed with a specific intent to kill. Alternatively, defendant argues that the photographs should be excluded because any probative value is outweighed by the unfairly prejudicial effect. We find neither of these arguments to have merit.

As a general rule, gory or gruesome photographs have been held admissible so long as they are used for illustrative purposes and are not introduced solely to arouse the passions of the jury. *See State v. Skipper*, 337 N.C. 1, 35, 446 S.E.2d 252, 270 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995); *State v. Williams*, 334 N.C. at 460, 434 S.E.2d at 600.

In this case defendant pled not guilty to the charge of first-degree murder. Although defendant consented for his counsel to concede

guilt of second-degree murder in closing argument, the State still bore the burden of proving all the elements of first-degree murder including premeditation and deliberation. *See State v. Skipper*, 337 N.C. at 35, 446 S.E.2d at 271. The condition of the victim's body, the nature of the wounds, and evidence that the murder was done in a brutal fashion are circumstances from which premeditation and deliberation can be inferred. *See State v. Gladden*, 315 N.C. 398, 431, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

The State introduced into evidence seven photographs of the victim. Two of the seven photographs at issue depict the remains of the victim in the car trunk, whereas the remaining five are photographs of the autopsy. The first two photographs were used during the testimony of a police officer to illustrate the location, position, and condition of the victim's body when it was discovered in the trunk of her car. The other photographs helped to illustrate the pathologist's testimony concerning the cause of death and depicted the body's appearance before the autopsy, which included the ligature marks, bruises, and discoloration. We conclude that the photographs were relevant and had probative value.

[19] Concluding that the photographs were relevant and probative, we now turn to defendant's argument that the unfairly prejudicial effect of the photographs outweighed the probative value. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1986). Whether to exclude evidence under Rule 403 of the North Carolina Rules of Evidence is within the discretion of the trial court and will not be overturned absent an abuse of discretion. *See State v. Williams*, 334 N.C. at 460, 434 S.E.2d at 600; *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

Having reviewed the photographs and determined that they were relevant and probative, that they assisted in illustrating the testimony of the police officer and pathologist, and that they could contribute to the finding of premeditation and deliberation, we conclude that the trial court did not abuse its discretion in admitting the photographs. This assignment of error is overruled.

[20] In defendant's next assignment of error, he argues that the trial court erred in its instruction to the jury as to flight. The court instructed the jury as follows:

> Now the State contends that the defendant fled, and evidence of flight may be considered by you, together with all the other facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt. Further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation. Therefore, it is not to be considered by you as evidence of premeditation and deliberation.

While defendant does not contest the existence of flight in this case, defendant does contend that the jury should not have been instructed regarding flight. Defendant's argument is that because he conceded guilt for second-degree murder, the only issue for the jury to decide was whether there was sufficient evidence of premeditation and deliberation to find that defendant was guilty of first-degree murder, an issue on which flight has no bearing. As discussed previously defendant did not plead guilty to second-degree murder, but merely consented to concede guilt for that offense in argument to the jury; thus, the State was still required to prove each element of the charged offense.

Further, defendant failed to object to the above jury instruction at trial. Hence, as to this assignment of error, he is entitled to review only under the plain error rule. "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 probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997).

Defendant also asserts that evidence of and instruction on flight violate constitutional rights. This argument has repeatedly been made to this Court, and we see no reason to abrogate application of the flight instruction. *State v. Gray*, 347 N.C. 143, 186, 491 S.E.2d 538, 558 (1997); *see also State v. Norwood*, 344 N.C. 511, 534-35, 476 S.E.2d 349, 359-60 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 500 (1997); *State v. Jefferies*, 333 N.C. 501, 510-11, 428 S.E.2d 150, 155 (1993).

[21] Defendant next challenges the trial court's jury instruction on the elements of second-degree murder. Defendant did not object to the instruction at trial; hence, any review must be under the plain error rule as noted above. We find no merit in defendant's argument. "Suffice it to say that the challenged instruction, taken directly from North Carolina Pattern Jury Instructions—Criminal [206.10], is an accurate statement of the law[; thus, w]e decline defendant's invitation to consider the challenged instruction." *State v. Sanders*, 303 N.C. 608, 620, 281 S.E.2d 7, 14, *cert. denied*, 454 U.S. 973, 70 L. Ed. 2d 392 (1981).

[22] Defendant next assigns error to the trial court's comments to the jury regarding the taking of notes. Defendant asserts that the trial judge had no authority to prohibit jurors from taking notes in the absence of an objection by the parties. Defendant argues that the version of N.C.G.S. § 15A-1228 in effect at the time the crime was committed in 1990 should apply.

The former version of the statute provided as follows: "Jurors may make notes and take them into the jury room during deliberations. Upon objection of any party, the judge must instruct the jurors that notes may not be taken." N.C.G.S. § 15A-1228 (1988). In 1993 the statute was amended to read: "Except where the judge, on the judge's own motion or the motion of any party, directs otherwise, jurors may make notes and take them into the jury room during their deliberations." N.C.G.S. § 15A-1228 (1996). This act became effective 1 October 1993 and applies to trials begun on or after that date. Act of July 23, 1993, ch. 498, sec. 2, 1993 N.C. Sess. Laws 1962, 1963. The General Assembly explicitly stated that the amended statute enacted in 1993 is applicable to defendant's trial, which began on 18 March 1996. Accordingly, we find no merit to this assignment of error.

SENTENCING PROCEEDING ISSUES

[23] Defendant next asserts that the trial court's peremptory instructions on mitigating circumstances erroneously imposed a higher burden of proof on defendant by requiring the jury to find the evidence supporting the circumstances to be "credible or convincing."

The jury was given the following instruction regarding mitigating circumstances:

> Now, the defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of

> the evidence, that is, the evidence taken as a whole must satisfy you—not beyond a reasonable doubt but simply satisfy you—that any mitigating circumstance exists. Now, if the evidence satisfies any of you that a mitigating circumstance exists, you would indicate that finding on the Issues and Recommendation form. A juror may find . . . any mitigating circumstance by a preponderance of the evidence whether or not that circumstance was found to exist by all jurors. In any event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all the mitigating circumstances listed on the form and any others which you deem to have mitigating value.

The court then gave the following instruction, repeated in substantially the same form, as to each of the mitigating circumstances:

> As I have said, the defendant has the burden of establishing this mitigating circumstance by the preponderance of the evidence.
>
> Accordingly, as to this mitigating circumstance[], I charge that if one or more of you find the facts to be as all the evidence tends to show, you will answer "Yes" as to Mitigating Circumstance No. 2 on the Issues and Recommendation form. However, if none of you finds this circumstance to exist because the defendant has not persuaded you by a preponderance of the evidence that the facts supporting this circumstance are credible or convincing, you would so indicate by having your foreman write "No" beside this issue on the Issues and Recommendation form.

A "preponderance of the evidence" is the correct burden of proof for establishing that a mitigating circumstance exists. *See, e.g., State v. Payne*, 337 N.C. 505, 531, 448 S.E.2d 93, 108 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995); *State v. Moore*, 335 N.C. 567, 610, 440 S.E.2d 797, 821-22, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994); *State v. Price*, 326 N.C. 56, 94, 388 S.E.2d 84, 106, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). The trial court properly instructed the jury on this burden; however, defendant contends that by forcing the jury to also find the facts to be "credible or convincing," a higher burden was imposed on the defense. A single jury instruction may not be viewed in isolation, but rather the instructions should be considered in their entirety. *State v. Hartman*, 344 N.C. 445, 467, 476 S.E.2d 328, 340 (1996), *cert. denied*,

—— U.S. ——, 137 L. Ed. 2d 708 (1997). A jury may reject a mitigating circumstance notwithstanding the fact that all the evidence supports its existence if the jury does not find the evidence credible or convincing. *State v. Rouse*, 339 N.C. 59, 107, 451 S.E.2d 543, 570 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995).

This Court recently addressed this issue in *State v. Holden*, 346 N.C. 404, 488 S.E.2d 514, holding contrary to defendant's position. As in this case, the jury in *Holden* was repeatedly instructed that defendant's burden of proof was a preponderance of the evidence. The peremptory instruction in *Holden* required that the jury find the evidence to be "credible and convincing" in order to conclude that the mitigating circumstance existed. In upholding the peremptory instruction, this Court stated:

> In the context of the entire charge, we are satisfied the jury would have applied the "credible and convincing" requirement . . . to mean that it must believe the evidence to find that the circumstances existed and that it could reject the circumstance if it did not find the evidence to be credible or convincing.

State v. Holden, 346 N.C. at 439, 488 S.E.2d at 533. This assignment of error is overruled.

[24] In his next assignment of error, defendant argues that an omission in the issues and recommendation form submitted to the jury violated his constitutional rights. The trial court submitted an issues and recommendation form which set forth the statutory mitigating circumstance pursuant to N.C.G.S. § 15A-2000(f)(6):

> (2) 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.
>
> ANSWER _____ One or more of us finds this mitigating

The form inadvertently omitted the last three words, "circumstance to exist." Defendant argues that the failure to include these three words permitted the jury to find that a statutory mitigating circumstance existed, but had no mitigating value.

We note that defendant failed to object or call to the attention of the trial court the omission of the words "circumstance to exist." In fact, the trial court asked if the issues and recommendation form was correct; and defense counsel responded that it was. Review is, there-

fore, limited to plain error. In order to constitute plain error, the error must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). Further, " '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)) (alteration in original).

Assuming *arguendo* that the trial court erred by omitting the words "circumstance to exist" from the issues and recommendation form and that the error was of constitutional dimension, we hold it was harmless beyond a reasonable doubt. In *State v. Jennings*, 333 N.C. 579, 430 S.E.2d 188, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993), the trial court submitted an issues and recommendation form that omitted part of the statutory language of one aggravating circumstance. *Id.* at 617, 430 S.E.2d at 207. In order for the jury to find that the aggravating circumstance in N.C.G.S. § 15A-2000(e)(5) was present in that case, it had to conclude that "[t]he capital felony was committed while the defendant was engaged . . . in the commission of, or an attempt to commit . . . a sex offense." *Id.* at 616, 430 S.E.2d at 207 (second and third alterations in original). The trial judge gave an accurate oral instruction to the jury that a sexual offense involves penetration of the victim's anus by force or by the threat of force; however, the written list given to the jury would have allowed it to find that the aggravating circumstance existed simply by concluding that "the murder was committed while the defendant was engaged in the commission of or while attempting the penetration of the anus with an object" and not necessarily require it to find that a sexual offense was involved. *Id.* at 617, 430 S.E.2d at 207. In discerning no plain error, this Court noted that the trial court twice instructed the jury that force or threat of force must be present in order to affirmatively answer the question on the form and that the evidence presented no issue as to the use of force. *Id.* at 618, 430 S.E.2d at 208; *see also State v. Holden*, 346 N.C. at 436, 488 S.E.2d at 531 (no plain error where evidence supported N.C.G.S. § 15A-2000(e)(3) aggravating circumstance even though the words "or threat" were omitted from issues and recommendation form). *But see State v. Cummings*, 326 N.C. 298, 324-25, 389 S.E.2d 66, 80-81 (1990) (new sentencing hearing granted when nonstatutory mitigating circumstances not listed in writing after defendant made a written request).

In the present case the trial court, after explaining the meaning of capacity to appreciate the criminality of one's conduct and the capacity to conform one's conduct to law, instructed the jury as follows:

> Now, you would find this mitigating circumstance if you find, as all the evidence tends to show, that the defendant suffered from schizoid, anti-social substance abuse, and Intermittent Explosive disorders, and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.
>
> As I have said, the defendant has the burden of establishing this mitigating circumstance by the preponderance of the evidence.
>
> Accordingly, as to this mitigating circumstance, I charge that if one or more of you find the facts to be as all the evidence tends to show, you will answer "Yes" as to mitigating circumstance No. 2 on the Issues and Recommendation form. However, if none of you finds this circumstance to exist because the defendant has not persuaded you by a preponderance of the evidence that the facts supporting this circumstance are credible or convincing, you would so indicate by having your foreman write "No" beside this issue on the Issues and Recommendation form.

We conclude that the trial court properly instructed the jury that it must answer affirmatively as to the mitigating circumstance at issue if one or more of the jurors found that the circumstance existed. We further conclude that the evidence to support this mitigating circumstance, though uncontroverted, was not overwhelming or unquestionably credible. The failure of any juror to find the mitigating circumstance is not necessarily indicative that the jury misapprehended the instruction. Furthermore, Issue Two on the form read: "Do you find from the evidence the existence of one or more of the following mitigating circumstances?" Then follow the two statutory mitigating circumstances, one of which the jury found. When the jurors reached the nonstatutory mitigating circumstances, the form contained additional language requiring that they determine if the circumstance had mitigating value.

Given the court's oral instructions and the language on the form, we conclude there was no reasonable probability that the omission of the words "circumstance to exist" had impact upon the jury's verdict. Accordingly, any error was harmless beyond a reasonable doubt; and this assignment of error is overruled.

[25] Defendant next contends that the trial court improperly submitted the (e)(2) aggravating circumstance to the jury in that he had not been *convicted* of a capital felony at the time of the murder in this case. N.C.G.S. § 15A-2000(e)(2) allows a jury to consider as an aggravating circumstance whether "defendant had been previously convicted of another capital felony." Defendant argues that this aggravating circumstance cannot be introduced because although the *conduct* (two prior first-degree murders) preceded the murder in this case, the *convictions* did not.

Defendant concedes that this Court has recently rejected this argument in connection with the (e)(3) aggravating circumstance. *See, e.g., State v. Warren*, 347 N.C. 309, 320, 492 S.E.2d 609, 615 (1997); *State v. Burke*, 343 N.C. 129, 157-59, 469 S.E.2d 901, 915-16, *cert. denied*, — U.S. —, 136 L. Ed. 2d 409 (1996); *State v. Lyons*, 343 N.C. 1, 22, 468 S.E.2d 204, 214, *cert. denied*, — U.S. —, 136 L. Ed. 2d 167 (1996). Using language strikingly similar to the (e)(2) aggravating circumstance, N.C.G.S. § 15A-2000(e)(3) provides that one of the aggravating circumstances which may justify a death sentence is the fact that the "defendant had been previously convicted of a felony involving the use or threat of violence to the person."

Finding no distinction between these two aggravating circumstances, we hold that the "previously convicted" language in N.C.G.S. § 15A-2000(e)(2) includes capital felonies " '*conducted* prior to the events out of which the charge of murder arose,' even when the *conviction* came after those events, provided the conviction occurs before the capital sentencing proceeding in which it is used as the basis of the" (e)(2) aggravating circumstance. *State v. Warren*, 347 N.C. at 320, 492 S.E.2d at 615 (quoting *State v. Lyons*, 343 N.C. at 22, 468 S.E.2d at 214 (emphasis added)). Defendant *committed* the murders which supported the (e)(2) aggravating circumstance *before* he murdered the victim in this case and was convicted for those murders prior to this capital sentencing proceeding; therefore, the trial court properly submitted the (e)(2) aggravating circumstance for the jury's consideration. Thus, we find no merit to this assignment of error.

[26] In his next assignment of error, defendant argues that the trial court erroneously used a pattern jury instruction which omitted the words "on or about the alleged date," thus constituting an *ex post facto* violation under both the United States and North Carolina Constitutions. Defendant contends that the jury should have been given the pattern jury instruction in effect at the time of the offense

and not the instruction in effect at the time of his trial, thus entitling defendant to a life sentence since the prior instruction would not have allowed the jury to find the existence of the only aggravating circumstance submitted, N.C.G.S. § 15A-2000(e)(2).

On the date of the charged offense, 15 July 1990, the pattern jury instruction for N.C.G.S. § 15A-2000(e)(2) read, in pertinent part, as follows: "If you find from the evidence beyond a reasonable doubt that *on or about the alleged date*, the defendant had been convicted of [first-degree murder], and that he killed the victim after he committed [that first-degree murder] you would find this aggravating circumstance . . . ." N.C.P.I.—Crim. 150.10 (repl. Nov. 1988) (emphasis added). The version in effect during defendant's capital sentencing proceeding, which was read verbatim, provides, in pertinent part: "If you find from the evidence beyond a reasonable doubt that the defendant had been convicted of first degree murder, and that he killed the victim after he committed that first degree murder you would find this aggravating circumstance . . . ." N.C.P.I.—Crim. 150.10 (repl. Apr. 1995). Defendant argues that the omission of the clause "on or about the alleged date" is a change in the law which increased his punishment and violated the constitutional prohibition against *ex post facto* laws. We do not agree.

Initially, we note that in defendant's previous assignment of error, we held that the "previously convicted" language in N.C.G.S. § 15A-2000(e)(2) includes capital felonies committed before the events out of which the murder charge arose, even though the conviction came after those events, so long as the conviction precedes the capital sentencing proceeding in which it forms the basis of the (e)(2) aggravating circumstance. With this as a foundation, it would be improper to restrict the jury's ability to find the (e)(2) aggravating circumstance only to those situations in which the *conviction* for the prior murder predates the events which gave rise to the charge of murder. Therefore, the *law* mandates that the jury find the (e)(2) aggravating circumstance in defendant's case because, as previously discussed, the conduct constituting his prior capital convictions came before the murder of the victim in this case.

We further note that this was the state of the *law* at the date of the offense and that since the date of the offense, the *law*, as applicable to defendant, has not changed, despite the fact that the pattern jury instruction has. The pattern jury instruction, which has neither the force nor the effect of law, was merely altered to conform to the

law. Since there has been no modification in the law regarding N.C.G.S. § 15A-2000(e)(2), there cannot be an *ex post facto* violation. Accordingly, we find no merit to this assignment of error.

Defendant next argues that the trial court's submission of the (e)(2) aggravating circumstance, where the pattern jury instruction was changed between the date of the charged offense and the sentencing proceeding, violated defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 27 of the North Carolina Constitution.

The pattern jury instructions are drafted by a committee of the North Carolina Conference of Superior Court Judges and, as previously mentioned, do not in themselves have the force of the law. As such the fact that the instruction concerning N.C.G.S. § 15A-2000(e)(2) was altered has no bearing on the applicable law and certainly does not create a substantive change in the law. Defendant's argument that the alteration by the committee violated the Separation of Powers Clause of the North Carolina Constitution is frivolous.

Further, defendant contends that the modification in the pattern jury instruction was the sole reason he received the death penalty, thus rendering the application of the aggravating circumstance arbitrary and capricious under both the federal and state Constitutions. Again, defendant's contention is flawed in that he presumes that the pattern jury instruction is the law, which it is not. This assignment of error is overruled.

[27] Defendant's final assignment of error regarding N.C.G.S. § 15A-2000(e)(2) is that the trial court provided erroneous instructions to the jury regarding this aggravating circumstance. In prior assignments of error, defendant contended that the 1995 pattern jury instruction should not have been given; here, defendant contends that the 1995 instruction was not given properly.

In his closing argument to the jury during the sentencing proceeding, defense counsel argued that the aggravating circumstance submitted, N.C.G.S. § 15A-2000(e)(2), was not applicable based upon the pattern jury instruction in effect at the date of the offense. The trial court subsequently read to the jury from the 1995 pattern jury instruction, which required the jury to find the aggravating circumstance if it found that "defendant had been convicted of first degree murder, and that he killed the victim after he committed that first

degree murder." Defendant argues that the trial judge incorrectly instructed the jury, allowing it to find the aggravating circumstance without finding that defendant had been previously convicted of first-degree murder.

After ten minutes of deliberation, the jury requested a copy of the statute the judge read concerning the (e)(2) aggravating circumstance. The judge had not previously read from the statute, instead he had read the pattern jury instruction; however, he called the jury back in, read the statute, gave the jury a copy of his instructions, and repeated the instruction regarding (e)(2). Less than an hour later, the jury submitted the following question:

> The third sentence, does the word "and" in that sentence indicate that the two parts of the sentence are dependent upon each other, or can they be considered as mutually exclusive statements? The first part, the defendant had been convicted of first degree murder. Second part, that he killed the victim after he committed that first degree murder. In other words, do both parts of that sentence have to be true in order for Issue One to be considered an aggravating circumstance?

The judge excused the jury for the evening and the next morning instructed the jury as follows:

> You asked this: "In other words, do both parts of the sentence have to be true in order for Issue One to be considered an aggravating circumstance?"
>
> The answer to that is yes, both parts have to be true in order for this issue to be an aggravating circumstance.
>
> The next matter that you asked up above was: "Does the word 'and' in that sentence indicate that the two parts of the sentence are dependent upon each other, or can they be considered as mutually exclusive statements?"
>
> All right. I instruct you that they are not dependent on each other, that they are mutually exclusive. Do you understand that?

Defendant admits that the judge correctly responded "yes" to whether "both parts have to be true in order for this issue to be an aggravating circumstance," but argues that by stating that the two parts are mutually exclusive, the jury was not required to find that defendant had been previously convicted of first-degree murder. We find no merit to this argument.

The obvious thrust of the jury's concern was whether both parts of the sentence had to be true in order to find the aggravating circumstance. The use of the term "mutually exclusive" in both the question and the judge's answer was inartful but on the critical question, the judge appropriately instructed the jury that it must find both parts to be true in order to find the aggravating circumstance. Any confusion was most likely caused by defense counsel's reading of the prior pattern jury instruction, and any misunderstanding was clarified by the judge's instructions and answers to the jury's questions. The jury knew that in order to find the aggravating circumstance, it was required to find that defendant had been previously convicted of first-degree murder. We find no merit in defendant's argument.

[28] Defendant next assigns error to the trial court's denial of his request to instruct the jury on defendant's parole eligibility. Defendant contends that because of his prior conviction and death sentence for murder in Buncombe County, if a life sentence were imposed in this case, he would be parole ineligible under North Carolina law. Defendant contends that during the sentencing proceeding, the State argued defendant's future dangerousness to support imposition of the death penalty; therefore, the jury should have been instructed that defendant would be parole ineligible if sentenced to life imprisonment.

This Court has consistently held that evidence regarding parole eligibility is not a relevant consideration in a capital sentencing proceeding. *See State v. Conaway*, 339 N.C. 487, 520, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995); *State v. Price*, 337 N.C. 756, 759, 448 S.E.2d 827, 829 (1994), *cert. denied*, 514 U.S. 1021, 131 L. Ed. 2d 224 (1995). Further, this Court has determined that the United States Supreme Court ruling in *Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133 (1994), does not alter our prior holdings on this issue and that "*Simmons* is limited to those situations where the alternative to a sentence of death is life imprisonment without the possibility of parole." *State v. Conaway*, 339 N.C. at 520, 453 S.E.2d at 845. In *Simmons* the Court found that a death sentence based in part on future dangerousness while concealing from the jury that life imprisonment meant life without possibility of parole amounted to a due process violation. *Simmons v. South Carolina*, 512 U.S. at 168-69, 129 L. Ed. 2d at 145-46.

We have reviewed the prosecutor's argument that defendant contends entitles him to relief, and in our view the prosecutor did not

argue future dangerousness. Rather, the prosecutor argued the evidence that defendant had committed three murders to show that defendant was a serial killer deserving of the death penalty. For this reason we conclude that the trial court's denial of defendant's request was not inconsistent with *Simmons*. Accordingly, this assignment of error is overruled.

[29] Defendant next contends that the trial court erred by allowing into evidence, over defendant's objection, postmortem photographs of two victims in other cases for which he had been previously convicted of first-degree murder. Defendant contends that the photographs lacked relevance and were unduly prejudicial.

As this Court has repeatedly held, "[a]ny evidence that the trial court 'deems relevant to sentenc[ing]' may be introduced in the sentencing proceeding." *State v. Heatwole*, 344 N.C. 1, 25, 473 S.E.2d 310, 322 (1996) (quoting *State v. Daughtry*, 340 N.C. 488, 517, 459 S.E.2d 747, 762 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996)) (second alteration in original), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 339 (1997). The State must be allowed to present any competent evidence in support of the death penalty, *id.*, including "evidence of the circumstances surrounding a defendant's prior felony, notwithstanding the defendant's stipulation to the record of conviction, to support the existence of aggravating circumstances," *State v. Warren*, 347 N.C. at 316, 492 S.E.2d at 612.

In this case the postmortem photographs of Velma Gray, defendant's victim in South Carolina, and Jayme Hurley, defendant's victim in Asheville, North Carolina, illustrated the testimony of police detectives and supported the existence of the (e)(2) aggravating circumstance, that defendant had been previously convicted of another capital felony. *See* N.C.G.S. § 15A-2000(e)(2) (1988) (amended 1994). This evidence was relevant and competent evidence to illustrate the circumstances surrounding defendant's commission of the previous capital felony for which he had been convicted. *State v. Warren*, 347 N.C. at 316, 492 S.E.2d at 612.

Whether photographic evidence is more probative than prejudicial lies within the discretion of the trial court. *Id.* at 316, 492 S.E.2d at 612-13; *State v. Heatwole*, 344 N.C. at 25, 473 S.E.2d at 322; *State v. Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Defendant has failed to show that the trial court abused its discretion by admitting the postmortem photographs of defendant's prior murder victims. Defendant's contention is overruled.

Defendant next argues that the trial court erred by overruling his objections to portions of the prosecutor's closing argument during the capital sentencing proceeding. Defendant asserts that the prosecutor misstated the reasons underlying the aggravating circumstance and that the prosecutor called defendant a "coward," in violation of defendant's constitutional rights.

Generally, a prosecutor in a capital trial is given wide latitude during jury arguments. *State v. Hill*, 347 N.C. 275, 298, 493 S.E.2d 264, 277 (1997); *State v. Gregory*, 340 N.C. at 424, 459 S.E.2d at 672; *State v. Soyars*, 332 N.C. at 60, 418 S.E.2d at 487. The prosecutor may argue the law, the facts in evidence, and all reasonable inferences drawn therefrom. *State v. McCollum*, 334 N.C. at 223, 433 S.E.2d at 152; *State v. Syriani*, 333 N.C. at 398, 428 S.E.2d at 144.

[30] Defendant first contends that the trial court should not have overruled his objection to the following argument by the prosecutor:

> And our courts have said that the better rule is to allow both sides to introduce evidence in support of aggravating and mitigating factors.
>
> "This is so because the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely—["]
>
> . . . [Objection overruled.]
>
> . . . —"must be a valid consideration for the judge and the jury. It helps contribute to decisions as to sentence that will lead to uniform treatment and eliminate unfairness."
>
> So it's a character analysis we're going to enter into here, and let's look at the mitigating factors that will be proposed, and a little bit of the character or lack of character of this defendant.

In this case the prosecutor quoted *State v. Taylor*, 304 N.C. 249, 280, 283 S.E.2d 761, 780 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983), in which this Court quoted with approval language from *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977). Defendant's argument that this language was not the law of North Carolina is without merit. This Court has repeatedly held that the State is entitled to present competent, relevant evidence pertaining to

the circumstances of the crime and the character of the criminal. *See State v. Rose*, 339 N.C. 172, 201, 451 S.E.2d 211, 228 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). *State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983). We find no compelling reason to depart from our prior holding; therefore, this assignment of error is overruled.

[31] Next, defendant objected to the prosecutor calling defendant a "coward" in the following context:

> The interesting thing is, in a way, he committed all these acts against women. Have you seen—have you seen any evidence of any type of aggression or assault by this man against another man? None. I contend to you he's a coward.
>
> . . . [Objection overruled.]
>
> . . . Under this evidence, he chokes and beats up—excuse me—he chokes and murders and kills women. Not men, women. And even then, women who have their back to him, women who are lying under him and can't do anything to him. He is a coward. I wouldn't want to face myself either. I'd try to hide myself from myself, like that doctor said he would. Not a thing about men in there, because he doesn't have the guts to do anything to a man, because a man might do something back to him. The man is a coward.

We have stated that it is improper to compare "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). However, in *State v. Perkins*, 345 N.C. 254, 481 S.E.2d 25, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 64 (1997), the prosecutor called the defendant "sorry" and said that "describ[ing] him as a man is an affront to all of us." *Id.* at 286, 481 S.E.2d at 40. We held that the prosecutor did not label "defendant an 'animal' or refer to him by any other disparaging term." *Id.* at 287, 481 S.E.2d at 40; *cf. State v. Thompson*, 118 N.C. App. 33, 44, 454 S.E.2d 271, 277 (1995) (assuming that referring to defendant as a "coward" was not based upon any evidence introduced, it constituted error; but given the substantial evidence of defendant's guilt, it could only have been *de minimis*), *disc. rev. denied*, 340 N.C. 262, 456 S.E.2d 837 (1995). In this instance the prosecutor's comments were connected to the evidence which suggested that defendant preyed on those who were weaker than he. In context the use of the word "coward" to describe defend-

ant, while not complimentary, was not disparaging; and we conclude the trial court did not err by overruling defendant's objection.

[32] In his next assignment of error, defendant argues that the trial court should have intervened *ex mero motu* when the prosecutor communicated to the jury that defendant had previously been sentenced to death.

The standard of review for an alleged error in the prosecution's opening statement to which defendant failed to object is the same as for an unobjected-to statement in closing argument. "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. at 369, 259 S.E.2d at 761. In determining whether the statement was grossly improper, we must examine the context in which it was given and the circumstances to which it refers. *State v. Tyler*, 346 N.C. 187, 205, 485 S.E.2d 599, 609, *cert. denied*, — U.S. —, 139 L. Ed. 2d 411 (1997); *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996).

The prosecutor stated:

> We will show you evidence that he has been convicted of the capital or first degree murder of Jayme Hurley in Asheville, North Carolina. . . .
>
> We will show you another aggravating factor in that he has been convicted of another crime of violence, in that he has been convicted of the non capital murder of a lady in South Carolina . . . .

We have previously held that it is improper for the jury to have knowledge that a capital defendant has been on death row in the same case. *State v. Britt*, 288 N.C. at 713, 220 S.E.2d at 292. Defendant asserts that the prosecutor's distinguishing one murder conviction as capital and the other as noncapital signaled to the jury that in the Asheville trial, defendant received a sentence of death. We disagree. The prosecutor accurately depicted the prior convictions. At the time of his opening statement, both parties and the judge believed that the South Carolina conviction would be submitted to the jury as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(3) since the trial judge in the South Carolina case had stricken the sole aggravating factor,

thereby eliminating the possibility of defendant being sentenced to death. However, subsequent to opening statements defendant requested that both convictions be submitted under (e)(2). Further, the prosecutor never mentioned that defendant was sentenced to death as a result of the Asheville conviction, and merely referring to a conviction for "capital or first-degree murder" does not necessarily lead to the conclusion that a death sentence was imposed. After reviewing the prosecutor's statement contextually, we conclude the statement was not so grossly improper as to require the trial court to intervene *ex mero motu.*

[33] Next, defendant argues that the trial court erred by failing to declare a mistrial where defendant's witness testified that defendant was on death row. On direct examination, defendant's witness testified:

> He is doing quite as well as one could do on death row right now, and feels that that's where he belongs. He told me that he feels most comfortable when he's institutionalized, and in many ways he feels that he has been almost certain to end up there throughout his life, and feels he will spend the rest of his life in prison or be executed. He's quite willing to spend the rest of his life in prison.

In *Britt* during cross-examination the prosecutor referred to defendant's being on death row. This Court stated that "[c]ross-examination by which the prosecutor places before the jury inadmissible and prejudicial matter is highly improper and . . . [that] some transgressions are so gross and their effect so highly prejudicial that no curative instruction will suffice to remove the adverse impression from the minds of the jurors." *Id.* at 712-13, 220 S.E.2d at 292. However, we have declined to accept the *per se* rule that mere knowledge by the jurors that a previous jury had recommended a death sentence in the same case demonstrates prejudice to the defendant. *State v. Spruill*, 338 N.C. 612, 646, 452 S.E.2d 279, 297 (1994), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995); *State v. Green*, 336 N.C. 142, 165, 443 S.E.2d 14, 28, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994); *State v. Simpson*, 331 N.C. 267, 271, 415 S.E.2d 351, 354 (1992).

In rejecting the defendant's argument in *Spruill* and distinguishing it from *Britt*, this Court noted that the prosecutor inadvertently mentioned death row only once, that the remark went unnoticed by defense counsel and was never brought to the jury's attention, that

defendant did not move for a mistrial, and that the jury could have inferred from other evidence that defendant had previously been sentenced to death. *State v. Spruill,* 338 N.C. at 645-46, 452 S.E.2d at 296-97. For the foregoing reasons, and despite the fact that defendant did move for a mistrial after the close of evidence, we likewise find the instant case distinguishable from *Britt*: The mention of death row was inadvertently made on direct examination of defendant's witness, was made only once, and was never brought to the attention of the jury. We cannot say that comments of defendant's witness constituted a transgression so gross or highly prejudicial that it alone warrants the granting of a mistrial.

PRESERVATION ISSUES

Defendant raises six additional issues which he concedes have been decided contrary to his position previously by this Court: (i) the trial court erred in denying defendant's motion to strike the death penalty on the ground that it is unconstitutional; (ii) the trial court committed reversible constitutional error by excusing a juror without allowing defendant to examine her; (iii) the trial court erred by instructing the jury that it could find a nonstatutory mitigating circumstance and not give it any weight; (iv) the trial court committed reversible error by not instructing the jury that a mitigating circumstance is one which reduces defendant's moral culpability, rather than the offense; (v) the trial court erred in failing to instruct the jury that it must consider any other circumstance having mitigating value; and (vi) the trial court committed reversible constitutional error by not instructing the jury to consider any mitigating circumstance that any jury has determined exists.

Defendant raises these issues for purposes of permitting this Court to reexamine its prior holdings and also for the purpose of preserving them for any possible further judicial review. We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[34] Having found no prejudicial error in either the guilt-innocence or sentencing stages, it is now our duty to determine (i) whether the record supports the jury's findings of the aggravating circumstance upon which the court based its death sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any

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

Defendant was found guilty of first-degree murder under the theory of premeditation and deliberation. Following a capital sentencing proceeding, the jury found the one submitted aggravating circumstance that defendant had been previously convicted of another capital felony. N.C.G.S. § 15A-2000(e)(2). While two statutory mitigating circumstances were submitted to the jury, only one was found. The jury found the statutory mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), but declined to find the statutory mitigating circumstance that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6). Of the nineteen nonstatutory mitigating circumstances submitted, the jury found ten to exist.

After careful deliberation we conclude that the record fully supports the jury's finding of the aggravating circumstance submitted. Further, we find no indication that the sentence of death was 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.

We begin our proportionality review by comparing this case to those cases in which this Court has concluded that the death penalty was disproportionate. This Court has determined the death sentence 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. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). This case is not substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate.

This Court has never found the sentence of death disproportionate where the defendant has been convicted for the death of more than one person. *State v. McLaughlin*, 341 N.C. 426, 466, 462 S.E.2d

1, 23 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996). In four of the seven disproportionate cases, the defendant had no prior criminal record. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181; *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163. In the other three cases, the defendant had no prior violent felony convictions. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653; *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170; *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703. This defendant has been found guilty of multiple murders, all of women whom he strangled. In this particular case defendant carefully planned the murder and the method to conceal his crime by hiding the victim's body in the trunk of the victim's car, which defendant then left parked in a parking deck. On these facts we cannot say as a matter of law that the sentence of death is disproportionate when compared with other cases roughly similar with respect to the crime and the defendant.

For the foregoing reasons we conclude that defendant received a fair trial free from prejudicial error and that the sentence of death imposed by the trial court is not excessive or disproportionate.

NO ERROR.

JAMES H. POU BAILEY, A. PILSTON GODWIN, HARRY L. UNDERWOOD, HENRY L. BRIDGES, ROSALIE T. ADAMS, JESSE M. ALMON, HELEN L. ANDREWS, WORTH B. SKEW, BILLY A. BAKER, PARKER N. BARE, ARTHUR C. BEAMAN AND GRACE G. BEAMAN, JOSEPH G. BINKLEY, ROBERT L. BLEVINS, ELLIE L. BOYLES, CHANCEL T. BROWN AND JOAN W. BROWN, ELIZABETH S. BUTLER, DOROTHY T. CARMICHAEL, JOHN CARRICKER, HAROLD D. COLEY, SR., ANNA L. COOPER, CHARLES C. COOPER AND BERTIE S. COOPER, T.J. DUNCAN AND ESTHER P. DUNCAN, DAN R. EMORY, MARTIN W. ERICSON, FRED W. GENTRY, IVEY B. GORDON AND IZORIA S. GORDON, LOUIS N. GOSSELIN, EARL T. GREEN, BOB HAMMONS, DARIUS B. HERRING, RAY F. HOLCOMB, TILLE M. HOLCOMB, KAY C. HURT, JOHN I. KIGER AND MARIE K. KIGER, CLARENCE T. LEINBACH, WALTER G. LEMING AND BARBARA C. LEMING, YATES LOWE, HARRIETTE B. McCORMICK, VIRGINIA H. MICKEY, WILLIAM F. MORGAN, HARRIETTA B. McCORMICK, EARL RAY PARKER, CALVIN C. PEARCE, MICHAEL PELECH, DIANE S. PEOPLES, MILDRED R. POINDEXTER, WINNIE D. POTTS, PATSY M. REYNOLDS, GLENN D. RUSSELL, BLANCHE S. SHIPP, CLYDE R. SHOOK, HAROLD E. SIMPSON, SONNIE B. SIMPSON, LENORA S. SMITH, FRANCES J. SNOW, CHARLES A. SPEED, JUSTUS M. TUCKER, WALTER P. UPRIGHT, RALPH B. WALKER AND MARTHA M. WALKER, JEAN A. WATSON, ROBERT I. WEATHERSBEE, RUBY WEBSTER, HARRY LEE WILLIAMS, DANIEL W. WILLIAMS, ELIZABETH H. WILSON, WILBUR G. WILSON, ERNEST B. WOOD,

BAILEY v. STATE OF NORTH CAROLINA

[348 N.C. 130 (1998)]

THOMAS S. WORSHAM, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONER-PLAINTIFFS AND W.K. AUBRY, JR., JAMES BRYAN BARRETT, NORMAN W. CASH, ROBERTA M. COOK, JOHN ED DAVIS, DANIEL M. DYSON, EDWIN C. GUY, SAMUEL L. HARMON, JOHN MARSHALL HARTLEY, DONALD ELLIOT HARTLE, MARTHA M. LAWING, DOUGLAS LAMAR MASON, DELMA DALTON RESPASS, JR., WILLIAM ELMER RIGGS, PAUL L. SALISBURY, JR., RICHARD A. SHARPE, NELSON LEROY SHEAROUSE, FRANCIS C. SIMMONS AND MARY E. SIMMONS, NED RAEFORD SMITH, G. VANCE SOLOMON AND EULALIA T. SOLOMON, THOMAS LASH TRANSOU AND WILBUR EUGENE YOUNG, ADDITIONAL PETITIONER-PLAINTIFFS v. STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, JANICE FAULKNER, IN HER CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER, HARLAN E. BOYLES, IN HIS CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, RESPONDENT-DEFENDANTS

No. 53PA96

(Filed 8 May 1998)

1. Retirement § 4 (NCI4th)— state and local government employees—retirement systems—contractual relationship—benefits exempt from state taxation

The relationship between the retirement systems for state and local government employees and employees vested in the systems is contractual in nature. Furthermore, the right to retirement benefits exempt from state taxation is a term of such contract where the evidence showed the creation of various statutory tax exemptions by the legislature, the location of those provisions alongside the other statutorily created benefit terms instead of within the general income tax code, the frequency of governmental contract making, communication of the exemption by governmental agents in both written and oral form, use of the exemption as inducement for employment, mandatory participation, reduction of periodic wages by contribution amount, loss of interest for those not vesting, establishment of a set time period for vesting, and the reliance of employees upon retirement compensation in exchange for their services.

2. Taxation § 22 (NCI4th)— state and local government retirement benefits—exemption from taxation—not contracting away of taxing power

The state tax exemption for state and local government retirement benefits does not constitute a contracting away of the State's sovereign power of taxation in violation of Art. V, § 2(1) of

the North Carolina Constitution. When subsection (1) of Art. V, § 2 is considered with subsections (3), (6), and (7), it is clear that the State may make contracts for exemptions without contracting away the power of taxation as long as the contract is for a public purpose, and the exemption was for a public purpose in that it helped attract and keep quality public servants despite the generally higher wages paid in private employment.

3. Constitutional Law § 143 (NCI4th); Retirement § 4 (NCI4th)— retirement benefits—state and local government employees—cap on state tax exemption—impairment of contract

The 1989 legislation which placed a $4,000 annual state tax exemption cap on retirement benefits received by state and local government employees impaired the contractual rights of employees whose retirement benefits had vested prior to passage of the legislation to a tax exemption for those benefits in violation of Art. I, § 10 of the United States Constitution.

4. Constitutional Law § 143 (NCI4th); Retirement § 4 (NCI4th)— retirement benefits—state and local government employees—cap on state tax exemption—not necessary for important public purpose

Although the 1989 legislation which placed a $4,000 cap on the state tax exemption for retirement benefits received by state and local government employees was passed in response to a U.S. Supreme Court decision holding that federal retirees had to be treated the same as state and local retirees, the impairment of contracts caused by this legislation was neither reasonable nor necessary for achieving an important state interest since there are numerous ways in which the State could have complied with the decision without impairing any contract rights, including the exemption of federal benefits or application of the exemption cap prospectively only to those state and local employees whose retirement benefits had not yet vested. Therefore, the 1989 legislation was not an exercise of the police power or other means under which the State may legitimately skirt the mandate of the Contract Clause of Art. I, § 10 of the United States Constitution.

5. Constitutional Law § 110 (NCI4th); Retirement § 4 (NCI4th)— retirement benefits—state and local government employees—cap on state tax exemption—taking without just compensation

The 1989 legislation which placed a $4,000 annual state tax exemption cap on retirement benefits received by state and local government employees constituted a taking without just compensation of the property of employees whose retirement benefits had vested in violation of the Fifth Amendment to the United States Constitution and Art. I, § 19 of the North Carolina Constitution where the employees had contracted, as consideration for their employment, that their retirement benefits, once vested, would be exempt from state taxation. U.S. Const. amend. V; N.C. Const. Art. I, § 19.

6. Taxation § 219 (NCI4th)— retirement benefits—state and local government employees—income taxation—injunction improper—harmless error

The trial court erred by enjoining the collection of income taxes on state and local government retirement benefits pursuant to the 1989 legislation which placed a $4,000 state tax exemption cap on those benefits since N.C.G.S. § 105-267 is the relevant statute for challenging the legislation, and the only relief granted under this statute is a refund of improperly collected taxes. However, this error was not prejudicial where the trial court immediately stayed the injunction pending appeal; the trial court determined that plaintiffs would still be required to file refund suits for years not covered by the present litigation; and the N.C. Supreme Court has determined in this appeal that the 1989 legislation is unconstitutional as applied to employees whose benefits vested prior to its passage so that the State will be prevented from further attempts to collect taxes on the benefits of those employees.

7. Costs § 29 (NCI4th)— class action—refund of income taxes on retirement benefits—common fund for attorney fees and costs

In a class action in which it was held that the 1989 legislation which partially taxed state and local government retirement benefits was unconstitutional and that retirees whose benefits had vested are entitled to recover income taxes paid on those benefits by refunds or credits, the trial court did not err by ordering

that fifteen percent of the refund or credit amount for each class member be paid to a common fund for the payment of the representative plaintiffs' attorney fees and other costs and expenses. The recovery in this case constitutes a common fund for purposes of shifting attorney fees under the common fund doctrine.

8. Taxation § 216 (NCI4th)— retirement benefits—unconstitutional tax statute—refunds—compliance with protest statute not required

Where it was determined that the 1989 statute which placed a $4,000 annual state tax exemption cap on retirement benefits received by state and local government employees unconstitutionally impaired contractual rights and constituted a taking of property without just compensation, the trial court erred by ordering that refunds be made only to those taxpayers who complied with the protest requirements of N.C.G.S. § 105-267 rather than to all taxpayers unconstitutionally taxed pursuant to the statute. To the extent that the decisions of *Bailey v. State of North Carolina*, 330 N.C. 227 (1991), and *Swanson v. State of North Carolina*, 335 N.C. 674 (1994) imply otherwise, they are disavowed.

Justice FRYE concurring in part and dissenting in part.

Justice WEBB concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals from an order for plaintiffs entered by Thompson, J., on 2 June 1995 and an amended order entered on 25 September 1995 in Superior Court, Wake County. Heard in the Supreme Court 12 September 1996.

Womble Carlyle Sandridge & Rice, P.L.L.C., by G. Eugene Boyce, for petitioner-appellants and -appellees.

Michael F. Easley, Attorney General, by Edwin M. Speas, Jr., Senior Deputy Attorney General, Norma S. Harrell, Special Deputy Attorney General, and Marilyn R. Mudge, Assistant Attorney General, for respondent-appellants and -appellees.

Marvin Schiller on behalf of The State Employees Association of North Carolina, Inc., amicus curiae.

LAKE, Justice.

This is an appeal from an order entered essentially in plaintiffs' favor by the Honorable Jack A. Thompson in Superior Court, Wake County, pursuant to assignment and designation of the case as an exceptional case under Rule 2.1 of the General Rules of Practice. Following a two-week trial, including the testimony of twenty-four witnesses and 1,689 pages of transcript, and subsequent proceedings before the trial court, a final order on all issues was entered 25 September 1995.

This class action was initiated by the filing of plaintiffs' complaint on 2 October 1992. Many of the plaintiffs in this suit had previously brought a virtually identical suit, which resulted in certification of the class and partial summary judgment for plaintiffs. This ruling was reversed on appeal by this Court for failure of plaintiffs to comply with mandatory protest or demand requirements contained in N.C.G.S. § 105-267, which the Court held was the exclusive method for challenging unconstitutional or invalid income taxes in North Carolina. *Bailey v. North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991), *cert. denied*, 504 U.S. 911, 118 L. Ed. 2d 547 (1992) ("*Bailey I*"). Plaintiffs took a voluntary dismissal in *Bailey I* before filing this action.

Plaintiffs' motion for class certification was again allowed by an order filed 10 October 1994, certifying a class of state and local government retirees and beneficiaries with claims for tax years 1989, 1990 and 1991 who had complied with North Carolina requirements for refund claims.

The trial court's judgment for plaintiffs was contained in two orders, the import of which held that the 1989 legislation which partially taxed state and local government retirement benefits was an unconstitutional impairment of contract under the United States Constitution. The trial court also ruled that the taxation was a material breach of contract, was an unconstitutional retroactive tax, violated judges' state constitutional rights not to have their salaries diminished during office, and violated other state and federal constitutional provisions.

On 25 September 1995, the trial court entered an Amended Order in Wake County Superior Court. The amended order made further findings of fact and conclusions of law and ruled on certain of plaintiffs' claims which were previously unaddressed. The amended order

also provided for retirees who had five or more years of retirement system service as of 12 August 1989 to recover income taxes paid on retirement benefits since 1989 in the form of tax credits or refunds, if they had filed timely "protests." It also enjoined defendants to cease collecting income taxes on state and local government retirement benefits attributable to service prior to 1989. The amended order further provided for fifteen percent of the refund or credit amount for each plaintiff class member to be paid to a common fund for payment of plaintiffs' attorney's fees and various expenses and costs, with any excess remaining in the common fund to be paid to the State Employees' Association. Finally, the amended order stayed, pending appeal, the relief awarded to plaintiffs, including refunds, credits, and injunctive relief, except for notice to class members and preservation of relevant records.

Defendants filed notice of appeal on 25 September 1995. On 5 February 1996, defendants filed with this Court a petition for discretionary review prior to determination by the Court of Appeals. This petition was allowed by this Court on 3 April 1996.

The facts relevant to this appeal as established at trial are as follows. Beginning in 1939, the North Carolina General Assembly established numerous programs for the provision of retirement benefits to North Carolina state and local government employees. As of 12 August 1989, the date on which the General Assembly enacted chapter 792 of the 1989 Session Laws, the legislation which is the subject of this case, at least thirteen different public employee retirement systems were operating for the purpose of providing public servants with retirement benefits. These various systems are set forth in chapters 58, 120, 127A, 128, 135, 143, 143B, 147 and 161 of the North Carolina General Statutes (collectively referred to as the "Retirement Systems"). The Retirement Systems include three different benefit and contribution schemes: mandatory defined benefit plans with mandatory contribution, optional defined contribution plans or defined benefit plans to which employees may contribute, and noncontributory defined benefit plans.

The mandatory defined benefit systems include the Legislative Retirement System (LRS), the Consolidated Judicial Retirement System (CJRS), the Teachers' and State Employees' Retirement System (TSERS), the Local Government Employees' Retirement System (LGERS), and the Disability Income Plan (DIP). During the period relevant to this appeal, all full-time state and local government

employees had to be a member of at least one of these systems and were required to contribute a specified percentage of their salary to the system through payroll deduction. Prior to 12 August 1989, an exemption from state and local taxation was allowed for each of the above systems, providing:

> the right of a person to a pension, an annuity, or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit or any other right accrued or accruing to any person under the provisions of [the primary deferred benefit retirement acts], and the moneys in the various funds . . . are hereby exempt from any state or municipal tax, and exempt from levy and sale, garnishment, attachment, or any other process whatsoever . . . .

N.C.G.S. § 128-31 (1986) (LGERS); *accord* N.C.G.S. § 120-4.29 (1986) (LRS); N.C.G.S. § 135-9 (1988) (TSERS); N.C.G.S. § 135-111 (1988) (DIP); N.C.G.S. § 135-52(a) (1988) (CJRS).

The optional defined contribution or defined benefit plans include the Supplemental Retirement Income Plan (SRIP), the Deferred Compensation Plan (DCP), and the Supplemental Retirement Income Plan for State Law Enforcement Officers (SRIPLEO). For each of these plans, employees could contribute during the course of their employment but were not required to contribute. An exemption from taxation was allowed for benefits accruing as a result of participation in these plans prior to 12 August 1989 in one of the following forms: "These benefits are . . . exempt from all State and local taxation," N.C.G.S. § 147-9.4 (1987) (DCP), or "[t]he right . . . to the benefits . . . is nonforfeitable and exempt from levy, sale, garnishment, and the benefits payable under this Article are hereby exempt from any State and local government taxes," N.C.G.S. § 143-166.30(g) (1987) (SRIPLEO); *accord* N.C.G.S. § 135-95 (1988) (SRIP).

The noncontributory defined benefit plans include the National Guard Pension Fund (NGPF), the Register of Deeds Supplemental Pension Fund (RofDSPF), the Separate Insurance Benefits Plan (SIBP), and the Sheriffs' Supplemental Pension Fund (SSPF). Employees were neither required to nor allowed to contribute to these systems, but benefits were offered to all employees eligible for participation in the plans. For each of these systems, an exemption from taxation was allowed prior to 12 August 1989 under one of the following provisions: "Benefits paid under the provisions of

this [retirement system] shall be exempt from North Carolina income tax," N.C.G.S. § 143-166.85(e) (1987) (SSPF); *accord* N.C.G.S. § 127A-40(e) (Supp. 1979) (NGPF); N.C.G.S. § 161-50.5 (1987) (RofDSPF); or "The right of a participant . . . to the benefits provided . . . is nonforfeitable . . . and the benefits payable . . . are exempt from any State and local government taxes," N.C.G.S. § 143-166.60(h) (1987) (SIBP).

Each of these systems contains certain preconditions to the receipt of benefits. The primary one is the requirement that employees work a predetermined amount of time in public service before they are eligible for retirement benefits. After employment for the set number of years, an employee is deemed to have "vested" in the retirement system. Thereafter, the employee generally is guaranteed a percentage payment at retirement based upon years of service. Since the inception of the Retirement Systems, the periods of employment required for vesting have been shortened. For example, the LGERS, TSERS and CJRS or their predecessor systems were shortened over time from twenty years' service to the present five years' service. Plaintiff class members each completed five or more years of creditable public service prior to 12 August 1989, retired, and received benefits under one of the Retirement Systems after their retirement.

From their inception and until 12 August 1989, the benefits paid plaintiff retirees from the Retirement Systems were exempted from state taxation. Evidence adduced at trial established that the exemptions were contained in the aforementioned retirement statutes, alongside the requirements for and descriptions of benefits, as opposed to being located among or within the statutes providing the individual income tax provisions or other tax statutes. Numerous employee witnesses testified that defendants' agents offered the exemptions as a type of compensation to employees of state and local governments. The testimony reveals that often the exemption of benefits from taxation was communicated to prospective employees with the intent of inducing individuals to either begin or continue public service employment. Moreover, testimony and exhibits offered at trial establish that innumerable communications were made to plaintiff public employees throughout their careers, both orally and in writing (including multiple unequivocal written statements in official publications and employee handbooks) that their retirement benefits would be exempt from state taxation. Plaintiffs assert they relied on such statutes and communications as assuring compensa-

tion in the form of such exemption in exchange for public service. Upon accepting employment, plaintiffs also bore the risk that they would receive no benefits and that their contributions would be returned without interest should they fail to work the time required for vesting.

The exemption from state taxation on retirement benefits paid by the State, as provided under the Retirement Systems, applied only to state and local government employees and was not available to federal government employees. This case is one of many that arose in the wake of the United States Supreme Court's ruling in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891 (1989). In *Davis*, the Supreme Court held that if a state taxes state and local government employees differently than it taxes federal employees, the state violates the constitutional doctrine of intergovernmental tax immunity as well as federal statutory law. *Id.* at 817, 103 L. Ed. 2d at 906. Under 4 U.S.C. § 111, the federal government expressly "consents to the taxation [by states] of pay or compensation for personal service as an officer or employee of the United States . . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 111 (1988). Since the State made different provisions for taxation of federal employees (i.e., the exemption from state tax), the exemption was held to be violative as applied. *Davis*, 489 U.S. at 817, 103 L. Ed. 2d at 906.

In response to *Davis*, the North Carolina General Assembly passed 1989 Session Laws chapter 792, section 3.9 ("the Act"). The Act changed the exemption of retired state employees from taxation on retirement benefits in two important ways. First, the Act amended the exemption to provide it to all governmental employees—state, local and federal. Second, the Act placed a $4,000 cap on the amount of annual benefits that would be exempt from state taxation. N.C.G.S. § 105-134.6 (1989) (adjustments to taxable income).

Class plaintiffs are North Carolina state and local government employees whose retirement benefits vested on or before 12 August 1989, the ratification date of the Act. Plaintiffs assert, *inter alia*, that the State's removal of the exemption beyond the amount of $4,000 operated unconstitutionally to deprive them of benefits to which they had a vested right.

In this opinion, we first address whether plaintiffs have a contractual right to an exemption of their benefits from state taxation that has been impaired by the Act. Necessary to a full consideration

of this question is examination of several subissues, including the legal relationship between vested members of the Retirement Systems and the State, the constitutionality of the State's contracting for a tax exemption, the factual basis of plaintiffs' contract claim, and finally the degree and reasonableness of the State's impairment of those contracts. In the second part of this opinion, we examine whether the State's passage of the Act amounts to a taking of plaintiffs' property without just compensation. Next, we consider whether the trial court erred by enjoining the State from future collection of the taxes in question. We then review the trial court's creation of a common fund for payment of fees and expenses incurred by plaintiffs. Lastly, we address whether the trial court erred by limiting recovery only to those plaintiffs who met the statutory requirements for filing a tax refund lawsuit as opposed to all retirees affected by the Act.

I. IMPAIRMENT OF CONTRACT

The central issue in this case is whether the plaintiffs have an enforceable contract right that has been unconstitutionally impaired by the State of North Carolina. Plaintiffs urge this Court to follow the Court of Appeals' decision 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), which held that the relationship between the Retirement Systems and state employees who have vested in those systems is contractual in nature. Defendants argue that no contractual relationship exists between the Retirement Systems and the employees in this case. This argument is based on several contentions, notably that: (1) *Simpson* was wrongly decided, and there is no contractual relationship between vested state employees and the Retirement Systems; (2) as a general matter, statutes are statements of policy, and the legislature expressed no intent to create a contract for a tax exemption through the statute; and (3) the North Carolina Constitution prohibits contracting away the State's sovereign "power to tax" under Article V, Section 2(1). Upon analysis, we conclude that plaintiffs did have an enforceable contract right which has been impaired by the State through the passage of the Act by the General Assembly.

Article I, Section 10 of the United States Constitution, the "Contract Clause," provides in pertinent part, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10. In determining whether a contractual right has been unconstitutionally impaired, we are guided by the three-part test set forth in *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 52 L. Ed. 2d

92 (1977). The *U.S. Trust* test requires a court to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose. *Id.*

A. Contractual Obligation

[1] The first step of our analysis is determining whether a contractual obligation is present between plaintiffs and the State. The most pertinent North Carolina case on this subject is the Court of Appeals' decision in *Simpson.* In *Simpson,* plaintiffs were vested members of the North Carolina Local Government Employees' Retirement System. They brought a class-action suit against the State of North Carolina, the retirement system and its board of trustees. Plaintiffs argued that the State unconstitutionally impaired their contractual rights to a specific pension plan when the legislature amended the method of calculating the plan's benefits, resulting in a reduction of their benefits. The Court of Appeals, upon examination of approaches taken by other states, agreed and held that "the relationship between plaintiffs and the Retirement System is one of contract." *Simpson,* 88 N.C. App. at 223, 363 S.E.2d at 93. This was based on the premise that retirement benefits are presently earned but deferred compensation to which employees have a vested contractual right. *Id.* at 223, 363 S.E.2d at 93-94. As the Court of Appeals stated:

> "A pension paid a governmental employee . . . is a deferred portion of the compensation earned for services rendered." If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. The agreement to defer the compensation is the contract. Fundamental fairness also dictates this result. A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, had a *contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.*

Id. at 223-24, 363 S.E.2d at 94 (quoting *Great Am. Ins. Co. v. Johnson,* 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962)) (emphasis added).

The Court of Appeals and this Court have reaffirmed this central principle of *Simpson* in several subsequent cases. *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997) (vested plaintiffs had contractual right to disability retirement benefits, making subsequent amendment of calculation method subject to impairment analysis); *Miracle v. N.C. Local Gov't Employees Retirement Sys.*, 124 N.C. App. 285, 477 S.E.2d 204 (1996) (pension terms at time of plaintiff's vesting deemed contractual, and subsequent alteration by the legislature subject to impairment analysis under Article I, Section 10 of the United States Constitution), *disc. rev. denied*, 345 N.C. 754, 485 S.E.2d 57 (1997); *Hogan v. City of Winston-Salem*, 121 N.C. App. 414, 466 S.E.2d 303 (pension term allowing retirement instead of transfer upon injury deemed contractual, and alteration after plaintiff's injury deemed subject to impairment analysis), *aff'd per curiam*, 344 N.C. 728, 477 S.E.2d 150 (1996); *Woodard v. N.C. Local Gov't Employees' Retirement Sys.*, 108 N.C. App. 378, 424 S.E.2d 431 (amendment of disability benefits impaired vested member's contract), *aff'd per curiam*, 335 N.C. 161, 435 S.E.2d 770 (1993).

An examination of North Carolina case law, as well as an analysis of the principles underlying *Simpson*, confirms that the contractual relationship approach taken by the Court of Appeals in *Simpson* and our subsequent decisions is the proper one. Thus, it follows that the retirement benefits of all employees whose retirement rights became vested prior to 12 August 1989 must be exempt from state tax without regard to whether those benefits are attributable to service prior to or after that date.

Cases arising in North Carolina have long demonstrated a respect for the sanctity of private and public obligations from subsequent legislative infringement. *See, e.g., Trustees of the Univ. of N.C. v. Foy*, 5 N.C. 58 (1805); *see also Springs v. Scott*, 132 N.C. 548, 44 S.E. 116 (1903) (judgment is a vested property right that cannot be taken by the legislature); *Dunham v. Anders*, 128 N.C. 207, 38 S.E. 832 (1901) (legislature has no power to destroy or to interfere with vested rights). In fact, scholars credit this Court, in the case of *Trustees v. Foy*, with being the first state or federal court to interpret the phrase "due process" as a protection of private rights against the lawmaking power of the legislature. Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 Tex. L. Rev. 1025, 1031-32, 1031 n.28 (1985). This Court in *Foy*

interpreted the "Law of the Land" Clause, currently found in Article I, Section 19 of our Constitution, to mean that "individuals shall not be so deprived of their liberties or properties, unless by a trial by jury in a court of justice, according to the known and established rules of decision derived from the common law and such acts of the Legislature as are consistent with the Constitution." *Foy*, 5 N.C. at 88.

This respect for individual rights has manifested itself through the expansion of situations in which courts have held contractual relationships to exist, and in which they have held these contracts to have been impaired by subsequent state legislation. In *Jones v. Crittenden*, 4 N.C. 55 (1814), this Court afforded protection to a private debtor-creditor contract by striking down an act of the legislature that temporarily suspended executions of judgments against debtors. In *Stanmire v. Taylor*, 48 N.C. 207 (1855), this Court extended contractual protection to a grant of property by the State by declaring unconstitutional a legislative act that sought to grant land previously granted by the State to someone else. This Court held that the first grant gave to the recipient a contractually based vested right that could not be impaired by subsequent legislation. *Id.* at 213; *see also Ogelsby v. Adams*, 268 N.C. 272, 150 S.E.2d 383 (1966) (statutory attempt to raise fee during term of lease of state property found to impair lease contract). In the case of *Wilmington & Weldon R.R. Co. v. Reid*, 80 U.S. 264, 20 L. Ed. 568 (1871), the United States Supreme Court applied the contractual analysis to a North Carolina incorporation charter and determined that the charter, which contained an exemption from all taxes for the company, created a contract between the railroad and the State. *Id.* at 267-68, 20 L. Ed. at 569. A subsequent legislative attempt to tax the property of the railroad was, therefore, an unconstitutional impairment of the contract. *Id.* at 268, 20 L. Ed. at 570. In *Broadfoot v. City of Fayetteville*, 124 N.C. 478, 32 S.E. 804 (1899), this Court extended that contractual analysis to municipal bond obligations. In that case, the Court held that the General Assembly's establishment of a new city charter that prohibited Fayetteville from taxing its citizens to pay for plaintiff's bonds issued under the old charter was an unconstitutional impairment of contract. *Id.* at 489-90, 32 S.E. at 807; *see also Bryson City Bank v. Town of Bryson City*, 213 N.C. 165, 195 S.E. 398 (1938) (ordinance limiting taxation subsequent to issuance of bonds constituted impairment of contract to the extent the town was thereby unable to meet its obligation). In *First Nat'l Bank of Charlotte v. Jenkins*, 64 N.C. 719 (1870), this Court extended protection from impairment beyond

the strict contractual terms and beyond application to just the offeror and offeree by holding that equities arising in favor of a creditor out of contract between the State and the debtor are afforded protection. *Id.* at 725. A more recent and far-reaching case in this area is *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 344 S.E.2d 821, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 598 (1986). There, the Court of Appeals held that oral representations to municipal employees by city officials regarding accrual of benefits, upon which the employees relied, constituted a contractual agreement to which the city was bound. *Id.* at 551-53, 344 S.E.2d at 826-27. The court found no impairment, however, because the act that purportedly affected the benefits had not been applied retroactively.

The basis of the contractual relationship determinations in these and related cases is the principle that where a party in entering an obligation relies on the State, he or she obtains vested rights that cannot be diminished by subsequent state action. In *Jones v. Crittenden*, this Court stated, "The first principles of justice teach us that he to whom a promise is made under legal sanctions should signify his consent *before* any part of it can be rightfullly canceled by a legislative act." *Jones*, 4 N.C. at 57 (emphasis added). In *Stanmire*, this Court quoted Chief Justice John Marshall in underscoring the inviolate nature of vested contractual rights:

> "A law," says Judge Marshall, "annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the [c]onstitution[] as a law discharging the vendors of property[] from the obligation of executing their contracts by conveyances." Neither can the Legislature discharge itself from its obligation to perform its contracts.

Stanmire, 48 N.C. at 213 (quoting *Fletcher v. Peck*, 10 U.S. 87, 137, 3 L. Ed. 162, 178 (1810)). In *Broadfoot*, this Court upheld vested contractual rights even against the State's power to control taxation on the basis that "the power of taxation which is vested in the Legislature . . . is subject to the qualification which attends all State legislation—that is, that it must not be exercised to impair the obligation of contracts, thereby conflicting with the Constitution of the United States and of North Carolina." *Broadfoot*, 124 N.C. at 489, 32 S.E. at 807. In *Ogelsby*, this Court again enunciated the underlying expectational interests safeguarded by the Contract Clause protection of vested rights:

> "The general principle is established in American jurisprudence that a legislative grant under which rights have vested amounts to a contract . . . ." "*[A] legislative enactment in the ordinary form of a statute may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State* within the protection of the clause of the Federal Constitution forbidding impairment of contract obligations; *rights may accrue under a statute or even be conferred by it, of such character as to be regarded as contractual,* and such rights cannot be defeated by subsequent legislation. When such a right has arisen, the repeal of the statute does not affect the right or an action for its enforcement."

Ogelsby, 268 N.C. at 273-74, 150 S.E.2d at 385 (quoting 16 Am. Jur. 2d 790 *Constitutional Law* § 442 (1966)) (emphasis added).

Earlier North Carolina decisions involving the governmental provision of pensions, as well as *Simpson*, are similarly rooted in the protection of expectational interests upon which individuals have relied through their actions, thus gaining a vested right. In the case of *In re Smith*, 130 N.C. 638, 41 S.E. 802 (1902), this Court addressed the issue of whether pension warrants erroneously issued to pensioners after their death were property of the pensioners' estates. In concluding that they were not, the Court reasoned that pension warrants are charitable gifts because they are granted by the State only on the basis of indigence as defined in the statute. *Id.* at 639, 41 S.E. at 802. The Court went on to say, however, that had the pension warrants been disbursed as reimbursement or compensation, then they would belong to the estates. *Id.* The Court also recognized that had the pension warrants been issued before death but not cashed until after death, then the pensioners' estates would also be entitled to the benefits. *Id.* at 639, 41 S.E. at 803. These determinations imply that pensioners have vested rights to pension payments that are earned and have become due. *See* R.D. Hursh, *Vested Right of Pensioner to Pension*, 52 A.L.R. 2d 437, at 470-71 (1957). In *Dillon v. Wentz*, 227 N.C. 117, 41 S.E.2d 202 (1947), this Court addressed the question of how assets of a public employees' pension fund should be distributed upon dissolution of the fund. The Court determined that the members whose claims have accrued at the time of the dissolution have a "vested interest" in their benefits; and therefore, those members' benefits should be paid in full before distribution of the remainder of the fund. *Id.* at 122, 41 S.E.2d at 207.

In *Simpson*, the same principles were applied. There, the Court of Appeals concluded not only that employees relied on the representations regarding their pension benefits as consideration for their continued employment, but also that the pension benefits were "deferred compensation, already in effect earned." *Simpson*, 88 N.C. App. at 223, 363 S.E.2d at 94. Thus, the employees "had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested." *Id.* at 224, 363 S.E.2d at 94. Because the holding in *Simpson* is based on the protection of vested rights, as were the other cases in which courts found a contractual relationship, the *Simpson* court's determination that the relationship between employees vested in the retirement system and the State is contractual in nature is the appropriate conclusion.

However, this determination does not end our analysis. This Court must determine whether the tax exemption was a condition or term included in the retirement contract. Our role in reviewing this issue is limited. Where the trial is conducted by the judge sitting without a jury, as occurred in this case, the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding. *Curl v. Key*, 311 N.C. 259, 260, 316 S.E.2d 272, 273 (1984). In the present case, the trial court found as a fact that "[a] reasonable person would have concluded from the totality of the circumstances and communications made to plaintiff class members that the tax exemption was a term of the retirement benefits offered in exchange for public service to state and local governments." A thorough review of the record reveals abundant, competent evidence to support this finding, including *inter alia*: creation of various statutory tax exemptions by the legislature, the location of those provisions alongside the other statutorily created benefit terms instead of within the general income tax code, the frequency of governmental contract making, communication of the exemption by governmental agents in both written and oral form, use of the exemption as inducement for employment, mandatory participation, reduction of periodic wages by contribution amount (evidencing compensation), loss of interest for those not vesting, establishment of a set time period for vesting, and the reliance of employees upon retirement compensation in exchange for their services. Thus, it is clear the tax exemption was a term or condition of benefits of the Retirement Systems to which plaintiffs have a contractual right.

Defendants cite *Bowers v. City of High Point*, 339 N.C. 413, 451 S.E.2d 284 (1994), in support of their argument that government officials acted *ultra vires* in communicating to prospective and employed workers that the tax exemption was a contractual part of retirement benefits. However, *Bowers* is distinguishable from the present case. In *Bowers*, a municipal official calculated compensation in a manner not authorized by any state statute, thus exceeding the municipality's power and making the official's act *ultra vires*. *Id.* at 418-19, 451 S.E.2d at 288-89. In the case *sub judice*, the legislature created a statutorily valid exemption, and therefore, state officials acted within their power.

[2] Defendants next argue that even if the tax exemption was a condition of the retirement contracts, the creation of that condition was unconstitutional. This assertion is based on their reading of Article V, Section 2(1) of the North Carolina Constitution, which provides that "[t]he power of taxation . . . shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1). Defendants contend that the exemption constitutes an unconstitutional contracting away of the power of taxation because it permanently deprives the State of its sovereign right to tax retirees. We find this argument unpersuasive.

As an initial matter, " '[t]he rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens.' " *Convent of Sisters of St. Joseph v. City of Winston-Salem*, 243 N.C. 316, 324, 90 S.E.2d 879, 885 (1956) (quoting 11 Am. Jur. *Constitutional Law* § 123, at 767 (1937)). In this case, the State created the exemption and then proceeded for decades to represent it as a portion of retirement benefits and to reap its contractual benefits. It is clear from the record evidence that the State used these representations as inducement to employment with the State, and employees relied on these representations in consideration of many years' valuable service to and with the State. The State's attempt to find shelter under the North Carolina Constitution must be compelling indeed after such a long history of accepting the benefits of the extension of the exemption in question. We find no such compelling case here.

Upon examination of the circumstances surrounding this case and the Act at issue, we must conclude that the State has failed to establish that the tax exemption is an unconstitutional contracting

away of the power to tax. A thorough reading of Article V, Section 2 of the state Constitution reveals that the State is empowered to enter into contracts for tax exemptions. As well as ensuring that the power of taxation may never be contracted away, Article V, Section 2 also contains other provisions regarding taxing and contracting by the State. Subsection (6) provides that, regarding income taxes, "there shall be allowed . . . exemptions." N.C. Const. art. V, § 2(6). Subsection (3) further provides that "[n]o taxing authority *other* than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it." N.C. Const. art. V, § 2(3) (emphasis added). Section 2 also establishes that the "State . . . may contract with . . . any person . . . for the accomplishment of public purposes only." N.C. Const. art. V, § 2(7). We cannot read subsection (1) in isolation as the State would have us do. Isolated interpretations of statutory and constitutional provisions are contrary to the jurisprudence of North Carolina. *See, e.g., State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944). In light of the interplay between subsections (3), (6) and (1), it is apparent that the granting of an exemption is not the same thing as relinquishing the "power" of taxation. If it were, no exemptions would be possible—a result incongruous with express provisions of the Constitution. Combining these subsections with the power to make contracts granted in subsection (7), it is clear that the State may make contracts for exemptions without contracting away the "power" of taxation as long as the contract is for a public purpose. However, once such a contract is made, the Supremacy Clause of the United States Constitution comes into effect in order to prevent subsequent impairment of that contract.

The sovereign power of taxation is not, as defendants appear to assert, an inviolable power, the exercise of which the State may never limit by obligation. In *U.S. Trust*, the Supreme Court draws a distinction between cases involving "reserved powers" that cannot be contracted away in any manner, such as the police power and eminent domain, and those powers for which a state can bind itself to a limitation for the future, such as taxing and spending. *U.S. Trust*, 431 U.S. at 23-25, 52 L. Ed. 2d at 110-11. The fact that the contract between the State and its retirees limits the ability of the State to tax under certain circumstances, in this instance the benefits of those in whom the benefits have vested, does not inherently undermine the State's sovereign power of taxation. "The constitutional provision against impairing contract obligations is a *limitation* upon the taxing power,

as well as upon all legislation, whatever form it may assume. Indeed, attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition." *Murray v. City Council of Charleston*, 96 U.S. 432, 444, 24 L. Ed. 760, 762-763 (1877) (emphasis added). Such a specific limitation as provided here by conditional exemption, that is, the limitation of a tax levied (i.e., income tax), does not equate to a limitation of the general power to levy.

The necessity for the State to be bound to its contractual obligations is clear when the Act in question is compared with the long-established practice of the issuance of municipal bonds. The State regularly enters into contracts for tax exemptions in connection with its issuance of municipal bonds and the creation of its obligations thereunder. In exchange for paying a lower rate of interest, the State agrees by statutory exemption to forgo taxation of the income or gain on the bonds. The State's policy of entering into a contract for a tax exemption clearly serves a public purpose by inducing needed investment for important projects while paying a lower-than-market rate of interest.

The State's action here in changing the taxability of vested retirement benefits is no different than if the State issued tax-free bonds, collected hundreds of millions of dollars for their purchase, and then retrospectively repealed investors' tax-free interest and capital gain advantages. However, under application of defendants' premise, this is precisely what the State could do. The basis for prohibiting such action is fundamental fairness. As the Pennsylvania Supreme Court so eloquently stated:

> According to the cardinal principle of justice and fair dealings between government and man, as well as between man and man, the parties shall know prior to entering into a business relationship the conditions which shall govern that relationship. *Ex post facto* legislation is abhorred in criminal law because it stigmatizes with criminality an act entirely innocent when committed. The impairment of contractual obligations by the Legislature is equally abhorrent because such impairment changes the blueprint of a bridge construction when the spans are half way across the stream.

Hickey v. Pension Bd., 378 Pa. 300, 309-10, 106 A.2d 233, 237-38 (1954).

Here, in exchange for the inducement to and retention in employment, the State agreed to exempt from state taxation benefits derived from employees' retirement plans. This exemption certainly was for a public purpose, as it was a significant difference between governmental and comparable private employment that helped attract and keep quality public servants in spite of the generally lower wage paid to state and local employees. Thus, the State entered into a contract for, *inter alia*, a tax exemption for a public purpose. As the Oregon Supreme Court explained in a case similar to the one *sub judice*:

> Government obtained its employees' services less expensively because the gross cost of providing a more nearly adequate pension amount was lowered by the tax exempt nature of the benefit payments and of the contributions put in trust to purchase annuities payable at the time of each employee's future retirement. . . . Less expense meant that less tax money was exacted from the taxpayers in general over past years to fund a public employee's salary and benefits.

Hughes v. Oregon, 314 Or. 1, 43 n.7, 838 P.2d 1018, 1042 n.7 (1992). Once the commitment is made, and its derivative benefits enjoyed by the State, the State can no more remove this condition than it can tax the interest and gain of municipal bond holders. "Government proposes to keep the benefit of lower cost, but to take away the promise that its employees accepted in order to lower that cost, thereby keeping the benefit of its bargain but depriving the employees of the benefit of theirs." *Id.* Such a "change in the blueprint" is not acceptable in a government guided by notions of fairness, consent and mutual respect between government and man, and certainly not between the government of this State and its employees.

We therefore hold that the relationship between the Retirement Systems and employees vested in the system is contractual in nature, the right to benefits exempt from state taxation is a term of such contract, and such exemption does not constitute an unconstitutional contracting away of the State's sovereign power of taxation. Thus, plaintiffs have met their obligation under the first part of the *U.S. Trust* test.

B. Impairment

[3] Having found a contractual relationship and the existence of a valid exemption in the contract, we now turn our focus to the second

prong of the *U.S. Trust* test, whether the contract was impaired by the Act in question. *U.S. Trust*, 431 U.S. at 17, 52 L. Ed. 2d at 106. When examining whether a contract has been unconstitutionally impaired, the "inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. . . . Minimal alteration of contractual obligations may end the inquiry at [this] stage." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45, 57 L. Ed. 2d 727, 736-37 (1978). Defendants contend that the tax exemption provision is only incidental to the basic contract for retirement benefits. We disagree.

The legislative amendment placed a $4,000 annual exemption cap on retirement benefits. While this will affect retirees in differing degrees depending on their individual benefit levels, the overall impact is substantial. The record evidence reveals that, at last count, losses to retirees in expected income will be in excess of $100 million. In *Simpson*, the Court of Appeals determined that plaintiffs' contractual rights had been impaired, "as plaintiffs stand to suffer significant reductions in their retirement allowances as a result of the legislative amendment under challenge." *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94. Such is the case here. Thus, it is clear and we hold that the statutory amendment in question substantially impairs the employees' contractual right to a tax exemption.

C. Reasonableness and Necessity of Impairment

[4] Having decided the first two questions in the affirmative, we lastly consider the third prong of the *U.S. Trust* test, whether the impairment was reasonable and necessary to serve an important public purpose. *U.S. Trust*, 431 U.S. at 25-26, 52 L. Ed. 2d at 111-12. Not every impairment of contractual obligations by a state violates the Contract Clause. *Id.* at 21, 52 L. Ed. 2d at 109. Through the exercise of its police power, a state may constitutionally impair its contractual obligations to protect the general welfare of its citizens, so long as such impairment is reasonable and necessary to serve an important public purpose. *Id.* at 25-26, 52 L. Ed. 2d at 111-12; *Simpson*, 88 N.C. App. at 224, 363 S.E.2d at 94. In applying this test, the courts are not bound by just any rationale put forward by the legislature to justify its actions. The Supreme Court noted in *U.S. Trust* that:

> In applying this standard, . . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do

> not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

U.S. Trust, 431 U.S. at 25-26, 52 L. Ed. 2d at 112. Defendants assert that the exemption cap was a reasonable and necessary approach to effectuating the important state interest of complying with the Supreme Court's *Davis* decision. We find defendants' argument here unpersuasive.

While it is clear that the state interest in this case—complying with a Supreme Court ruling—was important, what is equally clear is that the method chosen was not necessary to achieve the state interest asserted. In *Davis*, the Supreme Court did not tell North Carolina that it was required to tax state and local employees; nor did it set forth any mandatory scheme of compliance. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891. The Court merely held that federal retirees had to be treated the same as state and local retirees. *Id.* There are numerous ways that the State could have achieved this goal without impairing the contractual obligations of plaintiffs. Two of the most obvious ways would have been either to exempt federal employees or to apply the exemption cap prospectively only to those state and local employees whose retirement benefits had not yet vested. Thus, we hold the Act which placed a cap on tax-exempt benefits was not necessary to a legitimate state or public purpose, i.e., it was not "essential" because "a less drastic modification" of the State's exemption plan was available. *U.S. Trust*, 431 U.S. at 30, 52 L. Ed. 2d at 114. As the Supreme Court stated, "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *Id.* at 31, 52 L. Ed. 2d at 115.

Furthermore, the method chosen was not reasonable under the circumstances. The legislature sought a "revenue neutral" approach to complying with the *Davis* decision, meaning that legislators would be faced with neither raising taxes nor cutting other programs in order to comply. However, this convenient approach impaired vested rights of current and future state and local retirees to whom the State had made promises of exemption in consideration of their many years of public service. Legislative convenience is not synonymous with reasonableness. Because the impairment of contracts caused by the Act was neither reasonable nor necessary for achieving an important

state interest, this legislative enactment was not an exercise of the police power or other means under which the State may legitimately skirt the mandate of the Contracts Clause.

D. Conclusion

For the above-stated reasons, we hold that the plaintiffs have met their burden under the *U.S. Trust* test of establishing an unconstitutional impairment of contract. The plaintiffs had a contractual relationship with the Retirement Systems, and that contract included the tax exemption of benefits derived from their retirement plans. The Act, which placed a cap on the amount of benefits exempted from state taxation, substantially impaired the contract. Finally, the Act was neither necessary nor reasonable for achieving an important state interest. As a result, the Act is unconstitutional as an impermissible impairment of contract under the Contract Clause, Article I, Section 10 of the United States Constitution, with regard to employees whose benefits had vested when it was passed.

II. TAKING WITHOUT JUST COMPENSATION

[5] Defendants assign error to the trial court's conclusion that the Act's removal of plaintiffs' exemption from taxation on their retirement benefits constitutes a taking of property without just compensation under the "Law of the Land" Clause, Article I, Section 19 of the North Carolina Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. The trial court concluded as a matter of law that "[r]epeal of the tax exemption was a taking under the federal and state constitution." Defendants argue the Act cannot be considered a taking of property because, under the Supreme Court's decision in *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 41 L. Ed. 2d 132 (1974), the Act constitutes a legitimate exercise of the State's taxing power. Defendants additionally assert that because the exemption cannot be considered contractual, it cannot be considered property deserving of just compensation. We find defendants' arguments to be without merit.

As established above, the relationship between the State and the plaintiffs is contractual in nature, and the plaintiffs' exemption from taxation of benefits from their retirement plans is a term of that contract to which plaintiffs have a vested right. The issue thus becomes whether the subsequent taxation of those benefits via the Act constitutes an unconstitutional taking of property without just compensation under the state and federal Constitutions. Article I, Section 19 of

the North Carolina Constitution reads in pertinent part: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

This Court recognized in *Morris v. Holshouser*, 220 N.C. 293, 17 S.E.2d 115 (1941), that "[t]he privilege of contracting is both a liberty and a property right. . . . 'Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property.' " *Id.* at 295-96, 17 S.E.2d at 117 (quoting *Coppage v. Kansas*, 236 U.S. 1, 14, 59 L. Ed. 441, 446 (1915)). In *Lynch v. United States*, 292 U.S. 571, 78 L. Ed. 1434 (1934), Justice Brandeis, writing for a unanimous Supreme Court, recognized that "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States." *Id.* at 579, 78 L. Ed. at 1440. The Court went on to note that impairment of a contract could constitute an impermissible taking by stating, "Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Id.* Such is the case with rights arising out of contracts between the State and individuals through application of the Fourteenth Amendment. *See Department of Transp. v. Harkey*, 308 N.C. 148, 151 n.*, 301 S.E.2d 64, 67 n.* (1983).

Moreover, such contracts are protected by provisions in the state Constitution. *Id.* In *Foy*, this Court was the first in the nation to recognize that the purpose of a written constitution is to place limits on the power of the legislature. This Court premised its analysis of the act considered in *Foy* on the principle "that the people of North Carolina, when assembled in convention, were desirous of having some rights secured to them beyond the control of the Legislature, and these they have expressed in the Bill of Rights and the Constitution." *Foy*, 5 N.C. at 83. The *Foy* Court then recognized "that if the Legislature had *vested* an individual with the property in question, this section of the Bill of Rights [the Law of the Land Clause] would restrain them from depriving him of such right." *Id.* at 87. In *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982), this Court further explained the application of the state Constitution to takings of private property by governmental action:

> Every state constitution, except North Carolina's, contains similar provisions prohibiting the taking of private property for public use without just compensation. While North Carolina does not have an express constitutional provision against the "taking" or "damaging" of private property for public use without payment of just compensation, this Court has allowed recovery for a taking on constitutional as well as common law principles. *We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State,* and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. *This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of Article I, Section 19 of our State Constitution.*

Id. at 195-96, 293 S.E.2d at 107-08 (citations omitted) (footnote omitted) (emphasis added). The Court went on to explain that "[g]overnmental immunity is not a defense . . . . 'The test of liability is whether, notwithstanding its acts are governmental in nature and for a lawful purpose, the municipality's acts amount to a partial taking of private property. If so, just compensation must be paid.' " *Id.* at 203, 293 S.E.2d at 111 (quoting *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*, 260 N.C. 69, 79, 131 S.E.2d 900, 907 (1963)).

In the present case, it is clear that the State has taken plaintiffs' private property by passage of the Act. Plaintiffs contracted, as consideration for their employment, that their retirement benefits once vested would be exempt from state taxation. The Act now undertakes to place a cap on the amount available for the exemption, thereby subjecting substantial portions of the retirement benefits to taxation. This is in derogation of plaintiffs' rights established through the retirement benefits contracts and thus constitutes a taking of their private property. The State fails to compensate them for such taking through the Act. As such, the Act is unconstitutional under the state and federal Constitutions.

Defendants' attempt to analogize this case to the Supreme Court's decision in *City of Pittsburgh* is misplaced. There, the Supreme Court held that a city ordinance imposing an unusually high tax on parking in the city did not constitute a violation of due process so as to constitute an unconstitutional taking of the property of parking lot owners. *City of Pittsburgh*, 417 U.S. at 375, 41 L. Ed. 2d at 136.

The Court held that it would not judge the reasonableness of a tax that was *otherwise within the power of the legislative body to enact,* so long as it was not so arbitrary as to constitute a ruse for some forbidden action by the legislative body. *Id.* The instant case is distinguishable in that the Act is not otherwise within the power of the legislature to enact because it violates the constitutional prohibitions against impairing contracts and taking property without just compensation. Thus, the Act cannot be construed as a legitimate exercise of the State's taxing power.

III. DECLARATORY AND INJUNCTIVE RELIEF

[6] Defendants next assign error to the trial court's order for declaratory and injunctive relief in favor of plaintiffs. In its 2 June 1995 order, the trial court held that the Act constituted a material breach of contract and was unconstitutional under numerous provisions of both the state and federal Constitutions. The court went on to conclude that the Act was "void, a nullity and unenforceable." The trial court further concluded in its 25 September 1995 amended order:

> Injunctive relief would be statutorily unavailable to plaintiffs without a final ruling that the portion of the August 12, 1989 Act which repealed the tax exemption on retirement benefits is unconstitutional. And ordinarily sovereign immunity and G.S. 105-267 preclude any relief to plaintiffs in this action other than refunds of additional state income taxes, paid because of the repeal of the tax exemption, for the years 1989, 1990 and/or 1991 for those plaintiffs, including class members, who made appropriate timely refund demands for those tax years. However, it is a useless act for plaintiff class members and other state or local government retirees who had completed five years of creditable service on or before August 12, 1989 to continue to pay taxes on retirement benefits, file protests pursuant to G.S. 105-267, and continue to file lawsuits resulting in multiple duplicative litigation. *Sovereign immunity has been waived by the passage of G.S. 105-267 permitting suits against the State for tax refunds. As the statutory remedies are inadequate, equitable relief including injunction of future collection of taxes on retirement benefits attributable to service rendered or contributions made prior to August 12, 1989 is proper.*

(Emphasis added.) Based on these conclusions, *inter alia,* the trial court then enjoined defendants from further collecting the disputed tax, ordering that defendants "shall cease collecting income taxes

calculated upon state and local government retirement benefits paid to all state and local government retirees, for those portions of said retirement benefits attributable to service rendered or contributions made prior to August 12, 1989." However, this injunctive relief was stayed pending appeal.

Defendants assert that, despite the stay, the granting of declaratory and injunctive relief by the trial court was improper. Defendants further contend that the trial court erred and must be reversed in its conclusions of law that sovereign immunity was waived by passage of N.C.G.S. § 105-267 and that injunctive relief is proper since the statutory remedies are inadequate. According to defendants, relief should be limited strictly to refunds of unconstitutionally collected taxes. We generally agree with defendants' contentions but note that the trial court's holding has little if any practical impact on the outcome of this case.

N.C.G.S. § 105-267 contains the procedure required for contesting the taxation under the Act:

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2.

N.C.G.S. § 105-267 (1989) (amended 1996). In *Bailey I*, we held:

> Section 105-267 . . . bars courts absolutely from entertaining suits of any kind brought for the purpose of preventing the collection of any tax imposed in Subchapter I. Since the taxes challenged by plaintiffs were Subchapter I taxes, we hold that the trial court erred in enjoining defendants from further collection of taxes paid on plaintiffs' retirement benefits. Under section 105-267 plaintiffs' remedies are restricted to a refund of any illegal, invalid, or unauthorized tax . . . .

Bailey I, 330 N.C. at 242, 412 S.E.2d at 304. This Court further noted that N.C.G.S. § 105-267 was the exclusive basis for challenging taxation under this subchapter, even on constitutional grounds. *Id.* at 235, 412 S.E.2d at 300.

N.C.G.S. § 105-267 is the relevant statute for challenging the Act in the instant case. The only relief granted under this statute is a refund of improperly collected taxes. Nowhere does the statute allow a trial court to grant an injunction from collection of a tax during the pendency of a challenge to taxation under this subchapter. Further, this Court has ruled that the statutory procedures contained in section 105-267 are adequately protective of individuals' due process rights and are the exclusive means by which a tax under this subchapter may be challenged. *Swanson v. North Carolina*, 335 N.C. 674, 687, 441 S.E.2d 537, 545, *cert. denied*, 513 U.S. 1056, 130 L. Ed. 2d 598 (1994). As a result, the trial court technically erred in its conclusion that sovereign immunity had been completely waived by the passage of N.C.G.S. § 105-267 and in its order enjoining defendants from further collection of the tax during the resolution of this case.

However, an examination of the circumstances of this case reveals that the practical effect of the trial court's error was inconsequential. First, the trial court immediately stayed the injunction pending appeal, preventing any undue prejudice to defendants. Second, the trial court determined that plaintiffs would still be required to file refund suits, presumably in accordance with section 105-267, for years not covered by the present litigation, thereby allowing collection of the tax by defendants during the future pendency of the case. Finally, we have by our present decision ruled that the Act is unconstitutional under both the state and federal Constitutions as applied to those employees whose benefits vested prior to its passage. The State, pursuant to this decision, will be prevented from further

attempts to collect taxes on retirement benefits. As such, no ruling in the form of an injunction is necessary to forestall future harm to plaintiffs, thus making the issue of the injunction moot as a practical matter.

Thus, we reaffirm that trial courts may not generally grant injunctions barring future collection of taxes or fashion other remedies not provided in section 105-267. However, we hold that such error here was not prejudicial and that in light of our other determinations in this case, defendants should immediately cease collection of taxes pursuant to the Act on the employees affected by this decision and begin issuance of refunds consistent with the trial court's 25 September 1995 amended order and this opinion. This assignment of error is overruled.

IV. COMMON-FUND DOCTRINE

[7] Defendants next assign error to the trial court's creation of a "common fund" for the payment of attorney's fees and other costs incurred by the class representatives. In its 25 September 1995 amended order, the trial court ordered defendants to identify all individuals in the plaintiff class who had complied with the statutory requirements for receiving a refund. Next, the trial court established a formula by which the amount of each individual refund would be calculated, including interest. The result of this formulation is the "taxpayer credit amount," or the amount of money due to each plaintiff. The trial court then ordered eighty-five percent of the taxpayer credit amount to be applied against future state income tax liability incurred by plaintiffs or, in the case of plaintiffs who are deceased, no longer residents of the state, or who have no tax liability, to be paid in whole to such plaintiffs or their estates. The trial court ordered the remaining fifteen percent to be "paid by defendants into a common fund administered by the Court for the payment of plaintiffs' attorney's fees, costs of litigation, costs of administration, fees and expenses incurred by the special master and reimbursement of named plaintiffs for travel and expenses."

The "common-fund doctrine" is a long-standing exception to the general rule in this country that every litigant is responsible for his or her own attorney's fees. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 681-82 (1980); *Horner v. Chamber of Commerce*, 236 N.C. 96, 97, 72 S.E.2d 21, 22 (1952); 20 Am. Jur. 2d *Costs* § 66, at 60 (1995). Attorney's fees are ordinarily taxable as costs only when authorized by statute. *Horner*, 236 N.C. at 97, 72 S.E.2d at 22.

However, in *Horner*, the leading North Carolina case regarding the common-fund doctrine, this Court recognized:

> [T]he rule is well established that a court of equity, or a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful 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.

Id. at 97-98, 72 S.E.2d at 22. The United States Supreme Court noted in the case of *Boeing Co. v. Van Gemert*, "Since the decisions in *Trustees of the Internal Improvement Fund v. Greenough*, [105 U.S. 527, 26 L. Ed. 1157 (1881)], and *Central R.R. & Banking Co. v. Pettus*, [113 U.S. 116, 28 L. Ed. 915 (1885)], this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing*, 444 U.S. at 478, 62 L. Ed. 2d at 681. "This 'rule rests upon the ground that where one litigant has borne the burden and expense of the litigation that has inured to the benefit of others as well as to himself, those who have shared in its benefits should contribute to the expense.' " *Horner*, 236 N.C. at 98, 72 S.E.2d at 22 (quoting 14 Am. Jur. *Costs* § 74, at 47 (1938)).

Defendants do not contend that representative plaintiffs in this case have not "borne the burden and expense of litigation," nor do they contest that if the representative plaintiffs prevail (which they have), others will benefit from their efforts. Instead, defendants suggest a technical interpretation of the doctrine based on a strict application of factual precedents in the case law of this jurisdiction. In the majority of North Carolina cases dealing with the common-fund doctrine, the litigation involved a preexisting fund of money or piece of real estate. *See, e.g., Horner*, 236 N.C. 96, 72 S.E.2d 21 (common-fund doctrine applicable to recovery of improper donation of city funds challenged by representative plaintiff); *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) (common-fund doctrine applicable to increase of condemnation proceeds resulting from plaintiff's suit). As such, defendants argue the relief plaintiffs seek does not qualify for application of the common-fund doctrine

because plaintiffs' tax credits or refunds constitute separate individual claims and not a single "fund." We disagree.

The primary problem faced by courts in determining whether a shifting of fees is appropriate under the common-fund doctrine is deciding whether some finite benefit flows to a determinable group of plaintiffs. If the benefit reaped by the representative plaintiffs merely "vindicate[s] a general social grievance," *Boeing*, 444 U.S. at 479, 62 L. Ed. 2d at 682, or redounds to the benefit of the public at large, then the common-fund doctrine will not operate to shift the burden of attorney's fees, *id.* However, in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 44 L. Ed. 2d 141 (1975), the Supreme Court noted that the common-fund doctrine has been appropriately applied in cases (1) where the classes of persons benefitting from the lawsuit were small and easily identifiable, (2) where the benefits could be traced accurately, and (3) where the costs could be shifted to those benefitting with some precision. *Id.* at 264 n.39, 44 L. Ed. 2d at 157-58 n.39. In *Boeing*, the Supreme Court used these principles to hold that the common-fund doctrine was properly applied in a class-action suit by Boeing bondholders. In analyzing the application of the common-fund doctrine, the Court stated:

> the criteria [for appropriate fee-shifting cases] are satisfied when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf. Once the class representatives have established the defendant's liability and the total amount of damages, members of the class can obtain their share of the recovery simply by proving their individual claims against the judgment fund. . . . Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.

Boeing, 444 U.S. at 479, 62 L. Ed. 2d at 682. Although the common-fund doctrine is particularly applicable to cases involving preexisting funds, trusts or real estate parcels, nothing precludes application of the doctrine to funds that arise as a result of the litigation and otherwise meet the above requirements. In fact, this Court expressly authorized such application in *Horner* when it stated that the common-fund doctrine is appropriate in cases where a plaintiff "has *created* at his own expense *or brought into court* a fund which oth-

ers may share with him." *Horner*, 236 N.C. at 98, 72 S.E.2d at 22 (emphasis added); *see also Faulkenbury*, 345 N.C. 683, 483 S.E.2d 422 (holding that the common-fund doctrine applied to a change in calculation of benefits under the State's retirement system resulting in the creation of a recovery fund).

In the present case, the named plaintiffs have recovered a determinate fund for the benefit of every member of the class whom they represent. The defendants' liability has been proven. The qualifications for class membership have been established, and the formula for computing individual refunds has been set. Thus, the judgment fund itself is a quantifiable sum that has been created by the litigation undertaken by the representative plaintiffs. All the remaining class beneficiaries need to do in order to recover their proper refund or credit is to prove their individual claims against the judgment fund. As such, we are persuaded that the recovery at issue in this case properly constitutes a common fund for purposes of shifting attorney's fees under the common-fund doctrine of *Horner* and its progeny. As the Supreme Court stated in *Boeing*:

> Unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs. The judgment entered . . . rectifies this inequity by requiring every member of the class to share attorney's fees to the same extent that he can share the recovery. Since the benefits of the class recovery have been "traced with some accuracy" and the costs of recovery have been "shifted with some exactitude to those benefiting," *Alyeska Pipeline Service Co.*, [421 U.S.] at 265, n.39, 44 L. Ed. 2d [at 157, n.39] we conclude that the attorney's fee award in this case is a proper application of the common-fund doctrine.

Boeing, 444 U.S. at 480-81, 62 L. Ed. 2d at 683 (footnote omitted).

Moreover, N.C.G.S. § 6-20 provides, "In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." N.C.G.S. § 6-20 (1997). If an action is equitable in nature, the taxing of the costs is within the discretion of the court, and the court may allow costs in favor of one party or the other or require the parties to share the costs. *Hoskins v. Hoskins*, 259 N.C. 704, 707, 131 S.E.2d 326, 328 (1963). The present case involves not only plaintiffs' request for refund of improper taxation, but also their demand for performance of the State's contractual obligations and an injunction against future collection via a ruling of unconstitutionality.

Thus, this case is equitable in nature. The trial court acted within its discretion in the awarding of attorney's fees to the representative plaintiffs through the creation of a common fund. This assignment of error is overruled.

V. PLAINTIFF CLASS MEMBERSHIP

[8] The final issue to be addressed is the proper composition of the plaintiff class. Plaintiffs contend the trial court erred by ordering refunds only to those taxpayers who complied with the protest requirements of N.C.G.S. § 105-267. Here, the basic question is whether a refund of taxes paid, pursuant to an unlawful tax, is available only to those taxpayers who complied precisely with the procedural steps of N.C.G.S. § 105-267 or to all taxpayers who wrongfully had their benefit contracts impaired by the State. Fundamental fairness would seem to dictate an easy answer—the State should not profit from the collection of a tax which it was prohibited by our state and federal Constitutions from imposing in the first place. However, the resolution of this issue is complicated by our previous holdings in *Bailey I* and *Swanson.*

In *Bailey I*, this Court held that the case brought by the present plaintiffs should be dismissed because plaintiffs failed to pay the disputed tax first and then seek a refund in accordance with section 105-267 before bringing their constitutional challenge. (Plaintiffs subsequently met the requirements of section 105-267, resulting in the present case.) This Court stated: "When a tax is challenged as unlawful rather than excessive or incorrect, the appropriate remedy is to bring suit under N.C.G.S. § 105-267. '[A] constitutional defense to a tax does not exempt a plaintiff from the mandatory procedure for challenging the tax set out in N.C.G.S. § 105-267.' " *Bailey I*, 330 N.C. at 235, 412 S.E.2d at 300 (quoting *47th Street Photo Inc. v. Powers*, 100 N.C. App. 746, 749, 398 S.E.2d 52, 54 (1990), *appeal dismissed and disc. rev. denied*, 329 N.C. 268, 407 S.E.2d 835 (1991)). In *Swanson*, this Court held that class plaintiffs had not stated a claim because none of the demand letters sent to the Department of Revenue included information regarding any individual class member's claim as required by section 105-267. This Court, in *Swanson*, also upheld the constitutionality of the procedure in section 105-267 as measured by the requirements of due process, holding, "Denial of refunds to taxpayers for the tax years for which they failed to comply with this procedure does not . . . deprive these taxpayers of constitutional due process." *Swanson*, 335 N.C. at 687, 441 S.E.2d at 545.

In the case *sub judice*, defendants cite these authorities for the contention that a refund should be limited only to those taxpayers who complied with the protest procedures of section 105-267. However, close examination of the predicate for these holdings in *Bailey I* and *Swanson* undermines defendants' analysis.

First, the foundation upon which this Court's rather sweeping statement in *Bailey I* was premised has been undercut by the United States Supreme Court. Citing as authority the decision in *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977), this Court stated, "Absent protest in the form of a demand for refund, a tax is voluntarily paid, and 'voluntary payments of unconstitutional taxes are not refundable.' " *Bailey I*, 330 N.C. at 236, 412 S.E.2d at 301 (quoting *Coca-Cola*, 293 N.C. at 569, 238 S.E.2d at 783). A close and realistic examination of taxation procedure in this state reveals this reasoning to be suspect, particularly in light of the circumstances here. North Carolina does not provide taxpayers with any predeprivation procedures for determining the propriety or legality of a tax. Individuals who challenge tax liability must first pay the disputed amount and then petition the Department of Revenue for a refund of the amount in question. Individuals who do not pay taxes assessed, disputed or not, are subject to a myriad of the State's coercive powers, including fines and forfeiture. Under such circumstances, it would be generous at best to characterize the payment of a disputed tax as "voluntary." The United States Supreme Court, in the case of *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 L. Ed. 2d 17 (1990), a case decided after this Court's 1977 opinion in *Coca-Cola*, stated:

> We have long held that, *when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under "duress"* in the sense that the State has not provided a fair and meaningful predeprivation procedure. Justice Holmes suggested in *Atchison, T. & S.F. [Ry.] Co. v. O'Connor*, 223 U.S. 280, 56 L. Ed. 436 (1912), that a taxpayer pays "under duress" when he proffers a timely payment merely to avoid a "serious disadvantage in the assertion of his legal . . . rights" should he withhold payment and await a state enforcement proceeding in which he could challenge the tax scheme's validity "by [defense] in the suit." *Id.* at 286, 56 L. Ed. [at 438].
>
> In contrast, if a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers

> to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary."

McKesson Corp., 496 U.S. at 39 n.21, 110 L. Ed. 2d at 37 n.21 (citations omitted) (emphasis added). This logic eviscerates the conclusion of *Bailey I* that a tax is paid voluntarily "absent protest" and, without such voluntary payment, is not refundable even though the tax is unconstitutional. *Bailey I*, 330 N.C. at 236, 412 S.E.2d at 301.

Once this conclusion in *Bailey I* is removed, a thorough reading of the cases suggests that the procedural requirements of section 105-267 are intended only to establish the parameters within which a contested tax case must arise, not to preclude recovery for those determined via the resulting case to have been unconstitutionally taxed. Neither *Bailey I* nor *Swanson* reached the substantive merits of the respective cases. They addressed only the procedural stances under which each arose. In both cases, the plaintiffs were barred from reaching the merits because of this Court's holding of procedural infirmities resulting from failure to comply with section 105-267 and regulations promulgated thereunder. Neither decision addressed the issue of what effect section 105-267 had on remedies for taxpayers deemed to have been taxed unconstitutionally once a suit was properly filed within the requirements of section 105-267.

To determine the appropriate application of *Bailey I* and *Swanson*, we must examine the rationales underlying the Court's decisions. In both cases, the Court stated that the reason for the requirements of section 105-267 was the fiscal stability of the State. In *Bailey I*, the Court stated:

> Reasons for requiring that refund demands include the information identified by the Secretary of Revenue evidently spring from a concern for the stability of the fisc:
>
> > Where protest has been interposed, the [taxing authority] is notified that it may be obliged to refund the taxes and is required to be prepared to meet that contingency. If no protest has been lodged, it is generally assumed that taxes paid can be retained to meet authorized public expenditures, and financial provision is not made for contingent refunds.

Bailey I, 330 N.C. at 238, 412 S.E.2d at 302 (quoting *Conklin v. Town of Southampton*, 141 A.D.2d 596, 598, 529 N.Y.S.2d 517, 519 (1988)).

In *Swanson*, this Court quoted the above passage from *Bailey I*, as well as the following statement from the United States Supreme Court: " 'The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning . . . .' " *Swanson*, 335 N.C. at 687, 441 S.E.2d at 545 (quoting *McKesson Corp.*, 496 U.S. at 45, 110 L. Ed. 2d at 41).

Thus, according to *Bailey I* and *Swanson*, the purpose underlying the requirements of section 105-267 is to put the State on *notice* that a tax, or a particular application thereof, is being challenged as improper so that the State might properly budget or plan for the potential that certain revenues derived from such tax have to be refunded. Such an understanding affirms, and at the same time limits, the sweeping statement that even claims of unconstitutional taxation are subject to the procedural requirements of section 105-267. While claims of improper or illegal taxation, even on constitutional grounds as held in *Bailey I*, are subject to the procedural requirements of section 105-267, this is only to the extent necessary to provide the State with the notice sufficient to protect fiscal stability.

Notice for fiscal planning purposes is the touchstone of the section 105-267 requirements. In this case, plaintiffs met the requirements for filing suit under section 105-267. As of the first protest received in accordance with section 105-267, not to mention the first lawsuit filed thereafter, the State has been aware of a constitutional challenge to the validity of the Act. The State, through its agents, manages the various Retirement Systems. As a result, the State is or should be fully aware of the number of retirees whose benefits vested prior to 12 August 1989, as well as the amount of benefits paid to those retirees. Therefore, the State had notice that the Act was potentially unconstitutional and had the opportunity to budget for such a contingency. The purpose of the statute was realized.

We have determined in this case that the State acted unconstitutionally by impairing the contracts and taking without just compensation the property of state and local government employees whose retirement benefits vested on or before 12 August 1989. Such a determination does not discriminate between those who protested and those who did not. The State unconstitutionally collected taxes from *all* of these individuals. It would be unjust to limit recovery only to those taxpayers with the advantage of technical knowledge and foresight to have filed a formal protest and demand for refund. Such a result would clearly elevate form over substance. This is especially

untenable in a case such as this, where the matter is of constitutional import and where, in practical consequence, the purpose of the statute was realized. Further, this more expansive, inclusive determination would seem to comport with the language and spirit of section 105-267, which provides: "If upon the trial it is determined that all or part of the tax was levied or assessed for an illegal or unauthorized purpose, . . . judgment shall be rendered therefor, with interest, and the judgment shall be collected as in other cases. The amount of taxes for which judgment is rendered in such an action shall be refunded by the State." N.C.G.S. § 105-267.

Thus, as to this issue, we hold that section 105-267 does not shield the State from refunding money collected to all taxpayers unconstitutionally taxed by the Act and that the trial court erred by limiting relief only to those taxpayers who protested in accordance with section 105-267. To the extent that our rulings in *Bailey I* and *Swanson* imply otherwise, they are hereby disavowed.

For the foregoing reasons, we affirm the trial court's holding that the Act is unconstitutional as an improper impairment of contract and a taking of property without just compensation, and we also affirm the trial court's creation of a common fund. However, in light of our holding, we conclude that the trial court erred in its determination that only plaintiffs' retirement benefits attributable to service prior to 12 August 1989 are exempt from state tax and in limiting recovery only to those plaintiffs who complied with section 105-267. We remand the case to the trial court for entry of such further order or orders, consistent with this opinion, as the trial court shall find appropriate with respect to the determination and administration of plaintiffs' class, refunds, and the common fund. We have examined the remaining issues raised by the parties, including the issue of judicial salaries, and conclude we need not now address them in light of the determinations hereinabove set forth.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice FRYE concurring in part and dissenting in part.

This Court has decided, in two very recent cases, one involving the same parties as in this case, that the protest requirements of N.C.G.S. § 105-267 are valid. I cannot join the majority in overruling those cases today. Accordingly, I dissent from the portion of the majority opinion dealing with the protest requirements of N.C.G.S. § 105-267.

Justice WEBB concurring in part and dissenting in part.

I dissent from the portion of the majority opinion dealing with the protest requirements of N.C.G.S. § 105-267, which, when this action was filed, said:

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2.

N.C.G.S. § 105-267 (1989) (amended 1996).

I do not see how the language of this section could be more clear that an action may not be brought to prevent the collection of certain taxes, including the taxes involved in this case. The section further clearly says that the only way to test the imposition of these taxes is to pay them to the proper officer and file a protest within thirty days of payment.

In holding that a protest was not necessary in this case, I believe the majority has violated the first rule of statutory construction, which is that when the language of a statute is unambiguous and clear, there is no room for judicial construction, and a court must give the statute its plain and definite meaning. *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977).

The majority says that reaching the result in this case was complicated by *Swanson v. North Carolina*, 335 N.C. 674, 441 S.E.2d 537, *cert. denied*, 513 U.S. 1056, 130 L. Ed. 2d 598 (1994), and *Bailey v. North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991), *cert. denied*, 504 U.S. 911, 118 L. Ed. 2d 547 (1992). This complication is understandable in light of the fact that both the cases contain square holdings contrary to the result we have reached today. *Bailey*, of course, involves the very parties and issues involved in this case. The United States Supreme Court has said that our protest payment scheme is not unconstitutional. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 L. Ed. 2d 17 (1990).

In order to avoid the plain meaning of the statute, the majority goes to great lengths to prove (1) that payments under protest are not voluntary, and (2) that the purpose of N.C.G.S. § 105-267 is to provide the State with information as to what revenues it will have for its fiscal needs. The majority says the State should have known what revenues might be available without the protests, and this made it unnecessary to follow section 105-267.

I do not believe the involuntariness of the payments or the purpose behind the statute should be considered in this case. The meaning of the statute is clear. We should not go beyond the plain meaning.

The General Assembly has determined that in order to contest the imposition of a tax, there must be a payment under protest. We should not repeal this action of the General Assembly.

STATE OF NORTH CAROLINA v. ARCHIE LEE BILLINGS

No. 216A96

(Filed 8 May 1998)

1. Jury § 141 (NCI4th)— jury selection—perceptions about parole eligibility—disallowance of questions

The trial court properly denied defendant's pretrial motion to conduct a *voir dire* in this capital trial regarding the jurors' perceptions about parole eligibility. The decision of *Simmons v. South Carolina*, 512 U.S. 154, is inapplicable when defendant would be eligible for parole if given a life sentence.

2. Criminal Law § 78 (NCI4th Rev.)— pretrial publicity—denial of change of venue—no due process denial

The trial court did not err by denying defendant's motions for a change of venue or a special venire in this capital trial because of pretrial publicity where defendant did not exhaust his peremptory challenges; the jurors who decided the case each stated unequivocally that they would be able to reach a verdict based solely upon the evidence presented at trial; there was no indication that news accounts of the crimes or the trial were other than routine factual accounts; and nothing in the record would support a conclusion that either the community from which the jury was drawn or the trial proceedings were so infected by prejudice that they must be deemed to have deprived defendant of the opportunity to receive a fair trial and, thereby, to have denied him due process.

3. Jury § 222 (NCI4th)— death penalty views—excusal for cause

The trial court did not err by excusing a prospective juror for cause because of his capital punishment views where the juror stated that his feelings toward the death penalty could "probably" substantially impair his ability to consider voting for the death penalty and that his longstanding moral convictions about the death penalty would substantially impair him in the sentencing process and prevent him from voting for the death penalty.

4. Jury § 123 (NCI4th)— jury selection—questions ruled improper—exercise of peremptory challenge—failure to exhaust peremptory challenges—absence of prejudice

Defendant was not prejudiced by the trial court's ruling that defendant's questioning of a prospective juror about the statutory mitigating circumstance concerning defendant's impairment by cocaine use was an improper attempt to "stake out" the juror where defendant exercised a peremptory challenge to excuse the juror but did not exhaust his peremptory challenges during jury selection.

5. Appeal and Error § 150 (NCI4th)— constitutional claim—failure to raise in trial court

A defendant who failed to raise constitutional claims in the trial court is barred from asserting them for the first time on appeal.

6. Homicide § 669 (NCI4th)— first-degree murder—voluntary intoxication instruction not required

The trial court did not err in refusing to instruct the jury on voluntary intoxication in a first-degree murder prosecution where there was sufficient evidence to support the trial court's conclusion that, although the evidence was sufficient to support a finding that defendant was intoxicated, it was insufficient to support a finding that defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill.

7. Criminal Law § 570 (NCI4th Rev.)— unresponsive testimony—instructions to disregard—mistrial denied

The trial court did not err by denying defendant's motion for a mistrial when a witness volunteered his opinion that conditions he observed at the crime scene indicated a struggle, and the trial court sustained defendant's objection, allowed his motion to strike, and instructed the jury to disregard the conclusory statement made by the witness; the prosecutor then rephrased the question to the witness so as to avoid eliciting the stricken opinion testimony but the witness again gave an answer that included the previously stricken statement of opinion; and the trial court again sustained defendant's objection, instructed the jury to disregard the conclusory statement, and admonished the witness to testify only as to what he had seen. The jury is presumed to have followed the instructions of the trial court.

8. Criminal Law § 475 (NCI4th Rev.)— prosecutor's jury argument—insufficient evidence of voluntary intoxication—no gross impropriety

The prosecutor's jury argument in the guilt phase of a capital first-degree murder trial to the effect that defendant had not produced sufficient evidence of intoxication to justify even an instruction as to whether voluntary intoxication may have prevented defendant from forming a premeditated and deliberate intent to kill was not so grossly improper as to require the trial court to intervene *ex mero motu* since the argument raised a question about the possibility of an additional defense as to which the jury was not instructed and which defendant was not entitled to have considered by the jury, and the argument was thus helpful to defendant.

9. Criminal Law § 474 (NCI4th Rev.)— capital trial—prosecutor's closing argument—overhead photographic projections

The record fails to show that the prosecutor's use of overhead photographic projections during his closing argument in the guilt determination phase of a capital trial was prejudicial error.

10. Criminal Law § 422 (NCI4th Rev.)— capital sentencing—course of conduct—reference to other cases—no gross impropriety

Assuming that it was improper for the prosecutor to argue during a capital sentencing proceeding that "Prior cases [have] found course of conduct when a woman was kidnapped from the car and raped," this brief reference to other unspecified cases with no indication as to whether those cases had been upheld on appeal was not so grossly improper as to require the trial court to intervene *ex mero motu*.

11. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—mitigating circumstances—request by defendant—absence of prejudice

Defendant was not prejudiced by the prosecutor's argument that the mitigating circumstances submitted to the jury had been requested by defendant when submission of the (f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity was not requested but was opposed by defendant where one or more jurors found this mitigator to exist and weighed it in favor of defendant. N.C.G.S. § 15A-2000(f)(1).

12. Criminal Law § 458 (NCI4th Rev.)— capital sentencing—prosecutor's argument—rejection of mitigating circumstances

The prosecutor's arguments in a capital sentencing proceeding that jurors should reject mitigating circumstances because many people had the same problems in their lives as defendant but did not commit murder, and that even if the mitigating circumstances were found to exist, they did not justify the killing were not grossly improper and did not require intervention by the trial court on its own motion.

13. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—death penalty not prohibited by Bible—no gross impropriety

The prosecutor's jury argument in a capital sentencing proceeding which contended that the Bible did not prohibit the death penalty but which did not ask the jury to impose divine law was not so grossly improper as to require the trial court to intervene *ex mero motu.*

14. Criminal Law § 473 (NCI4th Rev.)— capital trial—prosecutor's argument—defense contrived by defendant

The prosecutor did not improperly argue in a capital trial that defense counsel had "contrived" a defense; rather, he argued that the defense was contrived by defendant after defendant learned that one victim had survived, and this argument was not improper.

15. Criminal Law § 442 (NCI4th Rev.)— capital trial—prosecutor's argument—lack of remorse

The prosecutor's argument in a capital trial that defendant had not shown any remorse for his actions was not an improper comment on defendant's exercise of his right to silence. The State is allowed to comment upon defendant's demeanor in the courtroom during closing arguments, and bringing defendant's lack of any demonstration of remorse to the attention of the jury is proper so long as the prosecutor does not urge the jury to consider lack of remorse as an aggravating circumstance.

16. Criminal Law § 461 (NCI4th Rev.)— capital sentencing—prosecutor's argument—effect of failure to recommend death penalty

It was not improper for the prosecutor to argue in a capital sentencing proceeding that if the jury failed to recommend death, defendant might get out of prison and hurt other people or the surviving victim, and that the surviving victim would not be able to sleep peacefully if the jury came back with a recommendation of anything other than death because defendant would not be locked up tight on death row. Further, any possible impropriety was cured by the trial court's instruction to the jury and his admonition to counsel.

17. Criminal Law § 474 (NCI4th Rev.)— capital sentencing—prosecutor's argument—audiotape of 911 call

Where an audiotape of the call made by the murder victim's brother to the 911 emergency communications center was admitted into evidence in the guilt phase of defendant's capital trial, it was proper for the prosecutor to play the audiotape during closing arguments in the capital sentencing proceeding for the jury's consideration.

18. Criminal Law § 1382 (NCI4th Rev.)— capital sentencing—mitigating circumstance—no significant criminal history

The trial court did not err during a capital sentencing proceeding by submitting as a mitigating circumstance that defendant had no significant history of prior criminal activity where the evidence tended to show that defendant had been convicted of five misdemeanors and two felonies and had unlawfully consumed drugs and alcohol as a child and adult. The trial court properly concluded that a reasonable juror could find that defendant had no significant history of prior criminal activity within the meaning of N.C.G.S. § 15A-2000(f)(1) and that it was required to submit this mitigating circumstance to the jury even though defendant opposed its submission.

19. Criminal Law § 1402 (NCI4th Rev.)— death penalty not disproportionate

A sentence of death imposed on defendant for first-degree murder was not excessive or disproportionate where defendant was convicted under theories of premeditation and deliberation and the felony murder rule; the jury also found defendant guilty of first-degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and first-degree rape; the jury found as aggravating circumstances that the murder was committed while defendant was engaged in committing the felony of rape, that the murder was especially heinous, atrocious, or cruel, and that the murder was part of a course of conduct which included the commission by defendant of other crimes of violence against another person; the evidence showed that defendant raped the eleven-year-old female victim in her home and then kidnapped and killed her; and the evidence also showed that defendant repeatedly stabbed the victim's thirteen-year-old brother.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Allen (J.B., Jr.), J., on 5 June 1996 in Superior Court, Caswell County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments for first-degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury, and first-degree rape was allowed by the Supreme Court on 2 June 1997. Heard in the Supreme Court 18 November 1997.

Michael F. Easley, Attorney General, by Thomas S. Hicks, Special Deputy Attorney General, and Teresa L. Harris, Associate Attorney General, for the State.

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

MITCHELL, Chief Justice.

On 12 September 1995, defendant was indicted for first-degree murder, first-degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and first-degree rape. On 18 September 1995, defendant filed a motion for change of venue or, in the alternative, a special venire, which was denied by Judge W. Osmond Smith, III, after hearing at the 6 November 1995 Criminal Session of Superior Court, Caswell County. On 1 May 1996, defendant filed an amended motion for change of venue or, in the alternative, a special venire, which was denied after hearing by Judge J.B. Allen, Jr., at the 6 May 1996 Criminal Session of Superior Court, Caswell County.

Defendant was tried capitally at the 13 May 1996 Criminal Session of Superior Court, Caswell County. The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. The jury also found defendant guilty of first-degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and first-degree rape. After a separate capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. On 5 June 1996, the trial court sentenced defendant to death. Defendant appealed his conviction for first-degree murder and death sentence to this Court as of right. His motion to bypass the Court of Appeals as to his appeal of the remaining convictions, except the kidnapping, was allowed by this Court 2 June 1997.

The State's evidence tended to show *inter alia* that Robert Jackson left his Caswell County mobile home at 1:50 a.m. on 7 July 1995 to gather and ready a herd of cows for milking. Jackson left his two children, Bobby, thirteen years old, and Amy, eleven years old, asleep in their beds.

Sometime between 1:50 a.m. and 4:50 a.m., defendant entered the mobile home, stabbed Bobby repeatedly with a knife, and began his assault on Amy. Bobby struggled to a telephone in the kitchen and dialed 911. When emergency personnel arrived at 5:00 a.m., Bobby was found on the kitchen floor in a pool of his own blood. Defendant had stabbed the boy some twenty-three times. Bobby identified defendant as the man who stabbed him and whom he had seen carry his sister out of the mobile home. It was not until some twelve hours later that Amy's body was found in a field, with her pajama bottoms around her feet and her pajama top partially torn off. Amy had died from a stab to her throat that had severed her carotid artery. An autopsy revealed that Amy had also been sexually assaulted. Defendant worked with Jackson on the dairy farm, and both children knew him well. Defendant was arrested by sheriff's deputies on the dairy farm the same morning the children were attacked.

[1] By his first assignment of error, defendant contends that the trial court erred in denying his pretrial motion to conduct a *voir dire* regarding the jury's perceptions about parole eligibility. This Court has consistently decided this issue contrary to defendant's contention. *State v. Chandler*, 342 N.C. 742, 467 S.E.2d 636, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 133 (1996); *State v. Powell*, 340 N.C. 674, 459 S.E.2d 219 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 688 (1996); *State v. Price*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, 514 U.S. 1021, 131 L. Ed. 2d 224 (1995); *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). As we explained in *Payne*, 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 when, as here, defendant would be eligible for parole if given a life sentence. *Payne*, 337 N.C. at 516-17, 448 S.E.2d at 99-100. We continue to adhere to our prior rulings on this issue. This assignment of error is overruled.

[2] By another assignment of error, defendant contends that the trial court erred in denying his pretrial motions for change of venue or special venire and his renewals of those motions during jury selec-

tion. The trial court conducted pretrial hearings and denied the motions. The trial court indicated, however, that it would allow defendant to renew his motion and would reconsider the matter if it became apparent at any time that a fair and impartial jury could not be selected.

A defendant seeking a new trial on the basis of a trial court's denial of a motion for change of venue or special venire must ordinarily establish specific and identifiable prejudice against him as a result of pretrial publicity. As we have stated in numerous cases, for a defendant to meet his burden of showing that pretrial publicity prevented him from receiving a fair trial, he ordinarily 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. *State v. Barnes*, 345 N.C. 184, 204, 481 S.E.2d 44, 54, cert. denied, —— U.S. ——, —— L. Ed. 2d ——, 66 U.S.L.W. 3260 (1997), cert. denied, —— U.S. ——, —— L. Ed. 2d ——, 1998 WL 125185 (March 23, 1998) (No. 97-5089); *State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347-48 (1983).

In this case, defendant did not exhaust his peremptory challenges before the twelve jurors who decided his case were seated; he used only ten of his fourteen peremptory challenges. As the jurors at issue in this case each stated unequivocally that they would be able to reach a verdict based solely upon the evidence presented at trial, defendant did not exhaust his peremptory challenges, and defendant has not offered particular objections to any individual juror, defendant has not shown any specific identifiable prejudice that necessitated a change of venue or special venire. *Barnes*, 345 N.C. at 205, 481 S.E.2d at 54.

Our examination of this issue in the present case, however, must go further. We indicated in *State v. Jerrett* that where the totality of the circumstances reveals that an entire county's population is "infected" with prejudice against a defendant, the defendant has fulfilled his burden of showing that he could not receive a fair trial in that county even though he has not shown specific identifiable prejudice. *Jerrett*, 309 N.C. at 258, 307 S.E.2d at 349. We based this conclusion on the United States 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 "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. Alleghany County, where Jerrett was tried, had 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). The *voir dire* in *Jerrett* revealed that 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 immediate family or other relatives, six jurors who decided the case knew State's witnesses, and the foreman stated that he had heard a victim's relative discussing the case in an emotional manner. *Id.* at 257, 307 S.E.2d at 348-49. The jury in *Jerrett* was examined collectively on *voir dire* rather than individually, thereby allowing prospective jurors to hear that other prospective 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. Additionally, in *Jerrett*, a deputy sheriff of the county, a magistrate of the county, and a private prosecutor retained by the victim's family and appearing as counsel for the State with the district attorney all expressed the opinion that it would be difficult if not impossible to select a jury in Alleghany County comprised of jurors who had not heard about, discussed, and formed opinions about the case. *Id.* at 252-54, 307 S.E.2d at 346-47. A majority of this Court concluded that based on the totality of the circumstances, there was a reasonable likelihood that Jerrett would not be able to receive a fair trial before a local jury. *Id.* at 258, 307 S.E.2d at 349.

Several factors distinguish the case *sub judice* from both *Sheppard* and *Jerrett*. With a population exceeding 20,000, *North Carolina Manual 1995-1996*, at 959 (Lisa A. Marcus ed.), Caswell County does not constitute a single small "neighborhood" like that at issue in *Jerrett*. Further, the population of the community from which the jury is to be drawn is not determinative and should not be the central focus when determining whether a change of venue is necessary. *See Barnes*, 345 N.C. at 206, 481 S.E.2d at 55 (focusing on matters

such as the exposure of prospective jurors to publicity and its potential prejudice in determining whether prejudicial publicity had "pervaded the proceedings").

While a number of prospective jurors had heard about the crimes involved in the present case prior to trial, only one of the seated jurors had any preconceived notions about the guilt or innocence of defendant Billings. That juror stated that she could put aside anything she had heard outside the courtroom and could find defendant not guilty should the State fail to prove him guilty beyond a reasonable doubt. Defendant did not challenge this juror.

Furthermore, the level of personal familiarity that the *Jerrett* jurors had with the victim, the victim's family, and the State's witnesses is not present in this case. The United States Supreme Court concluded that the prejudicial influence of the news media in cases like *Sheppard*, 384 U.S. 333, 16 L. Ed. 2d 600; *Estes v. Texas*, 381 U.S. 532, 14 L. Ed. 2d 543; and *Rideau v. Louisiana*, 373 U.S. 723, 10 L. Ed. 2d 663 (1963), "pervaded the proceedings" to the prejudice of the defendant in the community at large and in the courtroom, and resulted in a "circus atmosphere" in the courtroom itself during trial. *Murphy*, 421 U.S. at 799, 44 L. Ed. 2d at 594 (discussing *Estes*). The record in this case, on the other hand, does not show that the legal proceedings or news accounts at issue here were anything but routine. Rather, the trial court conducted all of the proceedings here in an able and commendable fashion, with the solemnity and gravity befitting a proceeding in which defendant's fate would be determined. Further, there is no indication here that news accounts of the crimes or the trial were other than routine factual accounts.

The United States Supreme Court warned in *Murphy* that its prior decisions "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." *Id.* 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 of venue. *See, e.g.*, *State v. Soyars*, 332 N.C. 47, 53, 418 S.E.2d 480, 484 (1992). Before a change of venue or special venire will be required, pretrial publicity must create "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." N.C.G.S. § 15A-957(1) (1997).

The United States Supreme Court determined in *Rideau v. Louisiana*, 373 U.S. 723, 10 L. Ed. 2d 663, that no matter what could be shown during the selection of the jury, the community in which the defendant was tried must be deemed to be so prejudiced as a result of pretrial publicity that the defendant could not receive a fair trial. That case is unique, however, because at a pretrial hearing on his motion for change of venue, which the trial court denied, evidence revealed that his lengthy televised confession without benefit of counsel was participated in by law enforcement authorities and was broadcast repeatedly to the local viewing audience in the community from which the jury was drawn. The *Rideau* case is "an aberration which should be confined to its facts and not brought into play here." *State v. McDougald*, 38 N.C. App. 244, 249, 248 S.E.2d 72, 78 (1978) *appeal dismissed and disc. rev. denied*, 296 N.C. 413, 251 S.E.2d 472 (1979).

While at least ten of the seated jurors in this case had been exposed to some information about the crimes before trial, there is no indication that these factual accounts were prejudicial to defendant. Certainly, nothing in the record in the present case would permit this Court to conclude that either the community from which the jury was drawn or the trial proceedings were so infected by prejudice that they must be deemed to have deprived defendant of the opportunity to receive a fair trial and, thereby, to have denied him due process. We therefore conclude that, viewing the totality of the circumstances in this case, there is not a reasonable likelihood that pretrial publicity prevented defendant from receiving a fair trial in Caswell County, and the trial court did not err in refusing to grant defendant's motions for change of venue or a special venire.

[3] By another assignment of error, defendant contends that the trial court erred by excusing for cause a venire member who was qualified and fit to serve. Prospective juror Epling initially indicated he felt that he would be a fair juror. Upon questioning by the prosecutor, Epling stated he thought that he could find a defendant guilty knowing that there would then be a capital sentencing proceeding but that he "would have to give [it] some thought." He said he was "kind of split" on the death penalty. He stated that he could understand the application of the death penalty in some circumstances but that he did not know that he could be the one to make the decision. He stated that his feelings toward the death penalty could "probably" substantially impair his ability to consider voting for the death penalty. Epling also stated that his longstanding moral convictions about the

death penalty would substantially impair him in the sentencing process and prevent him from voting for the death penalty.

The standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the prospective "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). "[B]ecause a prospective juror's bias for or against the death penalty cannot always be proven with unmistakable clarity," this Court must give great deference to the trial court's judgment concerning whether a prospective juror would be able to follow the law. *State v. Miller*, 339 N.C. 663, 679, 455 S.E.2d 137, 145, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 169 (1995). Here, the record on appeal will support only one conclusion; the prospective juror's views would have prevented his proper performance of the duties of a juror. The trial court did not err in excusing him for cause, and this assignment of error is overruled.

[4] By another assignment of error, defendant contends that the trial court erred in denying him the opportunity to question prospective jurors regarding their ability to fairly and impartially consider statutory mitigating circumstances. Specifically, defendant contends that the trial court improperly limited his *voir dire* of prospective juror Massey.

Counsel for defendant asked prospective juror Massey whether the statutory mitigating circumstance concerning defendant's impairment by cocaine use, N.C.G.S. § 15A-2000(f)(6) (1997), would in his opinion be mitigating. Upon Massey's answer that his feeling would be so strong that it would almost be impossible for him to consider this circumstance to be mitigating, defendant challenged Massey for cause. The trial court then instructed Massey on the law concerning aggravating and mitigating circumstances, and Massey stated that he could follow the law and consider statutory mitigating circumstances. Counsel for defendant then resumed questioning:

> Q Mr. Massey, do you understand that it's okay to have an opinion different from the law, and many of us do concerning this same issue, sir?

A Well, yeah, as a feeling, conviction, moralities, yeah.

Q The question I have for you, would it substantially impair your ability to consider the mitigating evidence that we are discussing here, sir, the evidence of self-induced cocaine use?

The prosecutor then objected, and the trial court sustained the objection on the ground that defendant's questioning was an attempt to "stake out" the juror.

Defendant exercised a peremptory challenge to excuse prospective juror Massey, but defendant did not exhaust his peremptory challenges during jury selection. Thus, defendant cannot show prejudice resulting from the trial court's ruling. N.C.G.S. § 15A-1214(h) (1997); *State v. McCarver*, 341 N.C. 364, 378, 462 S.E.2d 25, 32 (1995) (no prejudice to defendant results from a trial court's failure to allow defense counsel to elicit additional information from a prospective juror where defendant does not exhaust his peremptory challenges), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996); *State v. Conner*, 335 N.C. 618, 633, 440 S.E.2d 826, 834 (1994) (same); *State v. Avery*, 315 N.C. 1, 21, 337 S.E.2d 786, 797 (1985) (same). This assignment of error is overruled.

[5] By another assignment of error, defendant contends that the trial court erred in denying his request for a jury instruction on voluntary intoxication. He also contends for the first time on appeal that failure to give the instruction denied him due process of law in violation of both the state and federal constitutions. Defendant, having failed to raise these constitutional claims at trial, is barred from asserting them for the first time on appeal to this Court. *State v. Hester*, 343 N.C. 266, 271, 470 S.E.2d 25, 28 (1996); *State v. Hutchins*, 303 N.C. 321, 341, 279 S.E.2d 788, 801 (1981). Therefore, we address this assignment of error only in the context of state common law.

[6] It is "well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages or controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992). Evidence of mere intoxication is not enough to meet defendant's burden of production. *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). Before the trial court will be required to instruct on voluntary intoxication, defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried

> "defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon."

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)) (citations omitted).

The trial court's careful consideration of the evidence is clear from its forty-page order which concluded that there was sufficient evidence to support a finding that defendant was intoxicated but not sufficient evidence to support a finding that the intoxication was to the degree required for an instruction on voluntary intoxication. We agree. This assignment of error is overruled.

By another assignment of error, defendant contends that the trial court erred in denying his motion for a mistrial and in allowing the prosecutor to engage in misconduct. Defendant complains that the prosecutor's direct examination of a witness and his arguments both during the guilt determination and capital sentencing phases of the trial were designed to improperly fan the flames of passion that marked the nature of the crimes for which he was on trial. We disagree.

[7] Defendant contends in support of this assignment that the prosecutor persisted in attempting to elicit testimony of a witness after the trial court had sustained an objection to similar testimony and had instructed the jury to disregard the testimony. Examination of the trial transcript reveals that upon questioning Eric Taylor, the prosecutor asked what observations he had made at the crime scene. The witness described the conditions he had observed at the scene and then volunteered his opinion that conditions he had observed indicated a struggle. Defendant objected, and the trial court promptly sustained his objection and allowed his motion to strike the opinion testimony. The trial court then instructed the jury to disregard the conclusory statement made by the witness. The prosecutor then rephrased the question so as to avoid eliciting the opinion testimony that had been stricken. The witness failed to limit his response to the information sought by the prosecutor's question, however, and again gave an answer that included the previously stricken statement of opinion. The trial court again sustained defendant's objection, instructed the jury to disregard the witness' conclusory statement,

and admonished the witness to testify only as to what he had seen. The jury is presumed to have followed the instructions of the trial court. *State v. Best*, 342 N.C. 502, 516, 467 S.E.2d 45, 54, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 139 (1996).

[8] In further support of this assignment, defendant complains of two portions of the prosecutor's closing argument to the jury during the guilt determination phase of the trial. Defendant first contends that the prosecutor erroneously stated to the jury that it could find that intoxication prevented defendant from forming a premeditated and deliberate intent to kill only if defendant had borne the burden of showing that his intoxication "rendered him utterly incapable of forming a deliberated and premeditated intent to kill." Defendant correctly contends that the prosecutor was describing the burden of production defendant must meet in order to be entitled to a jury instruction on voluntary intoxication that would permit the jury to determine whether defendant's intoxication negated such intent. *Mash*, 323 N.C. 339, 372 S.E.2d 532. Defendant also correctly contends that this is not the standard to be applied by the jury in determining whether defendant formed a premeditated and deliberate intent to kill. The burden always rests with the State to prove beyond a reasonable doubt that the defendant formed a premeditated and deliberate intent to kill.

Defendant did not object to the prosecutor's argument concerning voluntary intoxication, nor did he allege that it was a basis for his motion for a mistrial. The scope of review when a defendant fails to object at trial is whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. *State v. Holden*, 346 N.C. 404, 431, 488 S.E.2d 514, 528 (1997), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 118 S.Ct. 1074 (1998).

The prosecutor's argument here really was no more than a statement that defendant had not produced sufficient evidence of intoxication to justify even an instruction on voluntary intoxication. Nevertheless, it was improper for the prosecutor or counsel for defendant to make any argument in the guilt determination phase of the trial as to whether voluntary intoxication may have prevented defendant from forming a premeditated and deliberate intent to kill, since the evidence at trial did not permit the trial court to submit that issue for the jury's consideration. However, it is difficult to imagine how the ill-advised argument of the prosecutor could have been anything but helpful to defendant, since it raised a question about the possibility of an additional defense as to which the jury was not

instructed and which defendant was not entitled to have considered by the jury. Apparently, defense counsel recognized this fact and, accordingly, allowed the prosecutor to make the argument without objection. Therefore, in the context of this case, we conclude that the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu.*

[9] Defendant next contends in support of this assignment that the prosecutor's use of overhead photographic projections during his closing argument in the guilt determination phase was error. The prosecutor stated for the record that he had used some "overheads" during his argument. The record does not describe these overheads. Defendant has the duty to provide a proper and complete record. *State v. Alston,* 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983); N.C. R. App. P. 9. Nothing in the record indicates that whatever may have been displayed to the jury was improperly prejudicial. " 'An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.' " *Alston,* 307 N.C. at 341, 298 S.E.2d at 644 (quoting *State v. Williams,* 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968)). Nevertheless, defendant appears to contend that any use of "large, overhead slides" by the prosecution has been strictly forbidden by this Court. This simply is not the law. *See State v. Hennis,* 323 N.C. 279, 372 S.E.2d 523 (1988). As defendant has pointed to nothing in the record indicating error by the trial court in this regard, we will find none.

[10] Defendant further contends in support of this assignment that during the capital sentencing proceeding, the prosecutor improperly argued the facts of other reported cases in which jurors had found the aggravating circumstance that the murder was part of a course of conduct which included the commission of violence against another person. N.C.G.S. § 15A-2000(e)(11). This Court has pointed out that "counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client." *State v. Gardner,* 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986). Here, the prosecutor's argument that defendant complains of was, "Prior cases [have] found course of conduct when a woman was kidnapped from the car and raped." Defendant did not object to this argument. Assuming *arguendo* that the argument was improper, we conclude that this brief reference to other unspecified cases with no indication as to whether those cases had been upheld on appeal did not amount to an argument so grossly improper as to require the trial court to intervene *ex mero motu.*

[11] Defendant also complains in support of this assignment that the prosecutor improperly argued to the jury that defendant had requested submission of the mitigating circumstance that he had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1). Defendant argues that the prosecutor knew that defendant had not requested this mitigating circumstance and had, in fact, urged the trial court not to submit it to the jury.

The argument complained of was as follows:

> The first [mitigating circumstance] that will be submitted for your consideration, and it is no opinion of the Court that these are there. These mitigating factors have been requested by the defendant.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Well, ladies and gentlemen, these arguments of these attorneys are in no way evidence to be considered, and this is not your instructions on the law.
>
> The attorneys may argue their contentions, but this is not evidence, and this is not your law. You will take the law from the Court.

The prosecutor then argued that there was no evidence to support the (f)(1) mitigating circumstance.

As can readily be seen, the prosecutor's argument that the mitigating circumstance had been requested by defendant was not directed specifically toward the (f)(1) mitigator, but to the mitigating circumstances in their totality. He did not focus on the (f)(1) mitigator until he began to argue that there was no evidence to support that mitigating circumstance. In any event, we conclude that the prosecutor's argument could not have prejudiced defendant, as one or more jurors found this mitigator to exist and weighed it in favor of defendant.

[12] Defendant further contends in support of this assignment that the prosecutor urged the jurors to reject mitigating circumstances because many people had the same problems in their lives as defendant but did not commit murder, and even if the mitigating circumstances were found to exist, they did not justify the killing. Defendant did not object to these arguments at trial but now contends that they were so grossly improper as to require the trial court to intervene *ex mero motu*. "[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*, 515 U.S. 1152, 132 L. Ed. 2d 845 (1995). This was the effect of the arguments complained of here, and we conclude that they were not grossly improper and did not require intervention by the trial court on its own motion.

[13] Defendant also contends in support of this assignment that during the capital sentencing proceeding, the prosecutor argued that the law is divinely inspired by referring to the law as a "statute of judgment." Defendant did not object. This Court has noted the wide latitude allowed counsel in closing arguments. *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 601 (1990). The prosecutor merely contended to the jury that the Bible did not prohibit the death penalty, but he did not ask the jury to impose divine law. The prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[14] Defendant also contends in support of this assignment that the prosecutor improperly argued that defense counsel had "contrived" a defense. It is clear that trial counsel "may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.' " *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d. 33, 39 (1994) (quoting *State v. Miller*, 271 N.C. 646, 658-59, 157 S.E.2d. 335, 346 (1967)). However, defendant misconstrues the record. The prosecutor did not argue that defense counsel had contrived a defense; he argued that defendant had done so. Immediately before he characterized the defense as contrived, the prosecutor argued that defendant was not unintelligent. He said defendant was clever in concealing his identity. The prosecutor then contended that the defense was something that came into existence after defendant learned that Bobby had survived. The prosecutor accused defense counsel of nothing. This argument was proper.

[15] Defendant also argues in support of this assignment that the prosecutor's argument that defendant had not shown any remorse for his actions was an improper comment on defendant's exercise of his right to silence. The State is allowed to comment upon a defendant's demeanor in the courtroom during closing arguments, as the prosecutor did here. The jurors are allowed to consider both the evidence and what they observe in the courtroom. *State v. Myers*, 299 N.C. 671,

679-80, 263 S.E.2d 768, 773-74 (1980). Bringing defendant's lack of any demonstration of remorse to the attention of the jury is proper, so long as the prosecutor does not urge the jury to consider lack of remorse as an aggravating circumstance. *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d. 1, 15, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

[16] Defendant further contends in support of this assignment that it was grossly improper for the prosecutor to argue in the capital sentencing proceeding that if the jury failed to recommend death, defendant might get out of prison and hurt other people or the surviving victim, Bobby. When the prosecutor made this argument, defendant objected, and the trial court instructed the jury to disregard the argument. The prosecutor then argued that Bobby would not be able to sleep peacefully if the jury came back with a recommendation of anything other than death, because defendant would not be locked up tight on death row. Defendant objected, and the trial court stated to the prosecutor, "I'll ask that you don't argue that point." The prosecutor's arguments in this regard were not improper. *State v. Alston*, 341 N.C. 198, 250-52, 461 S.E.2d 687, 717 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). Further, any possible impropriety was cured by the trial court's prompt actions.

[17] Defendant finally contends in support of this assignment that during the prosecutor's argument at the conclusion of the capital sentencing proceeding, the prosecutor improperly replayed the audiotape of the call that Bobby Jackson made to the 911 emergency communications center. Trial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence and the reasonable inferences that arise therefrom. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). The audiotape was introduced into evidence without objection by defendant. In a capital sentencing proceeding, the jury may consider all of the circumstances surrounding the murder. *State v. Thomas*, 344 N.C. 639, 647, 477 S.E.2d 450, 453 (1996), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 41 (1997). As the audiotape was admitted into evidence in the guilt phase of defendant's trial, it was proper to play it during closing arguments in the capital sentencing proceeding for the jury's consideration.

For all of the foregoing reasons, this assignment of error is without merit and is overruled.

[18] By another assignment of error, defendant contends that the trial court erred during his capital sentencing proceeding by submit-

ting as a mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1), because defendant had been previously convicted of attempted second-degree murder and had a history of drug-dealing. Defendant specifically requested that this circumstance not be submitted.

The test governing submission of the (f)(1) mitigator is "whether a rational jury could conclude that defendant had no significant history of prior criminal activity." *State v. Wilson,* 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). If so, the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant. *State v. Lloyd,* 321 N.C. 301, 364 S.E.2d 316, *sentence vacated on other grounds,* 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

Evidence in the present case tended to show that defendant had been convicted of five misdemeanors and two felonies as well as the unlawful consumption of drugs and alcohol as a child and adult. Based on the evidence of record, the trial court concluded that a reasonable juror could find that defendant had "no significant history of prior criminal activity" within the meaning of the statute and, therefore, that it was required to submit the (f)(1) statutory mitigating circumstance for the jury's consideration. The trial court was correct; in fact, one or more jurors found this mitigating circumstance to exist and weighed it in defendant's favor. This assignment of error is without merit and is overruled.

PRESERVATION ISSUES

Defendant also raises for "preservation" the following three issues, which he acknowledges this Court has previously found without merit in other cases.

(1) The trial court erred when it instructed the jury on the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel" in terms that were unconstitutionally vague.

(2) The trial court erred in requiring the jury to find that nonstatutory mitigating circumstances had mitigating value before considering factually proved evidence offered in mitigation of the sentence of death.

(3) The trial court erred in instructing the jury that each juror was allowed, rather than required, to consider mitigating cir-

cumstances he or she found at Issue Two when weighing the aggravating circumstance against the mitigating circumstances at Issues Three and Four.

We have considered defendant's arguments on these issues and find no 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 capital sentencing proceeding were free of prejudicial error, it is our duty to ascertain: (1) whether the evidence supports the jury's findings of the aggravating circumstances on which the sentence of death was based; (2) whether the sentence was entered under the influence of passion, prejudice, or any other arbitrary consideration; 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). The jury found three aggravating circumstances in the present case. The record fully supports these findings. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We turn then to our final statutory duty of proportionality review.

[19] In the present case, defendant was convicted of first-degree murder based on the theory of premeditation and deliberation and under the felony murder rule. The jury also found defendant guilty of first-degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and first-degree rape. The jury found as aggravating circumstances: (1) that the murder was committed by defendant while he was engaged in committing the felony of rape, N.C.G.S. § 15A-2000(e)(5); (2) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (3) that the murder for which defendant stands convicted was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11).

Of the sixteen mitigating circumstances submitted, one or more jurors found the following mitigating circumstances: (1) defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (2) defendant's mother drank alcohol to excess during defendant's formative years and did not provide proper supervi-

sion, moral teaching, and nurturing of defendant when defendant was a child; (3) defendant's father, who was sixty-eight years old at the time of defendant's birth, drank alcohol to excess during defendant's formative years and did not provide proper supervision, moral teaching, and nurturing of defendant when defendant was a child; (4) defendant's father died when defendant was approximately age eleven, leaving him without proper supervision, nurturing, and moral teachings; (5) defendant has a long history of alcohol and illegal drug abuse beginning when defendant was approximately eleven years of age; (6) defendant's use of alcohol and illegal drugs was condoned by defendant's mother prior to defendant attaining sixteen years of age; and (7) defendant lacked any law abiding role model in his immediate family.

In conducting 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*, 512 U.S. 1254, 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. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, — U.S. —, — L. Ed. 2d —, 66 U.S.L.W. 3262 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). This case is distinguishable from those cases.

This case has several features which distinguish it from the cases in which we have found the death penalty to be disproportionate. They include the fact that defendant raped the eleven-year-old female victim in her home and then kidnapped and killed her and the fact that defendant repeatedly stabbed the brother of the victim. We find it significant that none of the cases in which this Court has found the death penalty disproportionate involved multiple child victims or multiple violent felonies committed against children during the course of the murder. We have further noted that a conviction upon both theories of premeditation and deliberation and felony murder 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*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995).

We also compare this case with the cases in which we have found the death penalty to be proportionate. Although we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, we have previously stated, and we reemphasize here, that we will not undertake to discuss or cite all of those cases each time we carry out that duty. *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). It suffices to say that the present case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found it disproportionate.

After comparing this case to similar cases as to the crime and the defendant, we conclude that this case has the characteristics of first-degree murders in which we have previously held the death penalty proportionate. Accordingly, we cannot conclude that this death sentence is excessive or disproportionate. Therefore, the judgment of the trial court, including the sentence of death, must be and is left undisturbed.

NO ERROR.

JASON LAMONT HUNT, BY AND THROUGH HIS GUARDIAN AD LITEM, DAVID H. HASTY v. NORTH CAROLINA DEPARTMENT OF LABOR

No. 110PA97

(Filed 8 May 1998)

1. Public Officers and Employees § 35 (NCI4th); State § 24 (NCI4th)— tort claim against state agency—public duty doctrine

The public duty doctrine can apply to actions against state agencies brought under the Tort Claims Act.

2. Public Officers and Employees § 35 (NCI4th)— exceptions to public duty doctrine

The two recognized exceptions to the public duty doctrine are (1) where there is a special relationship between the injured party and the governmental entity (special relationship), and (2) when the governmental entity creates a special duty by promising

protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered (special duty).

3. Games, Amusements, and Exhibitions § 6 (NCI4th); Public Officers and Employees § 35 (NCI4th)— injury to go-kart rider—negligent inspection by Department of Labor—public duty doctrine—special relationship exception inapplicable

The Amusement Safety Device Act and rules promulgated thereunder governing the inspection of go-karts by the Department of Labor are for the protection of the general public and do not create a duty to an individual go-kart customer. Therefore, the "special relationship" exception to the public duty doctrine was inapplicable as a basis for liability by the Department of Labor in plaintiff go-kart rider's action based upon allegations that the Department inspected and passed go-karts which did not have shoulder straps as well as seat belts as required by the Administrative Code, that plaintiff operated such a go-kart with only a seat belt, and that plaintiff suffered severe abdominal injuries when the brakes failed, the go-kart struck a pole, and the seat belt tightened.

4. Games, Amusements, and Exhibitions § 6 (NCI4th); Public Officers and Employees § 35 (NCI4th)— injury to go-kart rider—negligent inspection by Department of Labor—public duty doctrine—special duty exception inapplicable

The "special duty" exception to the public duty doctrine cannot be the basis for liability by the Department of Labor for alleged negligent inspection of go-karts where plaintiff did not allege an actual promise by the Department of Labor to create the special duty.

Justice ORR dissenting.

Justice FRYE joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 125 N.C. App. 293, 480 S.E.2d 413 (1997), affirming a decision of the Industrial Commission denying defendant's motion pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and (6) to dismiss plaintiff's claim. Heard in the Supreme Court 20 November 1997.

MacRae, Perry, Pechmann, Williford & MacRae, by James C. MacRae, Jr., for plaintiff-appellee.

Michael F. Easley, Attorney General, by William H. Borden, Assistant Attorney General, for defendant-appellant.

PARKER, Justice.

Plaintiff, by and through his guardian ad litem, commenced this negligence action against defendant, North Carolina Department of Labor, pursuant to the Tort Claims Act, N.C.G.S. §§ 143-291 to -300.1 (1993) (amended 1994). Plaintiff sought damages for injuries resulting from an accident at an amusement park in Cumberland County, North Carolina. Defendant moved, pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and (6), to dismiss plaintiff's claim. Deputy Commissioner John A. Hedrick denied the motion. The full Commission affirmed and adopted his decision.

The Court of Appeals affirmed. The Court of Appeals held that the North Carolina Administrative Code, specifically 13 NCAC 15 .0405, which describes the duties of inspectors for the Department of Labor, imposes a duty upon defendant to inspect amusement devices to ensure compliance with the Administrative Code and that breach of this duty could give rise to an action for negligence. *Hunt v. N.C. Dep't of Labor*, 125 N.C. App. 293, 297, 480 S.E.2d 413, 416 (1997). The lower court also held that the public duty doctrine does not apply to actions brought against the State under the Tort Claims Act. *Id.* at 296, 480 S.E.2d at 415. On 5 June 1997 this Court granted defendant's petition for discretionary review.

This appeal is before us based on defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, N.C. R. Civ. P. 12(b)(1), (6);[1] thus, we treat plaintiff's factual allegations contained in his affidavit before the Industrial Commission as true. *See Cage v. Colonial Bldg. Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994). On 28 July 1993 plaintiff was operating a go-kart, owned by Ride 'N Slide, Inc., in Fayetteville, North Carolina, when the brakes failed, causing plaintiff to hit a pole. Plaintiff suffered severe injuries to his abdominal area when his seat

1. Nothing in the record suggests that the Industrial Commission treated the motion as anything other than a motion under Rule 12(b)(1) and (6) or that the Commission considered depositions or other evidence in its deliberations. Accordingly, statements in any such materials are not properly before this Court and cannot be considered.

belt tightened. Tony Brewer, an elevator and amusement ride inspector for defendant North Carolina Department of Labor, had previously inspected and passed the go-karts when the seat belts were not in compliance with the rules and regulations contained in section .0400 of the North Carolina Administrative Code.

Plaintiff contends that defendant had a duty under the Amusement Device Safety Act, chapter 95, article 14B of the North Carolina General Statutes, and the rules and regulations promulgated thereunder in the Administrative Code; that defendant breached that duty by failing to inform the amusement park's manager that, pursuant to rule .0429(a)(3)(B) of the Administrative Code, shoulder straps, as well as seat belts, must be mounted on the go-karts; that defendant's breach caused plaintiff's injury; and that plaintiff's injury entitles him to damages in tort.

Plaintiff has thus alleged a common law negligence action against the State under the Tort Claims Act. The Tort Claims Act provides, in pertinent part, that

> [t]he Industrial Commission shall determine whether or not each claim arose as a result of negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of office, employment, service, agency or authority under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C.G.S. § 143-291(a). To recover damages for common law negligence, a plaintiff must establish (i) a legal duty, (ii) a breach thereof, and (iii) injury proximately caused by such breach. *Tise v. Yates Constr. Co., Inc.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997); *see also Petty v. Cranston Print Works Co.*, 243 N.C. 292, 298, 90 S.E.2d 717, 721 (1956).

Defendant contends that the public duty doctrine bars this action against the State; that plaintiff has, therefore, failed to state a claim upon which relief may be granted; and that the claim is subject to dismissal pursuant to Rule 12(b)(6). The public duty doctrine was adopted by this Court in *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901-02 (1991). The doctrine "provides that governmental entities and their agents owe duties only to the general public, not to individuals, absent a 'special relationship' or 'special duty' between the entity and the injured party." *Stone v. N.C. Dep't of*

Labor, 347 N.C. 473, 477-78, 495 S.E.2d 711, 714 (1998). Defendant further contends that because plaintiff has failed to state a claim, the Industrial Commission lacks subject matter jurisdiction over defendant.

We recently examined the public duty doctrine and its applicability to claims brought under the Tort Claims Act. In *Stone* we held that "the Tort Claims Act . . . incorporat[es] the existing common law rules of negligence, including [the public duty] doctrine." *Id.* at 479, 495 S.E.2d at 715; *see also Floyd v. N.C. State Highway & Pub. Works Comm'n*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955), *overruled in part on other grounds by Barney v. N.C. State Highway Comm'n*, 282 N.C. 278, 284-85, 192 S.E.2d 273, 277 (1972); *McKinney v. Deneen*, 231 N.C. 540, 542, 58 S.E.2d 107, 109 (1950).

In *Stone v. N.C. Dep't of Labor*, plaintiffs brought a negligence claim against the Department of Labor and its Occupational Safety and Health Division for failure to inspect the Imperial Foods Products plant. *Stone*, 347 N.C. at 477, 495 S.E.2d at 713. A fire broke out at the plant, killing or injuring more than one hundred employees. *Id.* Plaintiffs brought suit under the Tort Claims Act arguing that defendants owed each employee a duty under N.C.G.S. § 95-4 to inspect the plant. *Id.* at 483, 495 S.E.2d at 717. In concluding that the public duty doctrine applied to plaintiffs' claims in *Stone*, we expressly found that N.C.G.S. § 95-4 imposed a duty upon defendants for the benefit of the general public, *id.*, and that "[t]he policies underlying recognition of the public duty in *Braswell* support its application here," *id.* at 481, 495 S.E.2d at 716. Accordingly, defendants did not owe a duty to each individual complainant in *Stone*; and, since the exceptions to the doctrine did not apply, defendants' motion to dismiss was improperly denied.

[1] This Court having determined in *Stone* that the public duty doctrine can apply to actions against state agencies brought under the Tort Claims Act, we must determine applicability of the public duty doctrine to this case.

The general rule is that a governmental entity acts for the benefit of the general public, not for a specific individual, and, thus, cannot be held liable for a failure to carry out its duties to an individual. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Without any distinct duty to any specific individual, the entity cannot be held liable. *Tise*, 345 N.C. at 460, 480 S.E.2d at 680.

A review of the Amusement Device Safety Act discloses that nowhere in the Act did the legislature impose a duty upon defendant to each go-kart customer. Pursuant to N.C.G.S. § 95-111.4, the Commissioner of Labor has promulgated rules governing the inspection of go-karts. 13 NCAC 15 .0400 (June 1992). These rules similarly do not impose any such duty. As this Court said in *Stone*, " '[A] government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.' " *Stone*, 347 N.C. at 481, 495 S.E.2d at 716 (quoting *Grogan v. Commonwealth*, 577 S.W.2d 4, 6 (Ky.), *cert. denied*, 444 U.S. 835, 62 L. Ed. 2d 46 (1979)).

[2] This Court has, however, recognized two exceptions to the public duty doctrine in order "to prevent inevitable inequities to certain individuals." *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. The exceptions exist (i) where there is a special relationship between the injured party and the governmental entity ("special relationship") and (ii) when the governmental entity creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered ("special duty").[2] *Id.* These exceptions are narrowly applied. *Id.* at 372.

[3] Plaintiff argues that the "special relationship" exception applies because the Amusement Device Safety Act and the Administrative Code created a special duty to him. As support for his position, plaintiff cites *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988). We note first that the Court of Appeals did not apply the public duty doctrine in *Coleman*.

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2. What our courts have labeled the "special duty" exception to the public duty doctrine, other jurisdictions call the "special relationship" exception. *See Hamilton v. Cannon*, 267 Ga. 655, 657, 482 S.E.2d 370, 373 (1997) (stating that the "special relationship" exception exists when the municipality makes promises of an affirmative undertaking); *Yonker v. State Dep't of Social & Heath Services*, 85 Wash. App. 71, 76-77, 930 P.2d 958, 961 (1997) (labeling the situation when the governmental entity gives explicit assurances the "special relationship" exception); *Jeffrey v. W. Va. Dep't of Pub. Safety*, 198 W. Va. 609, 614, 482 S.E.2d 226, 231 (1996) (stating that the "special relationship" exception exists when there is direct contact between the governmental entity's agents and the injured party and the injured party justifiably relied on the entity's affirmative undertaking). *But see Hurd v. Woolfork*, 959 S.W.2d 578, 582 (Tenn. Ct. App. 1997) (stating that the "special duty" exception applies where there is a "special relationship" between plaintiff and the public employee that gives rise to a "special duty").

Moreover, to the extent that *Coleman* is inconsistent with the holding in this case, it is hereby disapproved.

To determine whether the "special relationship" exception applies, we compare the regulatory language at issue in this case with the language at issue in *Stone*. In *Stone* we held that the applicable statute, N.C.G.S. § 95-4 (1989), "imposes a duty upon defendants, [but] that duty is for the benefit of the public, not individual claimants as here." *Stone*, 347 N.C. at 483, 495 S.E.2d at 717. The statute " 'charged [the Commissioner of Labor] with the duty' to visit and inspect 'at reasonable hours, as often as practicable,' all of the 'factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State.' " *Id.* (quoting N.C.G.S. § 95-4(5)). We conclude that the language of the Administrative Code at issue in this case is analogous to that in *Stone*.

Rule 13 NCAC 15 .0405, entitled "Inspections," provides that "[a]n inspector shall inspect each amusement device at each location to determine if the device: . . . (3) has complied with the rules and regulations of this Section . . . ." Rule 13 NCAC 15 .0429(a)(3), which governs go-karts, provides:

> (3) Seats, Seat Belts and Shoulder Straps. All karts shall meet one of the following requirements:
>
> (A) The seat, back rest, and leg area shall be designed to retain the driver/occupants inside the kart in the event of a rollover or a collision at the front, rear, or side of the kart; or
>
> (B) The Kart shall be equipped with seat belts and shoulder straps mounted in a manner that will restrain the occupant(s) in the vehicle in case of a collision or rollover. Properly mounted safety harnesses as effective as seat belts and shoulder straps may be substituted for seat belts and shoulder straps.

These rules do not explicitly prescribe a standard of conduct for this defendant as to individual go-kart customers. The Amusement Device Safety Act and the rules promulgated thereunder are for the "[p]rotection of the public from exposure to such unsafe conditions" and do not create a duty to a specific individual. N.C.G.S. § 95-111.1(b) (1989).

To hold contrary to our holding in *Stone*, in which we held that the defendants' failure to inspect did not create liability, would be tantamount to imposing liability on defendant in this case solely for

inspecting the go-karts and not discovering them to be in violation of the Code. "A showing that a [governmental entity] has undertaken to perform its duties to enforce such statutes is not sufficient, by itself, to show the creation of a special relationship with particular individual citizens." *Sinning v. Clark*, 119 N.C. App. 515, 519, 459 S.E.2d 71, 74, *disc. rev. denied*, 342 N.C. 194, 463 S.E.2d 242 (1995). If such a "special relationship" were to be found in this case, defendant would become a virtual guarantor of the safety of every go-kart subject to its inspection, thereby, "exposing it to an overwhelming burden of liability for failure to detect every code violation or defect." *Id.* at 519-20, 459 S.E.2d at 74. Thus, we hold that in order to fall within the "special relationship" exception to the public duty doctrine, plaintiff must allege a special relationship, such as that between "a state's witness or informant who has aided law enforcement officers," *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902.

[4] Although plaintiff does not assert that his case falls within the "special duty" exception, nonetheless, we examine this exception. To come within the "special duty" exception, plaintiff must show that an actual promise was made by defendant to create the special duty, that this promise was reasonably relied upon by plaintiff, and that plaintiff's injury was causally related to plaintiff's reliance. *Id.* In this case plaintiff has not alleged an actual promise; thus, the "special duty" exception cannot be a basis for liability. *Cf. Davis v. Messer*, 119 N.C. App. 44, 56, 457 S.E.2d 902, 910 (holding the plaintiffs' allegations that "the Town . . . promised it would provide fire-fighting assistance and protection; [that] the promised protection never arrived; and [that] plaintiffs relied upon the promise to respond to the fire as their exclusive source of aid, resulting in the complete destruction of their home," stated a claim for relief under the "special duty" exception to the public duty doctrine), *disc. rev. denied*, 341 N.C. 647, 462 S.E.2d 508 (1995).

Since the public duty doctrine applies to plaintiff's claim under the Tort Claims Act, the claim fails unless it fits into one of the two exceptions. We conclude that plaintiff's claim does not fit into either exception. For the reasons stated the Court of Appeals erred in affirming the Industrial Commission's denial of defendant's motion to dismiss. The decision of the Court of Appeals is, therefore, reversed; and the case is remanded to that court for further remand to the Industrial Commission for entry of an order of dismissal.

REVERSED AND REMANDED.

Justice ORR dissenting.

The practical effect of the majority opinion in this case sends a chilling message regarding the State's lack of accountability for its negligent conduct and resulting injuries to innocent third parties. Regardless of the fact that the legislature has imposed a duty on the State either directly through legislation or indirectly through administrative rule, regardless of the evidence of negligence by the State in carrying out such duties, regardless of the severity of injury to an innocent third party or parties, and regardless of the fact that the legislature has removed state immunity from suit under the Tort Claims Act, the majority holds that the public duty doctrine allows the State to escape liability for its negligence, and injured parties are thus left with no means of recovery against the State. This was clearly not the law before *Stone,* nor should it be now. *Stone v. N.C. Dep't of Labor,* 347 N.C. 473, 495 S.E.2d 711 (1998).

In my dissent in *Stone,* I concluded that the majority had incorrectly extended the public duty doctrine to protect the State from lawsuits, with the result being that the Tort Claims Act's protection of the public was seriously eroded. Suffice it to say, I am still convinced of the correctness of my dissent in *Stone,* particularly in light of the petition for rehearing and accompanying affidavits filed by the plaintiffs in *Stone.* (The petition for rehearing was denied by this Court on 2 April 1998.) However, for purposes of this dissent, I will not repeat those earlier arguments against the majority's unwarranted extension of the public duty doctrine.

The majority, relying on *Stone,* has determined in this case that the public duty doctrine applies to the State and concludes that plaintiff's claim is barred. According to the record, plaintiff, an eleven-year-old child, was seriously injured in a collision that occurred while he was riding a go-kart at the Ride 'N Slide amusement park. Plaintiff was secured in the go-kart by an improper seat belt. Tony Brewer, a North Carolina Department of Labor elevator and amusement ride inspector, had inspected the go-karts in June of 1993 within the course and scope of his employment. Brewer negligently and incorrectly informed the manager of the Ride 'N Slide that only lap belts needed to be installed on each go-kart, when in fact a three-point shoulder-type harness was required on the go-karts under the North Carolina Administrative Code. 13 NCAC 15 .0429(a)(3)(B) (May 1992). Because of this failure to inform the manager about the seat-belt requirement, the proper belts were never installed, and the

eleven-year-old rode a go-kart with only a lap belt, suffering severe internal injuries when the go-kart crashed.

Whether this evidence was sufficient to establish negligence on the part of the State and what damages, if any, plaintiff would be entitled to recover should, according to the majority, never be reached. By applying the public duty doctrine, the majority concludes that the State owed only a general duty to the public and that the Amusement Safety Act did not impose a duty upon the State for the protection of individuals, in many cases minors, who operate go-karts at these facilities. The majority thus concludes that plaintiff's claim should be dismissed because of the protection now afforded the State under the public duty doctrine.

In addition to my disagreement with the application of the public duty doctrine to this case, I find no basis for the majority's conclusion that article 14B of chapter 95 of the General Statutes, the Amusement Device Safety Act of North Carolina, imposes no legislative duty upon those who inspect go-karts. This article begins with N.C.G.S. § 95-111.1, which provides in pertinent part: "It is the intent of this Article that amusement devices shall be designed, constructed, assembled or disassembled, maintained, and operated so as to prevent injuries." N.C.G.S. § 95-111.1(c) (1985). The article concludes some eight pages later with N.C.G.S. § 95-111.18, which provides in pertinent part: "This Article and the rules and regulations promulgated thereunder shall receive a liberal construction to the end that the welfare of the people may be protected." N.C.G.S. § 95-111.18 (1985). Contained within the article is a lengthy list of powers and duties of the Commissioner of Labor, which includes the power to adopt rules and regulations for enforcement of article 14B *and* authority to inspect and test devices subject to the article. N.C.G.S. § 95-111.4 (1985). As a result, the Commissioner of Labor adopted administrative rules, including:

.0405 INSPECTIONS

An *inspector* shall inspect each amusement device at each location to determine if the device:

(1) has been soundly constructed and properly erected,

(2) has been modified to comply with any changes in safety requirements prescribed by the manufacturer,

(3) has complied with the rules and regulations of this Section, and

(4) has in existence a policy of insurance as required by G.S. 95-111.12.

13 NCAC 15 .0405 (Aug. 1987) (emphasis added). This would certainly appear to impose a duty on the State for the specific protection of individuals operating go-karts.

Let there be no misunderstanding of the breadth and logical extension of the holdings in *Stone* and now in *Hunt*. This is not limited just to inspections of the workplace as in *Stone*, or to inspections of go-karts as in the case before us. Every device regulated by the Department of Labor requiring inspection falls within the scope of these holdings. When the State Fair comes to Raleigh or when small, independent amusement operators set up rides in communities all across North Carolina, and the State agency required by law to inspect those amusement rides is negligent and injuries to innocent third parties occur, the State is now shielded from liability by the majority's holdings.

If, as in *Stone*, there can be no claim for failing to follow the law and inspect a workplace, and if, as in *Hunt*, there can be no claim for failing to follow the law and correctly inspect an amusement ride facility, then the myriad requirements throughout the General Statutes and Administrative Code requiring various types of inspections by State officials are meaningless to innocent third parties injured by the State's negligence. Without exhausting the possibilities, one need only contemplate some of the types of inspections provided by the State. For example, regulations are in place dealing with inspections involving day-care centers, hazardous-waste facilities, nuclear energy systems, mines and quarries, meat and poultry products, and milk production, as well as sanitary and health inspections involving epidemics and other communicable diseases. The list could go on and on, and if the State negligently performs its duties, then those injured must look elsewhere for relief. The doctrine of sovereign immunity—"the King can do no wrong"—has been reimposed by judicial extension of the law. *Steelman v. City of New Bern*, 279 N.C. 589, 592, 184 S.E.2d 239, 241 (1971).

Although the two cases now decided on this issue deal with questions of negligent inspection, I find no language in the decisions limiting the application of the public duty doctrine only to those cases involving inspections by state agents. The potential ramifications of these holdings to negligent acts of the State beyond the realm of inspections would appear to be without limit.

The underlying basis of the majority decision is: A duty to all is a duty to none. According to the majority, no duty was owed to the workers who perished or were injured in the Hamlet fire, and no duty was owed to eleven-year-old Jason Hunt when he sat down in a go-kart and put on an improper seat belt. The public duty doctrine should never have been extended to the State by this Court in *Stone* and further applied in this case. I dissented then, and I dissent now.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIAM CHRISTOPHER GREGORY

No. 19A97

(Filed 8 May 1998)

1. Evidence and Witnesses § 1235 (NCI4th)— first-degree murder—confession—not custodial—admissible

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion to suppress statements made to a detective. Although defendant contends that he was in custody and had not been advised of his *Miranda* rights prior to giving the statements, defendant went to the jail entirely of his own volition and not at the request of any law enforcement officer; he stated that he had just shot two people without any questioning by officers; and nothing in the record indicates that defendant had any reason to believe that he was not free to go at any time he wished prior to his initial statements.

2. Jury § 103 (NCI4th)— first-degree murder—jury selection—separate voir dire denied—absence of findings—no particular harm identified by defendant

The trial court did not abuse its discretion in a capital first-degree murder prosecution by denying defendant's motion for individual jury *voir dire*. While defendant argues that the ruling was an abuse of discretion because of an absence of findings of fact showing the trial court's rationale, counsel for the defense produced no evidence or argument as to why jurors should be questioned by individual *voir dire* and, in fact, while discussing

the motion before the trial court, acknowledged that there had been a change of venue and that the publicity in the new venue would not be as great as in the old. Defendant failed to identify any possible particular harm resulting from his having been required to question each of the prospective jurors in the presence of the other jurors.

3. Criminal Law § 475 (NCI4th Rev.)— first-degree murder—prosecutor's argument—no guilty plea to second-degree—response to defense argument

There was no error in the guilt phase of a capital first-degree murder prosecution where the prosecutor rhetorically asked the jury, "He hasn't pled guilty to those three things, has he? . . ." after counsel for defendant argued that the jury should find defendant guilty of second-degree murder. There was no criticism of defendant for failing to plead guilty; instead, the prosecutor was simply replying to the argument defense counsel had used.

4. Criminal Law § 475 (NCI4th Rev.)— first-degree murder—prosecutor's argument—not a comment on right to vigorous defense

There was no error in the prosecutor's argument in the guilt phase of a capital first-degree murder prosecution where defendant contended that the prosecutor improperly commented on defendant's exercise of his right to fully and vigorously defend himself in a scenario involving the suppression of evidence due to a defense motion. The prosecutor was rebutting the assertion made by defense counsel in closing arguments that a State's witness was not believable because he was the beneficiary of a lenient plea bargain. He explained his reason for the plea agreement in hypothetical terms and the argument was a proper response to the defense argument.

5. Criminal Law § 432 (NCI4th Rev.)— first-degree murder—prosecutor's argument—not a comment on defendant not testifying

There was no gross impropriety requiring the trial court to intervene on its own motion in the prosecutor's argument in a capital first-degree murder prosecution where the prosecutor commented he was sorry that defendant had not read his statement to a detective and that perhaps he ought to let defendant look at his statement in the courtroom. It is clear that the prosecutor was simply refuting the claim by the defense that the detec-

tive's notes and the recording of defendant's statement were inaccurate and that the prosecutor was not commenting on defendant's decision not to testify. The prosecutor's comment was isolated and not an extended reference to defendant's exercise of his right not to testify.

6. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—peremptory instruction—defendant's age—no plain error

There was no plain error in a capital sentencing proceeding in the court's peremptory instruction on the statutory mitigating circumstance of defendant's age, N.C.G.S. § 15A-2000(f)(7), where defendant requested a peremptory instruction on the statutory mitigating circumstance regarding his age at the time of the crime, the State conceded that all of the evidence showed defendant was eighteen when he committed the murder, the trial court gave an instruction in accord with approved pattern jury instructions, and defendant did not object or request any clarification.

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

A sentence of death was not disproportionate where the record fully supports the aggravating circumstances found by the jury, there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration, and this case is more similar to certain cases in which the death sentence was found proportionate than to those in which it was found disproportionate.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Freeman, J., on 7 November 1996 in Superior Court, Davidson County, upon a jury verdict finding defendant guilty of first-degree murder on the theory of premeditation and deliberation and under the felony murder rule. Defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments was allowed by the Supreme Court on 18 July 1997. Heard in the Supreme Court 10 February 1998.

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

J. Clark Fischer for defendant-appellant.

MITCHELL, Chief Justice.

On 4 January 1993, defendant was indicted by the Davie County Grand Jury for first-degree murder, felonious breaking and entering, and assault with a deadly weapon with intent to kill inflicting serious injury. He was tried capitally in August 1994 and found guilty of all charges. The jury recommended a sentence of death for the murder conviction, and the trial court sentenced defendant accordingly. The trial court also sentenced defendant to imprisonment for the other crimes.

On appeal, this Court found error and remanded for a new trial. *State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1996). Venue was subsequently changed to Davidson County. Defendant was retried capitally at the 28 October 1996 Criminal Session of Superior Court, Davidson County. The jury found defendant guilty of all charges and, after a separate capital sentencing proceeding, recommended a sentence of death for the first-degree murder conviction. The trial court sentenced defendant to death for the murder and to consecutive terms of imprisonment of twenty years for felonious assault and ten years for felonious breaking and entering. Defendant appeals to this Court as of right from the sentence of death. His motion to bypass the Court of Appeals on his appeal of the remaining convictions was allowed by this Court on 18 July 1997.

The State's evidence tended to show *inter alia* that on 10 August 1992, seventeen-year-old Evette Howell lived with her parents in Mocksville, along with her fifteen-year-old brother, Fonzie, and her eighteen-month-old son, Xavier. Evette's parents left for work shortly before 7:00 a.m. Shortly after 8:00 a.m., Evette was found dead in the middle of her bed. Her body was partially covered with a bedsheet, and a fired handgun lay next to her body. Her infant son was found alive and lying next to her in the bed. Evette had been killed by a small-caliber gunshot wound to the left side of her head.

In the next bedroom, Fonzie was found lying on the floor, bloody. One fired shell casing and two unfired bullets were lying next to him on the floor. Fonzie was taken to the emergency room at Baptist Hospital. He arrived in a coma and was placed on a ventilator and a feeding tube. He spent the next six weeks in the intensive care unit and another fifteen months undergoing intensive medical treatment.

Defendant, William Christopher Gregory, had been Evette's boyfriend for some three years and was the father of Evette's child.

In June 1992, after the last of many breakups with defendant, Evette came home with a black eye. The morning of Evette's murder, defendant and his cousin Gabe Wilson went to Evette's house with a shotgun, shells, and duct tape. When they arrived at the home, defendant got out of the car with a screwdriver, a hammer, and the duct tape. Defendant told Wilson he was going to kidnap Evette and that if Fonzie got in the way, he was going to kill him. Defendant broke into the house, yelling for Wilson to follow him. Defendant went into Evette's parents' room and took a .25-caliber automatic handgun. Defendant then went into Evette's bedroom and shut the door. Wilson heard Evette yell, "Fonzie, Fonzie." As Wilson began to exit the house, he heard a gunshot. Wilson was outside when he heard Fonzie say, "You got me Chris, you got me." He immediately heard another gun shot. Within a couple of minutes, defendant came out of the house and told Wilson that he had shot Evette and had then gone into Fonzie's room. Defendant's gun jammed, so he hit Fonzie over the head several times. He unjammed the gun, shot Fonzie in the face and then took the gun to Evette's room and put it on the bed beside her. Defendant told Wilson that Evette and Fonzie were both dead.

Upon leaving, defendant drove to his grandfather's house and told him that he had just shot Evette and Fonzie Howell and that Wilson had nothing to do with the shooting. Defendant, Wilson, and defendant's grandmother then went to the Davie County Jail, where defendant told Detective Allan Whitaker he had shot two people. Defendant was taken into custody and advised of his *Miranda* rights at 9:25 a.m. on 10 August 1992. Defendant signed a waiver of rights form and gave a statement to Detective Whitaker, which he signed after it was reduced to writing.

[1] By assignment of error, defendant contends that the trial court committed prejudicial error when it denied his motion to suppress the initial statements he made to Detective Whitaker shortly after he shot Evette and Fonzie Howell. Defendant further contends that he was in custody when he gave his initial statements and had not been advised of his *Miranda* rights prior to giving those statements. These contentions are without merit.

This Court has consistently held that the rule of *Miranda* applies only where a defendant is subjected to custodial interrogation. *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 405, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (1997). As we discussed in *Gaines*, "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." *Id.* at 662, 483 S.E.2d. at 405; *see also Stansbury v. California*, 511 U.S. 318, 128 L. Ed. 2d 293 (1994). The United States Supreme Court has held 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." *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977).

In the present case, defendant was not restrained or confined in any way. Defendant went to the jail entirely of his own volition, not at the request of any law enforcement officer. Without any questioning by officers, he stated he had just shot two people. Nothing in the record indicates that, at any time prior to his initial statements to Detective Whitaker, defendant had any reason to believe that he was not free to go at any time he wished. This assignment of error is overruled.

[2] By another assignment of error, defendant contends that the trial court did not properly exercise its discretion because it summarily denied his motion for individual jury *voir dire*. Defendant argues that because of an absence of findings of fact showing the trial court's rationale for denying the motion, the trial court's ruling was an abuse of discretion. We do not agree.

"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) (1997). A trial court's ruling on the issue of individual *voir dire* will not be disturbed absent an abuse of discretion. *State v. Short*, 322 N.C. 783, 788, 370 S.E.2d 351, 354 (1988).

Counsel for the defense, when arguing in support of this motion before the trial court, produced absolutely no evidence or argument as to why jurors should be questioned by individual *voir dire*. In fact, while discussing the motion before the trial court, defense counsel expressly acknowledged that there had been "a change of venue granted in this case and I do not imagine that the publicity in Davidson County is anywhere near the publicity in Davie County concerning these matters." Defendant has failed to identify any possible particular harm resulting from his having been required to question each of the prospective jurors in the presence of the other jurors. Therefore, defendant has failed to demonstrate that the trial court

abused its discretion by denying his motion for individual jury selection. *State v. Jones*, 336 N.C. 229, 261, 443 S.E.2d 48, 64, *cert. denied*, 513 U.S. 1003, 130 L. Ed. 2d 423 (1994). This assignment of error is overruled.

By another assignment of error, defendant contends that the trial court committed error by overruling his objection to parts of the prosecutor's closing argument and by failing to intervene *ex mero motu* during another portion of the closing argument made by the prosecutor.

[3] Defendant points to three arguments of the prosecutor during the guilt phase. First, counsel for defendant argued in his closing that the jury should find defendant guilty of second-degree murder. Then the prosecutor argued to the jury that defendant's tactic was to concede guilt to most, but not all, of the charges. Thus, the focus would be on reasonable doubt of premeditation and deliberation. The prosecutor rhetorically asked the jury, "He hasn't pled guilty to those three things, has he? Not a one of them." Defendant objected, and the trial court overruled the objection. There was no criticism of defendant for failing to plead guilty. Instead, the prosecutor was simply replying to the argument defense counsel had used. This was a proper argument.

[4] Defendant also contends the prosecutor raised speculative and irrelevant legal concerns to the jury, whose sole task at that point was to determine guilt or innocence. The prosecutor said to the jury, "Secondly, . . . you have heard all the evidence, now. If [defendant] had filed some motion to suppress this statement . . . [defendant objected and was overruled] and the Judge had suppressed this statement for some reason, what evidence would the State have to connect [defendant] to this case? Only Gabe Wilson. Deals have to be cut."

Defendant contends that by making these remarks, the prosecutor improperly commented on defendant's exercise of his right to fully and vigorously defend himself against the criminal charges in his case. We disagree. The prosecutor was rebutting the assertion made by defense counsel in closing arguments that State's witness Gabe Wilson was not believable because he was the beneficiary of an unnecessarily lenient plea bargain with the State. Defendant's assertion to the jury made it necessary for the prosecutor to reply and explain the State's rationale for entering into a plea agreement with Wilson. The prosecutor explained his reason in hypothetical terms

and did not tell the jury that defendant had made any motion to suppress his statements. The prosecutor's argument was a proper response to the argument made by defense counsel. *See State v. Perdue*, 320 N.C. 51, 61, 357 S.E.2d 345, 352 (1987); *State v. Abdullah*, 309 N.C. 63, 72-73, 306 S.E.2d 100, 106 (1983).

[5] Defendant's final challenge to the prosecutor's closing argument concerns a comment to which defendant did not object at trial. The prosecutor said in referring to defendant's statement to Detective Whitaker, "Now, you know, I'm sorry [defendant] did not read his statement. Maybe I ought to be over to his table and let him look at State's Exhibit 52 in this courtroom and take the next hour reading it. And then tell you what he thinks about it."

While defendant did not object at trial, he now argues that this was such an obviously improper comment on his right not to testify that the trial court should have intervened *ex mero motu*. The law in this area is well settled.

> A criminal defendant cannot be compelled to testify, and any reference by the State regarding his failure to do so violates an accused's constitutional right to remain silent. *Griffin v. California*, 380 U.S. 609, [14 L. Ed. 2d 106,] *reh. denied*, 381 U.S. 957[, 14 L. Ed. 2d 730] (1965). Well before *Griffin*, N.C.G.S. 8-54 provided that the failure of a defendant to testify creates no presumption against him. We have interpreted this statute as prohibiting the prosecution, the defense, or the trial judge from commenting upon the defendant's failure to testify. *See, e.g., State v. Bovender*, 233 N.C. 683, 65 S.E.2d 323 (1951) [*overruled on other grounds by State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989)]; *State v. Humphrey*, 186 N.C. 533, 120 S.E. 85 (1923). A nontestifying defendant, however, has the right upon request to have the trial court instruct the jury that his failure to testify may not be held against him. *Carter v. Kentucky*, 450 U.S. 288 [, 67 L. Ed. 2d 241] (1981); *State v. Leffingwell*, 34 N.C. App. 205, 237 S.E.2d 550 (1977).

State v. Randolph, 312 N.C. 198, 205-06, 321 S.E.2d 864, 869 (1984). This Court has also determined:

> When the State directly comments on a defendant's failure to testify, the improper comment is not cured by subsequent inclusion in the jury charge of an instruction on a defendant's right not to testify. Rather,

> this Court has held the 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)]. We consistently have held that when the trial court fails to give a curative instruction to the jury concerning the prosecution's improper comment on a defendant's failure to testify, the prejudicial effect of such an uncured, improper reference mandates the granting of a new trial.

State v. Reid, 334 N.C. 551, 556, 434 S.E.2d 193, 197 (1993) (citations omitted). However, "[c]omment on an accused's failure to testify does not call for an automatic reversal but requires the court to determine if the error is harmless beyond a reasonable doubt." *Id.* at 557, 434 S.E.2d at 198; *see* N.C.G.S. § 15A-1443(b) (1997).

Upon reviewing the record, it is clear that the prosecutor was not commenting on defendant's decision not to testify, but simply refuting the claim by the defense that Detective Whitaker's notes and recording of defendant's statement were inaccurate. "Since defendant made no objection during closing arguments, he must demonstrate that the prosecutor's closing arguments amounted to gross impropriety." *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). The prosecutor's comment was an isolated comment and not an extended reference to defendant's exercise of his right not to testify. Therefore, the trial court did not err by failing to intervene on its own motion. *See id.* at 96, 451 S.E.2d at 563; *State v. Taylor*, 337 N.C. 597, 614, 447 S.E.2d 360, 371 (1994); *State v. Randolph*, 312 N.C. at 206-07, 321 S.E.2d at 870. This assignment of error is overruled.

[6] In another assignment of error, defendant contends that the trial court committed prejudicial error by giving an improper peremptory instruction on the statutory mitigating circumstance of defendant's age, N.C.G.S. § 15A-2000(f)(7) (1997), which allowed the jury to improperly disregard a proven and uncontradicted statutory mitigating circumstance. Defendant orally requested a peremptory instruction on the statutory mitigating circumstance regarding his age at the time of the crime. The State conceded that all of the evidence showed defendant was eighteen when he committed the murder. The trial court gave the peremptory instruction on that circumstance. Defendant did not object to the peremptory instruction or request

any clarification for the jury. Defendant thus waived appellate review of this issue. *State v. Allen*, 339 N.C. 545, 554-56, 453 S.E.2d 150, 155-56 (1995), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396; N.C. R. App. P. 10(b)(2). Our review of this issue is limited to review for plain error. *Allen*, 339 N.C. at 555, 453 S.E.2d at 155. The trial court's instruction is in accord with the pattern jury instructions that have been approved by this Court. *State v. Simpson*, 341 N.C. 316, 348-49, 462 S.E.2d 191, 210 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996). Therefore, we find no plain error. This assignment of error is overruled.

PROPORTIONALITY REVIEW

[7] 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). After thoroughly 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.

In the present case, defendant was convicted of premeditated and deliberate first-degree murder. The jury also found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury and felonious breaking and entering. The jury found as an aggravating circumstance that the murder for which defendant stands convicted was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons. N.C.G.S. § 15A-2000(e)(11). Of the twenty mitigating circumstances submitted, one or more jurors found the following: (1) defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(6); (2) the offenses were committed while defendant

was under the influence of mental and emotional disturbance; (3) the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; (4) defendant had shown remorse for the offenses he committed; (5) defendant offered no resistance upon arrest and confessed shortly after the offenses; (6) at an early stage in the investigation, defendant admitted his guilt and gave a statement concerning his involvement in the crime; (7) defendant had no prior record for violence; and (8) defendant's father was in prison from the time defendant was age one until age nine.

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*, 512 U.S. 1254, 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. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that 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 killed a seventeen-year-old female victim in her home; (2) the victim, a young woman defendant had a relationship with for several years, was the mother of his infant son; (3) defendant assaulted with the intent to kill the victim's fifteen-year-old brother; and (4) defendant knew each of the victims and their family. 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.

We also compare this case with the cases in which we have found the death penalty to be proportionate. Although we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, we have previously stated, and we reemphasize here, that we will not undertake to discuss or cite all of those cases each time we carry out that duty. *State v.*

Williams, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). Here, it suffices to say 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 of death disproportionate.

After comparing this case carefully with all others in the pool of "similar cases" used for proportionality review, we conclude that it falls within the class of first-degree murders for which we have previously upheld the death penalty. For the foregoing reasons, we conclude that the sentence of death entered in the present case is not disproportionate.

Having considered and rejected all of defendant's assigned errors, we hold that defendant's trial and capital sentencing proceeding were free of prejudicial error. Therefore, the verdict and sentence of death entered against defendant must be and are left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. BERNARDINO ZUNIGA

No. 156A85-3

(Filed 8 May 1998)

Criminal Law § 1390 (NCI4th Rev.)— capital sentencing—age of defendant—mitigating circumstance—erroneous failure to submit

The trial court erred by failing to submit to the jury in a capital sentencing proceeding the (f)(1) mitigating circumstance of defendant's age where defendant was twenty-seven years old at the time of the murder; defendant scored a 56, indicating an intellectual age of 7.4 years, on an IQ test administered by a psychologist and a 64 on an IQ test given by a psychiatrist; the psychologist and the psychiatrist both testified that defendant suffered from mild to moderate mental retardation and that performance tests indicated evidence of chronic brain damage; and the psychologist and psychiatrist were both of the opinion that defendant's mental condition significantly restricted defendant's ability to conform his conduct to the requirements of the

law at the time of the murder. Furthermore, this error was not rendered harmless by the jury's consideration of the (f)(2) emotional disturbance mitigating circumstance, the (f)(6) impaired capacity mitigating circumstance, and the nonstatutory mental retardation mitigating circumstance. N.C.G.S. § 15A-2000(f)(1).

Justice LAKE dissenting.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Albright, J., at the 11 September 1995 Special Session of Superior Court, Davidson County. Heard in the Supreme Court 14 October 1997.

The defendant was indicted for the murder and rape of April Lee Sweet on or about 13 July 1982. In February of 1985, he was tried capitally and found guilty of first-degree murder and first-degree rape. He received a death sentence for the murder conviction and a consecutive term of life imprisonment for the rape conviction. We affirmed the conviction and the death sentence in *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

The defendant filed a motion for appropriate relief in the Superior Court, Davidson County. That motion was denied on 20 July 1991. This Court allowed the defendant's petition for a writ of certiorari and in *State v. Zuniga*, 336 N.C. 508, 444 S.E.2d 443 (1994), vacated the death sentence and remanded for a new sentencing proceeding on the grounds that the jury instructions were unconstitutional under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

At the new sentencing proceeding, Dr. Antonio Puente, an expert in psychology, testified for the defendant. Dr. Puente testified that he gave the defendant several psychological tests and that the results of each of the tests showed the defendant was in the impaired range. Dr. Puente concluded that the defendant suffered from mild to moderate mental retardation, with an intellectual age of seven, and organic brain syndrome of moderate range. Dr. Puente testified that the defendant's intellectual age of seven means he functions like an average seven-year-old. Organic brain syndrome indicates there is something wrong with the brain and that, as a consequence, the defendant's behavior is abnormal. The defendant scored a 56 on an IQ test. Dr. Puente also testified that the defendant had very low impulse control. He said that he felt the defendant's ability to appreciate the crim-

inality of his conduct and his ability to conform to the requirements of law were impaired.

Dr. Patricio Lara, a forensic psychiatrist, testified that he had examined the defendant and that, in his opinion, the defendant's abstract thinking process was very limited, as were his judgment and self-awareness. In his opinion, the defendant is mentally retarded, suffers from organic brain damage, and is significantly restricted in his ability to conform his actions to the limits established by law. The defendant scored 64 on an IQ test administered by Dr. Lara.

Other evidence presented at the sentencing proceeding is unnecessary to recite to have an understanding of this opinion.

The jury found one aggravating circumstance, that the murder was committed while the defendant was engaged in the commission of first-degree rape. N.C.G.S. § 15A-2000(e)(5) (1997). The jury found two statutory and two nonstatutory mitigating circumstances. The defendant did not request and the court did not submit the mitigating circumstance, "The age of the defendant at the time of the crime." N.C.G.S. § 15A-2000(f)(7). The jury found that the mitigating circumstances did not outweigh the aggravating circumstances and recommended the death penalty, which was imposed.

The defendant appealed.

Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

Ann B. Petersen for the defendant-appellant.

WEBB, Justice.

The defendant assigns error to the court's failure to submit the (f)(7) mitigator, "The age of the defendant at the time of the crime." N.C.G.S. § 15A-2000(f)(7). The court was required to submit to the jury any statutory mitigating circumstances which the evidence would support regardless of whether the defendant objects to it or requests it. *State v. Lloyd*, 321 N.C. 301, 312, 364 S.E.2d 316, 324, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

In interpreting the (f)(7) mitigator, we have held that chronological age is not the determinative factor. We have said age is a flexible and relative concept. "The defendant's immaturity, youthfulness, or lack of emotional or intellectual development at the time of the crime must also be considered." *State v. Bowie*, 340 N.C. 199, 203, 456

S.E.2d 771, 773, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 435 (1995); *see State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986); *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983).

In *State v. Holden*, 338 N.C. 394, 450 S.E.2d 878 (1994), we held that the age circumstance should have been submitted to the jury where there was substantial evidence showing that despite the defendant's being thirty years old, his mental age was ten years and his problem-solving skills were closer to those of a ten-year-old. *Id.* at 407-08, 450 S.E.2d at 885.

In this case, the defendant presented evidence from Dr. Puente and Dr. Lara that was at least as substantial as that offered in *Holden*. Dr. Puente testified that the defendant has a history of mild to moderate mental retardation and organic brain syndrome of moderate range. On one IQ test administered by Dr. Puente, the defendant scored a 56, signifying an intellectual age of 7.4 years. He administered numerous other tests, all of which indicated that the defendant is impaired. Dr. Puente was of the opinion that the defendant was impaired at the time he committed the murder and rape and that the defendant's ability to appreciate the criminality of his conduct and his ability to conform to the requirements of the law were impaired at the time of the crime.

Dr. Puente's testimony was supported by Dr. Lara's testimony, who testified that the defendant suffered from mild mental retardation and that his performance on tests indicated evidence of chronic brain damage. The defendant scored a 64 on an IQ test administered by Dr. Lara. Dr. Lara concluded that the defendant's mental condition significantly restricted his ability to conform his actions to the limits established by the law.

The testimony of Dr. Puente and Dr. Lara constitutes substantial evidence that would support a finding by the jury that the defendant's age at the time of the crime was mitigating. Therefore, the trial court was required to submit the (f)(7) statutory mitigating circumstance to the jury. *See id.* at 407, 450 S.E.2d at 885.

This Court has repeatedly held that the failure to submit to the jury a statutory mitigating circumstance that is supported by the evidence is reversible error, unless the State can prove the failure to submit was harmless beyond a reasonable doubt. *State v. Wilson*, 322 N.C. 117, 145, 367 S.E.2d 589, 605 (1988). The State argues that the jury considered the evidence concerning the defendant's mental age

when it weighed the (f)(2), (f)(6), and the nonstatutory mental retardation mitigating circumstances, and that it is clear that the jury would still have returned a sentence of death. We disagree. The State's argument ignores the fact that each statutory mitigating circumstance must be given individual weight, if found to exist. *See State v. Greene*, 329 N.C. 771, 776-77, 408 S.E.2d 185, 187 (1991). Furthermore, the submission of nonstatutory mitigating circumstances that parallel statutory mitigating circumstances does not satisfy the State's burden of showing harmlessness beyond a reasonable doubt because the jury was not required to give mitigating value to the nonstatutory mitigating circumstances. *See State v. Quick*, 337 N.C. 359, 364, 446 S.E.2d 535, 538 (1994). Thus, the failure to submit the (f)(7) mitigating circumstance was prejudicial error.

The defendant made several other assignments of error which we do not discuss because the questions they raise may not recur at a new sentencing proceeding.

For the reasons stated above, the defendant is entitled to a new capital sentencing proceeding.

NEW SENTENCING PROCEEDING.

Justice LAKE dissenting.

I believe that the trial court's failure to submit to the jury the statutory mitigating circumstance of the defendant's age was not error which requires that defendant receive a new sentencing hearing, his third. Furthermore, even assuming *arguendo* that the trial court erred in failing to submit the age statutory mitigating circumstance *ex mero motu*, the trial court's failure to do so was harmless error beyond a reasonable doubt. For this reason, I respectfully dissent.

The majority in this case holds, based on *State v. Holden*, 338 N.C. 394, 407-08, 450 S.E.2d 878, 885 (1994), that defendant is entitled to a new sentencing proceeding because the trial court failed to submit the (f)(7) mitigating circumstance of defendant's age to the jury.

I believe the majority opinion represents an overly technical and strained, if not incorrect, interpretation of the facts and application of the law. In light of the history and particular circumstances of this case, I find *State v. Spruill*, 338 N.C. 612, 452 S.E.2d 279 (1994), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995), to be much closer to the

instant case factually and procedurally, and thus it, rather than *Holden*, should control the outcome here. As in *Spruill*, in the instant case the evidence reveals an individual quite functional in society, though borderline intellectually, and, as a result of such evidence, a defendant who, the second time around, elected not to request submission of the (f)(7) mitigator. Under such circumstances, this Court should not render a decision which even implies a trial court must be held in error if it does not submit such mitigator *ex mero motu*.

This case involves the brutal rape and murder of a seven-year-old girl by the twenty-seven-year-old defendant. The plain facts are that on 14 July 1982, the defendant raped and then proceeded to stab and suffocate April Sweet to death, leaving her body under a sourwood tree in the woods. The sheriff found April's body lying on its right side, with blood around her throat and flowing from between her legs. April's underwear was lying on the ground nearby, and her tank-top shirt was pulled up over her head.

As the majority opinion reflects, defendant has already been found guilty of first-degree murder and first-degree rape in this case, and he has twice been sentenced to death upon the recommendation of two separate juries. This Court found no error and affirmed the conviction and the death sentence in *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). On the basis of the decision of the United States Supreme Court in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), this Court then vacated the death sentence and remanded for a new capital sentencing proceeding. *State v. Zuniga*, 336 N.C. 508, 444 S.E.2d 443 (1994). Thereafter, defendant was sentenced to death upon the recommendation of the jury, and he has again appealed to this Court.

In *Spruill*, this Court held that the failure of the trial court to submit the (f)(7) mitigating circumstance was not error where Spruill, a thirty-one year old at the time of the murder, had worked as an automobile mechanic and in a shipyard, had moved on to a better position, had attended church and had functioned quite well in the community even though Spruill was an immature, dependent person who had borderline intelligence. *Spruill*, 338 N.C. at 660, 452 S.E.2d at 305.

The evidence in this case shows that Dr. Patricio Lara, the forensic psychiatrist relied on in part by the majority, found defendant to be "quite normal" at the time of his arrest, with no evidence of acute impairment, intoxication or confusion; that defendant appeared to

understand the seriousness and criminality of the charges against him; and that defendant understood right from wrong and was therefore competent to stand trial. Dr. Antonio Puente, another of defendant's psychiatrists, testified that defendant was "somewhat functional" in society. Dr. Lara additionally testified that after the crimes, defendant attempted to hide the mail containing his address and changed his bloodstained pants, indicating a conscious and calculating attempt to avoid detection. Evidence presented at trial further indicated that defendant had previously maintained employment in each of the locations where he resided. This included employment as a veterinary assistant, a cooking assistant, an exterminator, and work in furniture manufacturing and tobacco. Defendant functioned well enough in society to be able to endorse and cash checks, obtain identification cards, set up a post-office box, and engage in relationships; he could and did read the newspaper. While in prison, defendant took several classes through Wake Technical Community College, including basic education classes and classes toward his high school equivalency or GED. Defendant also received diplomas for completing a six-month religious leadership and development course.

This Court has held that " '[t]he trial court is not required to instruct upon a statutory mitigating circumstance unless substantial evidence has been presented to the jury which would support a reasonable finding by the jury of the existence of the circumstance.' " *State v. DeCastro*, 342 N.C. 667, 692, 467 S.E.2d 653, 666, (quoting State v. Laws, 325 N.C. 81, 110, 381 S.E.2d 609, 626 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990)), *cert. denied*, — U.S. —, 136 L. Ed. 2d 170 (1996). The chronological age of a defendant is not the determinative factor under N.C.G.S. § 15A-2000(f)(7) in determining whether the evidence is sufficient to submit the (f)(7) mitigating circumstance to the jury. *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983). In *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986), this Court reiterated that the statutory mitigating circumstance of age is based on a "flexible and relative concept of age." *Id.* at 393, 346 S.E.2d at 624. Nevertheless, evidence showing emotional immaturity is not viewed in isolation, particularly where other evidence shows "more mature qualities and characteristics." *Id.* While we have held that chronological age is not *the* determinative factor on this mitigator, we do not fail to consider and weigh chronological age and the life experiences embodied in it. Thus, consistent with our determination in *Spruill*, I would conclude that the indistinct evidence of this defendant's limited intellectual

development is counterbalanced by his chronological age of twenty-seven years, his relative academic achievement, his work history and his generally normal social skills, such that the "trial court [was] not required to submit the mitigating circumstance of age." *Spruill*, 338 N.C. at 660, 452 S.E.2d at 305.

In this regard, it is significant that in *Spruill*, this Court specifically considered defendant's failure to submit the (f)(7) mitigating circumstance in determining whether the trial court erred in not submitting (f)(7) to the jury *ex mero motu*. *Id.* In the instance case, it should be noted that in defendant's first sentencing proceeding, in 1985, his attorneys requested and the trial court submitted the (f)(7) mitigating circumstance to the jury, but the jury refused to find it. Upon review of this issue, this Court stated:

> By requesting an instruction that the "age" mitigating circumstance may include mental as well as chronological age, the defendant was apparently arguing that the defendant's mental age was below his chronological age of twenty-seven years. However, we find no evidence in the record to support such an instruction and thus nothing which would entitle defendant to the submission of this factor.

Zuniga, 320 N.C. at 272-73, 357 S.E.2d at 922. With this background, in defendant's 1995 resentencing proceeding, his attorneys apparently decided not to submit the (f)(7) mitigating circumstance, even in light of the presumed "enhanced" evidence of mental impairment.

However, notwithstanding the question of sufficiency of the evidence to submit, and assuming *arguendo* the trial court erred in failing to submit the (f)(7) mitigating circumstance to the jury *ex mero motu*, the defendant is not entitled to a third resentencing proceeding because this error is harmless beyond a reasonable doubt. The trial court's asserted error here "is prejudicial unless the State can demonstrate on appeal that it was harmless beyond a reasonable doubt." *State v. Quick*, 337 N.C. 359, 363, 446 S.E.2d 535, 538 (1994). The State has clearly done so in this case. Although the (f)(7) mitigator was not submitted to the jury, the trial court did submit a list of thirteen mitigating circumstances for the jury's consideration. The jury found four of these, including: (1) the capital felony was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired,

N.C.G.S. § 15A-2000(f)(6); (3) the defendant is mentally retarded; and (4) the facts and circumstances of the defendant's birth, childhood and adolescence in Mexico. Therefore, the jury did find two statutory mitigating circumstances, (f)(2) and (f)(6), and two nonstatutory mitigating circumstances, three of which bear directly on the subject of defendant's mental or emotional maturity or capacity. The jury thus clearly found, considered and weighed all possible circumstances ("mental disturbance," "impaired capacity" and "mental retardation") which the majority now holds should have been considered under the (f)(7) mitigator.

Accordingly, based on these four mitigating circumstances which the jury found, it is as certain as anything can be in this process that even " 'had this statutory mitigating circumstance been found and balanced against the aggravating circumstances, the jury would still have returned a sentence of death.' " *Quick*, 337 N.C. at 363, 446 S.E.2d at 538 (quoting State v. Mahaley, 332 N.C. 583, 599, 423 S.E.2d 58, 67-68 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995)).

The defendant received a fair trial and a second fair sentencing proceeding, free from any prejudicial error. He is entitled to nothing more from the courts of this State.

Justice PARKER joins in this dissenting opinion.

THE CITY OF CHARLOTTE v. J. ERNEST COOK; AND WIFE, RUBY H. COOK

THE CITY OF CHARLOTTE v. J. ERNEST COOK; AND WIFE, RUBY H. COOK; AND CRESCENT ELECTRIC MEMBERSHIP CORPORATION

No. 83PA97

(Filed 8 May 1998)

Eminent Domain § 29 (NCI4th)— condemnation for water pipeline—fee simple rather than easement—no abuse of discretion

A city's condemnation of a fee simple estate rather than an easement in property for a water pipeline to connect an intake structure at a lake with a water treatment plant was not arbitrary, capricious, or an abuse of discretion where the city presented evidence that it was necessary to acquire a fee simple title to the

property because of the depth at which the pipeline will be laid, the number and nature of the facilities that will be constructed close to the pipeline, the need to have effective control over all uses of the pipeline route, and the ability to select the most economical electric supplier. The city did not have to show that it would be impossible to construct a pipeline using an easement but had to show only that it needed a fee simple title to construct and operate the pipeline under optimum conditions.

Justice LAKE dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 125 N.C. App. 205, 479 S.E.2d 503 (1997), vacating judgments entered by Sitton, J., on 6 December 1995, in Superior Court, Mecklenburg County. Heard in the Supreme Court 11 September 1997.

This appeal involves a question as to the power of a city to condemn property. The City of Charlotte filed actions to condemn a fee simple interest in two tracts of land in Mecklenburg County for the laying of a pipeline as a part of the North Mecklenburg Raw Waterline Project. Defendants Cook owned the property to be condemned, and defendant Crescent Electric Membership Corporation had an option to purchase one of the tracts. The two actions were consolidated by consent for trial.

The project being constructed by the Charlotte-Mecklenburg Utility Department (CMUD) will supply additional drinking water for Mecklenburg County. The pipeline to be constructed across the land will connect the raw water intake structure on Lake Norman and a water treatment plant in north Mecklenburg County.

A hearing pursuant to N.C.G.S. § 136-108 was held to determine all issues except compensation. In his judgments, Judge Sitton found the following facts:

17. The decision by the City of Charlotte to acquire the route for the pipeline in fee simple was based on a number of factors, including, but not limited to the following:

a. the depths (up to 40 feet deep) at which the 60-inch diameter pipes will be installed;

b. the number and nature of the facilities that will be located within the pipeline route;

c. the ability to exercise effective control over all uses of the pipeline route by having the ability to determine in advance any proposed use[] of the pipeline route which would be permitted by the City;

d. the ability to protect the pipeline facilities more effectively than if the City of Charlotte only had an easement[;]

e. the cost[s] for acquisition of a fee simple interest were not anticipated to be significantly different than for the acquisition of an easement;

f. the ability to select the most economical electric power supplier.

Based on these findings of fact, Judge Sitton allowed the plaintiff to acquire a fee simple estate in the property. The Court of Appeals vacated the judgments, and we allowed discretionary review.

Office of the City Attorney, by H. Michael Boyd, Senior Deputy City Attorney, and R. Susanne Knox, Assistant City Attorney, for plaintiff-appellant.

Bailey, Patterson, Caddell, Hart & Bailey, P.A., by Allen A. Bailey and H. Morris Caddell, Jr., for defendant-appellees J. Ernest Cook and Ruby H. Cook.

Crisp, Page & Currin, L.L.P., by Cynthia M. Currin and Tyrus H. Thompson, for defendant-appellee Crescent Electric Membership Corporation.

North Carolina League of Municipalities, by Andrew L. Romanet, Jr., General Counsel, and John M. Phelps, II, Assistant General Counsel, amicus curiae.

Michael F. Easley, Attorney General, by Grayson G. Kelley and Robert G. Webb, Special Deputy Attorneys General, and John F. Maddrey, Assistant Attorney General, on behalf of the North Carolina Department of Transportation, amicus curiae.

WEBB, Justice.

The Court of Appeals held that a condemning agency cannot take a larger estate in the condemned land than is necessary to carry out the public purpose for which the land is condemned. For this reason, said the Court of Appeals, the City could condemn only an easement in the property. We disagree with the Court of Appeals.

In *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. 451 (1837), we dealt with the condemnation of land for the construction of a railroad. Chief Justice Ruffin, writing for the Court, explained the nature of the power of eminent domain. He pointed out that unlike the federal government, which has only those powers delegated to it by the people through the Constitution of the United States, the government of our state has all the power necessary to exercise its sovereignty. *Id.* at 457. This sovereign power may be restricted only by the state or federal Constitution. The right of eminent domain is one of the sovereign powers. Chief Justice Ruffin said it is for the legislature to determine whether private property should be taken and to what extent. *Id.* at 467.

Following *Rail Road*, we have developed a rule governing the taking by the State of private property. Property may be condemned only for a public purpose, and the Judicial Branch of the government determines whether a taking is for a public purpose. The Legislative Branch decides the political question of the extent of the taking, and the courts cannot disturb such a decision unless the condemnee proves the action is arbitrary, capricious, or an abuse of discretion. *City of Charlotte v. McNeely*, 281 N.C. 684, 690, 190 S.E.2d 179, 184 (1972); *N.C. State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 470, 189 S.E.2d 272, 278 (1972); *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960).

It is unquestioned that the taking in this case was for a public purpose. The question then becomes whether the defendants have shown that the action of the City in condemning a fee simple estate was arbitrary, capricious, or an abuse of discretion. We cannot so hold.

The Charlotte City Council held two public hearings before authorizing the commencement of the condemnation proceedings. An affidavit by Thomas W. Vandeventer, a professional engineer, was submitted to the Council. Mr. Vandeventer said in his affidavit that it was necessary to acquire a fee simple title to the property because of the depth at which the line would be laid, the facilities that will be constructed close to the line, and the need to have effective control over all uses of the pipeline route. Mr. Vandeventer also said that CMUD had experienced difficulties in other places where facilities were within easements rather than on property owned in fee.

The defendants filed an affidavit by James Roderick Butler in which Mr. Butler refuted the reasoning of Mr. Vandeventer and concluded that there was no reason for CMUD to have more than an ease-

ment in the property in order to lay the line. There was conflicting evidence in the affidavits of the two engineers, and we cannot disturb Judge Sitton's decision to accept the testimony of Mr. Vandeventer. This testimony supports findings of facts (a) through (d). There was also evidence that if the plaintiff did not have a fee simple title to the property, it could not buy power from Duke Power Company but would have to purchase power from Crescent at a higher rate. *See Crescent Elec. Membership Corp. v. Duke Power Co.*, 126 N.C. App. 344, 485 S.E.2d 312 (1997). This evidence supports finding of fact (f). The findings of fact support the conclusions of law that the City may take a fee simple title in the property.

The defendants argue that the City of Charlotte has admitted that a fee simple title is not necessary for the construction of the line. They base this argument on statements made by a deputy city attorney at a meeting of the City Council, who said, "It is possible that an easement could be used," and that the plaintiff could acquire additional rights in the property if needed. They also rely on a statement at the Council meeting by the director of CMUD, who said when asked if it was possible with an easement to accomplish CMUD's purposes, "[I]t is technically possible, but not preferable."

We do not believe the statements show a fee simple title is not necessary. The City does not have to show it would be impossible to construct a line using an easement. If the City can show that it needs a fee simple title to construct and operate the line under optimum conditions, this is proof of necessity.

The defendants contend that the affidavit of Mr. Vandeventer is not credible, especially when compared to the affidavit of Mr. Butler. The credibility of the respective affidavits was for the City Council and the superior court to determine. We cannot overrule their findings.

The City took only an easement for the intake site on Lake Norman, and the defendants contend this shows the plaintiff did not need a fee simple title in their property. We do not know why the plaintiff acquired only an easement for the intake facility. The fact that it did so does not mean it does not need a fee simple title in the property involved in this case.

The mayor pro tem of the City was an employee of Duke Power Company. The mayor was absent from the meeting at which the City Council voted to condemn the property, and the mayor pro tem

presided over the meeting. The mayor pro tem voted to condemn a fee simple title. He filed an affidavit in which he said that if he had known Duke Power Company was involved in the matter, he would not have participated in the meeting. There was some evidence that he knew Duke was involved. The defendants say this makes the action by the Council arbitrary and capricious. We cannot so hold. An ethical problem involving the Council has to rise to a much higher level than this one for us to upset a decision by the Council.

The defendants next say that the Council's action must be set aside because Robert's Rules of Order were not followed at the meeting at which the decision was made to condemn a fee simple interest. We do not know what rules the City Council follows, but we shall let it judge its own procedure.

For the reasons given in this opinion, we reverse the Court of Appeals and remand to that court for further remand to the Superior Court, Mecklenburg County, for reinstatement of the judgments.

REVERSED AND REMANDED.

Justice LAKE dissenting.

I must respectfully dissent because I believe this decision, while satisfying two of our corporate giants, works a grave injustice upon innocent and powerless people and impairs the law on the taking of private property for a public purpose.

The simple and uncontroverted facts in this case are as follows. The City of Charlotte (the City) is building a pipeline to carry water from an intake center on Lake Norman to a new treatment plant for the purpose of providing the City with additional drinking water. The proposed route crosses defendant Cooks' family dairy farm. The design calls for the pipeline to be buried as much as forty feet underground, and the pipe is to be only five feet in diameter.

Evidence indicates that city officials knew it was necessary to acquire only an easement across the Cooks' property in order to install the pipeline and to service it in the future. A deputy city attorney told the City Council, "It is possible that an easement could be used," and the director of the Charlotte-Mecklenburg Utility Department told the City Council, "it is technically possible" to accomplish the project's purposes with only an easement. In fact, *the initial proposal for the project was to acquire only an ease-*

ment, and landowners were so informed by city officials at public hearings.

Interestingly, and perhaps not insignificantly, the Cooks' property is located in territory which the North Carolina Utilities Commission has assigned exclusively to Crescent Electric Membership Corporation (Crescent). The City would have to buy power for the new plant from Crescent if the City acquired only an easement across the Cooks' property. However, if the City owned contiguous tracts of land on which the pipeline and plant were constructed, the City would have the right under N.C.G.S. § 62-110.2 to buy electric power from Duke Power Company (Duke Power).

The record evidences multiple Duke Power internal e-mail messages and memoranda reflecting that Duke Power and the City collaborated to have the City acquire a fee simple title to the property in order that Duke Power could provide the power to the plant. These e-mail messages indicate that the mayor pro tempore of the City, an employee of Duke Power, as well as the project director had contact with Duke Power officials and discussed condemning a fee simple interest for the project. The mayor pro tempore chaired the 12 September 1994 City Council meeting where the subject of condemning a fee simple was discussed, and he voted in favor of a fee simple condemnation. In the entire project, the only parcel of land upon which the City settled for an easement instead of a fee simple title was that parcel where the intake structure was to be located. The intake structure is one of the most important sites in the project, and it will have employees working at the location. The pipeline between this intake and the plant, through the Cooks' property, will merely pass underground. Record evidence establishes that Duke Power has property rights in the land on which the intake structure will be constructed.

It has been the well-settled law in this state for over three-quarters of a century that a governmental body may condemn only the amount of property necessary to achieve the specific public purpose which required the condemnation. In *Spencer v. Wills*, 179 N.C. 175, 102 S.E. 275 (1920), this Court stated, "Condemnation by right of eminent domain is not allowed except so far as it is *necessary* for the proper construction and use of the improvement *for which it is taken.*" *Id.* at 178, 102 S.E. at 277 (emphasis added). Similarly, in *Jennings v. State Highway Comm'n*, 183 N.C. 69, 110 S.E. 583 (1922), this Court noted that in a condemnation proceeding, "the well con-

sidered cases on the subject hold that when the Legislature has not defined the extent or limit of the appropriation, the authorities charged with the duty are restricted to such property *in kind and quantity* as may be reasonably suitable and necessary to the *purpose designated.*" *Id.* at 71-72, 110 S.E. at 584 (emphasis added). In *N.C. State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972), this Court recognized that when a condemning authority seeks to take the property of a citizen, " 'the power to take private property is in every case limited to *such* and *so much* property as is necessary for the public use in question.' " *Id.* at 473, 189 S.E.2d at 280 (quoting *Brest v. Jacksonville Expressway Auth.*, 194 So. 2d 658, 661 (Fla. Dist. Ct. App.), *aff'd per curiam*, 202 So. 2d 748 (Fla. 1967)). Moreover, in *Highway Comm'n*, Justice Sharp (later Chief Justice) emphasized that it is unconstitutional for a governmental body to condemn property for private purposes:

> "The Legislature cannot under the guise of exercising sovereign power of eminent domain, which can only be exercised for a public purpose, take a citizen's property without his consent and give it or sell it to another for private use, . . . for to do so would be in violation of the Constitution of the United States Amendment 14."

Highway Comm'n, 281 N.C. at 473, 189 S.E.2d at 280 (quoting *Brest*, 194 So. 2d at 661).

These cases stand for three basic principles. First, a condemning authority may take only the amount of property and interest *necessary* to achieve the public use, not the amount it simply wants or prefers. Second, the property may be condemned only for a *public purpose*, not for the private purposes of government officials or third parties. Finally, the property taken must be for the direct public use *in question*, not some other, collateral purpose. The reason for these requirements is the protection of private property under the state and federal Constitutions. *See, e.g.*, *Highway Comm'n*, 281 N.C. 459, 189 S.E.2d 272; *Trustees of the Univ. of N.C. v. Foy*, 5 N.C. 58 (1805).

In this case, it is not necessary for the City to have fee simple title to the Cooks' property. The City has admitted the public use can be achieved fully with a properly drafted easement. It is thus clear that the City simply prefers to have a fee simple title for its own convenience or purpose extending well beyond the public use in question. Governmental convenience is not synonymous with necessity, especially when private property is at stake. The public use in question for

the taking here is the construction of a water supply pipeline, not the City's preference for one electric supplier over another. The proper determination of the entity that provides electricity to a water treatment plant is entirely separate from the proper construction and maintenance of a water pipeline.

Had the excellent unanimous opinion of the Court of Appeals been affirmed, as it should have been, the practical effect of such decision would be that the City would get an easement to bury its pipeline underground and to maintain it in the future, and the Cooks would still be able to use their property as a dairy farm, as they have since at least the early 1960s. Private property rights would be respected, and the legitimate public use in question would proceed unimpeded. The result of the majority's decision will be to split the Cooks' dairy into two separate, disjointed parcels and keep them from using the land even for grazing. The decision will also allow the improper use of the power of eminent domain to circumvent the intent and purpose of the carefully devised statewide legislative plan for settlement of electric service areas between electric suppliers, pursuant to N.C.G.S. § 62-110.2.

In light of the law and facts of this case, simple justice and basic principles require that we affirm the opinion of the Court of Appeals. However, it appears in this case that, " 'Justice is blind.' Blind she is, an' deef an' dumb an' has a wooden leg." Finley Peter Dunne, *Mr. Dooley's Opinions* (1900), *in The Harper Book of American Quotations* 306 (Gorton Carruth & Eugene Ehrlich eds., 1988).

STEPHEN S. ELLIOTT, PH. D., PETITIONER v. NORTH CAROLINA PSYCHOLOGY BOARD, RESPONDENT

No. 340PA97

(Filed 8 May 1998)

1. Physicians, Surgeons, and Other Health Care Professionals § 54 (NCI4th)— Ethics Code for psychologists—incorporated into statute—derogation of common law—strictly construed

The Court of Appeals erred in an action arising from the suspension of a psychologist's license for having social and sexual relationships with former patients by focusing on the policy

objectives underpinning the Ethics Code for psychologists, incorporated into N.C.G.S. § 90-270.15(a)(10), rather than on the conduct specifically prohibited. The statute is in derogation of the common law and is penal in nature and so must be strictly construed.

2. Physicians, Surgeons, and Other Health Care Professionals § 54 (NCI4th)— psychologist—relationships with former patients—not a violation of Ethics Code then in effect

The conclusion of the North Carolina Psychology Board that petitioner violated Principle 6(a) of the Ethics Code for psychologists by having social and sexual relationships with former clients was not supported by the evidence. Principle 6(a), which must be strictly construed, prohibits only sexual intimacies with clients and there is no finding or evidence that any of petitioner's social interactions with former clients ever occurred during the professional relationship. The subsequent amendment to the Ethics Code creating a two-year waiting period was not in effect at the time of these incidents.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 126 N.C. App. 453, 485 S.E.2d 882 (1997), affirming an order entered by Allen (J.B., Jr.), J., on 4 January 1996 in Superior Court, Wake County, which affirmed a decision of the North Carolina Psychology Board. Heard in the Supreme Court 11 February 1998.

Harry H. Harkins, Jr., for petitioner-appellant.

Michael F. Easley, Attorney General, by Anne J. Brown and Robert M. Curran, Assistant Attorneys General, for respondent-appellee.

ORR, Justice.

This case arises out of several incidents involving petitioner, Stephen S. Elliott, and several of his former patients. Petitioner is a psychologist licensed by the North Carolina Psychology Board and by the Virginia Board of Professional Counselors. Petitioner resided and was employed in Martinsville, Virginia, until September 1987. While residing in Martinsville, petitioner spent one afternoon a week seeing patients in Eden, North Carolina. In September 1987, petitioner relocated to Winston-Salem, North Carolina. The incidents involved in this appeal all occurred prior to petitioner's relocation.

The first incident involved a female adult patient who initially sought treatment from petitioner on 22 August 1984. This patient sought counseling for marital problems, anxiety attacks, and problems with coping skills. She remained in counseling until 12 February 1985 and took part in a total of twenty-four counseling sessions with petitioner. Subsequent to the completion of therapy, the patient contacted petitioner and "asked if [they] could be friends." Petitioner informed the patient that if they were to talk outside of therapy, he could no longer serve as her counselor. By the summer of 1985, the patient and petitioner had become close friends. Around this same time, both the patient and petitioner became separated from their respective spouses. In December 1985, the patient and petitioner began dating and continued to see each other through the winter of 1986. Petitioner and the patient engaged in sexual relations during this time.

The second incident involved a female adult patient who was in counseling with petitioner from May 1985 to July 1985. During that time, petitioner conducted eight counseling sessions with her. In June 1985, while still in counseling with petitioner, this patient separated from her husband. Petitioner did not hear from her again until December 1985. At that time, they encountered each other at a day-care center where the patient's daughter and petitioner's son were enrolled. After that encounter, the patient called petitioner and asked whether he would go out with her. Petitioner explained to her that he could never have a relationship with her as a counselor if he saw her socially. They dated from January 1986 through January 1988.

During 1986 and 1987, petitioner also had several dates with two other former adult female clients. In 1987, petitioner relocated to Winston-Salem, North Carolina. Subsequently, a complaint was filed with the Virginia Board of Professional Counselors by the first female client referenced above. On 24 April 1992, the Virginia Board entered a consent order with petitioner, which concluded that petitioner had violated various principles of the Regulations of the Board of Professional Counselors. Petitioner was reprimanded by the Virginia Board and ordered to submit an academic research paper on "the topic of the ethical standards of the profession regarding the prohibition of dual relationships of a sexual nature," with emphasis on the powerful position the counselor possesses over the patient.

Once the North Carolina Psychology Board became aware of the disciplinary action taken against petitioner by the Virginia Board, it

conducted its own hearing concerning the allegations. The North Carolina Board concluded that petitioner was in violation of Principles 2(f) and 6(a) of the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct (the Ethics Code), which is adopted by reference in the North Carolina Psychology Practice Act. N.C.G.S. § 90-270.15(a)(10) (1997). Based upon its conclusions, the Board suspended petitioner's license for sixty months, with an active period of suspension of thirty days. During the remaining period of suspension, the Board ordered petitioner to practice under the supervision of a licensed psychologist. Petitioner was also ordered to undergo therapy and evaluation with a psychologist.

Petitioner then filed a petition for judicial review. On 4 January 1996, the trial court affirmed the decision of the North Carolina Psychology Board. In its order, the trial court concluded that (1) the Psychology Board did not exceed its statutory authority, (2) the Psychology Board did not engage in any unlawful procedure or commit any error of law, (3) substantial evidence supports the Board's findings and conclusions, and (4) the final agency decision was not arbitrary or capricious.

On 26 January 1996, petitioner filed a written notice of appeal with the Court of Appeals. In an opinion filed on 17 June 1997, the Court of Appeals unanimously affirmed the decision of the trial court and, thus, that of the Psychology Board. On 2 October 1997, this Court allowed petitioner's petition for discretionary review.

[1] The only issue presented to us by petitioner's petition for discretionary review is whether the Court of Appeals was correct in affirming the trial court's order concluding that petitioner was in violation of Principle 6(a) of the Ethics Code. In the opinion below, the Court of Appeals focused on the policy objectives underpinning the Ethics Code. It noted that "[t]he purpose of [the Ethics Code] is to 'protect the public from . . . unprofessional conduct by persons licensed to practice psychology.' " *Elliott v. N.C. Psychology Bd.*, 126 N.C. App. 453, 457, 485 S.E.2d 882, 884 (1997) (quoting N.C.G.S. § 90-270.1 (1993) (incorporating by reference the Ethics Code)) (alteration in original). The Court of Appeals further stated that the Ethics Code "never suggests that dual relationships of a sexual or social nature are permissible after therapy is terminated." *Id.* at 459, 485 S.E.2d at 885. It concluded by holding that the Psychology Board was correct in determining that petitioner was in violation of Principle 6(a). *Id.* However, we disagree with the Court of Appeals and accordingly hold

that the Court of Appeals erred in affirming the portion of the order concluding that petitioner was in violation of Principle 6(a).

Article 18A of the North Carolina General Statutes governs the practice of psychology. N.C.G.S. § 90-270.15(e), contained within article 18A, provides that "the procedure for revocation, suspension, denial, limitations of the license or health services provider certification . . . shall be in accordance with the provisions of Chapter 150B of the General Statutes." N.C.G.S. § 90-270.15(e). In discussing judicial review of a final agency decision, chapter 150B provides that

> the court reviewing a final agency decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1995).

The issue presented to us by this appeal requires us to determine (1) whether the Court of Appeals correctly construed Principle 6(a), and (2) whether the Psychology Board's findings and conclusions regarding Principle 6(a) are supported by substantial evidence. First, we will address whether the Court of Appeals properly construed Principle 6(a). " 'When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review.' " *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981) (quoting *In re Appeal of N.C. Sav. & Loan League*, 302 N.C. 458, 465, 276 S.E.2d 404, 410 (1981)). Thus, in determining the appropriate construction to be given Principle 6(a), we will apply *de novo* review.

Principle 6(a) of the Ethics Code provides as follows:

> Psychologists are continually cognizant of their own needs and of their potentially influential position vis-à-vis persons such as clients, students, and subordinates. They avoid exploiting the trust and dependency of such persons. Psychologists make every effort to avoid dual relationships that could impair their professional judgment or increase the risk of exploitation. Examples of such dual relationships include, but are not limited to, research with and treatment of employees, students, supervisees, close friends, or relatives. *Sexual intimacies with clients are unethical.*

Ethical Principles of Psychologists, 36 Am. Psychologist 633, at 636 (June 1981) (emphasis added). Petitioner argues that both the Psychology Practice Act and the Ethics Code, incorporated therein by reference, must be strictly construed. He notes that Principle 6(a) specifically states that it is unethical to have sexual relations *"with clients."* Petitioner contends that because he engaged in social or sexual relationships only with former clients, after the counseling relationship had terminated, there is no violation of Principle 6(a).

It is well settled that statutes which are in derogation of the common law and which are penal in nature are to be strictly construed. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 131, 177 S.E.2d 273, 280 (1970). North Carolina common law did not provide for the regulation of the practice of psychology. Further, under the Psychology Practice Act, the Board has the authority to "deny, suspend, or revoke licensure and certification, and may discipline, place on probation, limit practice and require examination, remediation and rehabilitation." N.C.G.S. § 90-270.15(a). Thus, the Psychology Practice Act should be strictly construed because it is both in derogation of the common law and penal in nature.

In the case of *In re Dillingham*, 257 N.C. 684, 127 S.E.2d 584 (1962), this Court discussed N.C.G.S. § 93A-6(a), which authorizes the North Carolina Real Estate Licensing Board to hold a hearing and to revoke or suspend the license of a real estate broker or a real estate salesman. The Court stated:

> The portion of our Act which empowers The Board to revoke the license of a real estate broker or salesman is penal in its nature and should not be construed to include anything as a ground for revocation which is not embraced within its terms.

Id. at 695, 127 S.E.2d at 592. Similarly, as the statute in the present case gives the Psychology Board the right to deny, suspend, or revoke the license of a psychologist and impose other disciplinary and remedial actions for violations of the Ethics Code, it "should not be construed to include anything as a ground for revocation which is not embraced within its terms." *Id.*

Further, in *McArver v. Gerukos*, 265 N.C. 413, 144 S.E.2d 277 (1965), this Court construed a criminal statute requiring the licensing of real estate brokers and salesmen. The Court noted the criminal nature of the statute and stated:

> For this reason, and for the further reason that it is a statute restricting to a special class of persons the right to engage in a lawful occupation, the act must be strictly construed so as not to extend it to activities and transactions not intended by the Legislature to be included.

Id. at 417, 144 S.E.2d at 280. In the present case, by requiring that psychologists be licensed, the statutes contained within article 18A are statutes "restricting to a special class of persons the right to engage in a lawful occupation." *Id.* This additional factor provides further support for the strict construction of N.C.G.S. § 90-270.15, and, accordingly, Principle 6(a).

In the opinion below, the Court of Appeals addressed petitioner's contention "that he did not violate [Principle 6(a)] because it did not explicitly prohibit romantic involvement with *former* clients." *Elliott*, 126 N.C. App. at 456, 485 S.E.2d at 884. However, it declined to adopt petitioner's "interpretation of the ethical principles of psychologists with regard to sexual relationships with former clients." *Id.* at 457, 485 S.E.2d at 884. Instead, as noted above, the Court of Appeals focused on the policy objectives and general purpose of the Ethics Code.

The Court of Appeals agreed that the Ethics Code prohibits sexual relations "with clients." *Id.* at 459, 485 S.E.2d at 885. However, it noted that the Code "never suggests that dual relationships of a sexual or social nature are permissible after therapy is terminated." *Id.* By focusing on the underlying objectives and general principles of the Ethics Code, rather than the conduct specifically prohibited, the Court of Appeals erred. Accordingly, we reverse the Court of Appeals and hold that the Ethics Code must be strictly construed.

[2] Having determined that Principle 6(a) is to be strictly construed, we must determine whether there is substantial evidence to support the Board's conclusion that petitioner violated Principle 6(a). This determination requires application of the "whole record test." This test

> "does not allow the reviewing court to replace the Board'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*. On the other hand, the 'whole record' rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn."

Associated Mechanical Contractors, Inc. v. Payne, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996) (quoting *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted)).

While applying the "whole record" test, we must also strictly apply the terms of Principle 6(a). In applying the standard of strict construction, this Court has stated:

> [T]he rule requiring strict construction does not mean that such statutes are to be stintingly construed to provide less than what their terms would ordinarily be interpreted as providing. Strict construction of statutes requires only that their application be limited to their express terms, as those terms are naturally and ordinarily defined.

Turlington v. McLeod, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988).

The Board's findings of fact, which are pertinent to this determination, are as follows:

> 6. During the period of time from 8/84 through 2/85, [petitioner] had a counseling relationship with a female client with whom he subsequently entered into a dual and sexual relationship.

7. Between 1/86 and 1/88, [petitioner] entered into a social/sexual relationship with a second female client who was his client between 5/85 and 7/85.

8. [Petitioner] dated a third and fourth female, each of whom was a former client.

Thus, the Board's findings demonstrate that petitioner had social/sexual relationships only with former clients and only after the counseling relationships had ended. Principle 6(a) prohibits only "[s]exual intimacies with clients." Here, there is no finding or evidence that any of petitioner's social interactions with former clients ever occurred during the professional relationship. Accordingly, the conclusion that petitioner violated Principle 6(a) is unsupported by the evidence.

We note that a new version of the Ethics Code became effective 1 December 1992 and applies to conduct occurring on or after that date. The new Ethics Code contains Standard 4.05, which provides that "[p]sychologists do not engage in sexual intimacies with current patients or clients." *Ethical Principles of Psychologists*, 47 Am. Psychologist 1597, at 1605 (Dec. 1992). New Standard 4.07(a) goes on to clarify that "[p]sychologists do not engage in sexual intimacies with a former therapy patient or client for at least two years after cessation or termination of professional services." *Id.* Thus, in the future, there will be no question of the limitation placed on psychologists entering into relationships with former clients. There is a clear two-year "waiting period" now in effect.

However, as this subsequent amendment to the Ethics Code was not in effect at the time of the incidents involving petitioner, a strict construction of Principle 6(a) requires us to conclude that the Court of Appeals erred in affirming the trial court's order concluding that petitioner was in violation of Principle 6(a). Accordingly, the decision of the Court of Appeals is reversed as to this issue, and this case is remanded to that court for further remand to the superior court for further remand to the North Carolina Psychology Board for further proceedings not inconsistent with this opinion. Because the issue involving Principle 2(f) is not before us on appeal, the Court of Appeals' holding on that issue stands.

REVERSED IN PART AND REMANDED.

PEARSON v. C.P. BUCKNER STEEL ERECTION CO.

[348 N.C. 239 (1998)]

RICHARD D. PEARSON, EMPLOYEE-PLAINTIFF v. C.P. BUCKNER STEEL ERECTION COMPANY, DEFENDANT-EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANT-CARRIER

CARY HEALTH CARE CENTER, INC., D/B/A CARY MANOR NURSING HOME, INTERVENOR

No. 452PA97

(Filed 8 May 1998)

1. **Workers' Compensation § 220 (NCI4th)— medical expenses—amount exceeding Medicaid—liability of employer—subject matter jurisdiction**

The Industrial Commission had subject matter jurisdiction to decide whether an employer who had previously been ordered to pay an injured employee's reasonable and necessary medical expenses was required to pay medical providers the difference between the amount paid by Medicaid and the amount allowable under the Workers' Compensation Act. The Commission's supervisory power over its judgments includes the authority to enter orders to enforce those judgments.

2. **Workers' Compensation § 220 (NCI4th)— medical expenses—amount exceeding Medicaid—liability of employer**

An employer who denies liability but is ordered to pay an injured employee's reasonable and necessary medical expenses under the workers' compensation law may not fulfill this obligation by merely reimbursing Medicaid where Medicaid has paid medical providers a portion of the cost of treatment, but must also pay medical providers the difference between the amount covered by Medicaid and the full amount authorized under the Industrial Commission fee schedule for medical expenses. The obligation of the employer to pay reasonable and necessary medical expenses under the workers' compensation law, and the ability of medical providers to accept such payments, is not controlled or preempted by federal Medicaid statutes or regulations.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 126 N.C. App. 745, 486 S.E.2d 723 (1997), reversing an order of the Industrial Commission entered 19 December 1995. Heard in the Supreme Court 10 March 1998.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr., and N. Victor Farah, for plaintiff-appellant; and Lore & McClearen, by R. James Lore, for intervenor-appellant Cary Health Care Center, Inc.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey A. Doyle, for defendant-appellees.

FRYE, Justice.

The issue presented by this case of first impression is whether an employer who denies liability but is ordered to pay medical expenses under the Workers' Compensation Act (Act) may fulfill this obligation by merely reimbursing Medicaid where Medicaid has paid medical providers a portion of the cost of treatment or whether the employer must also pay medical providers the difference between the amount covered by Medicaid and the full amount authorized by the Act under the Industrial Commission (Commission) fee schedule for medical expenses.

This case arises out of an accident on 4 May 1992 in which plaintiff fell while at work at a construction site and sustained severe injuries resulting in quadriplegia. Although defendant-employer denied liability, by an opinion and award entered 7 February 1995, the Commission concluded that the accident arose out of and in the course of plaintiff's employment. Defendants were ordered to pay all of plaintiff's reasonable and necessary medical expenses, in addition to $299.67 per week in temporary total disability compensation. Defendants did not appeal this decision of the Commission.

On 6 November 1995, plaintiff's attorney notified the Commission that defendants had reimbursed Medicaid for amounts paid for plaintiff's medical care but refused to pay medical providers for the difference between their full charges and the amounts paid by Medicaid. On 8 November 1995, Cary Health Care Center, Inc. (Cary Health), which had provided medical services to plaintiff and received partial payment from Medicaid, moved to intervene and appear before the Commission and to require defendant-carrier to pay plaintiff's outstanding medical bills. Cary Health was allowed to intervene by order of the Commission filed 28 November 1995. The Commission treated plaintiff's letter as a motion for an order directing defendants to pay the medical providers the difference between the fees allowed under the Commission's fee schedule and the amounts paid by Medicaid. By an order dated 19 December 1995, the Commission granted inter-

venor's motion and ordered defendant-carrier to pay intervenor $49,883.81 for medical treatment provided to plaintiff. The Commission also granted plaintiff's motion, ordering defendant-carrier to pay plaintiff's other medical care providers the difference between the Medicaid amounts already reimbursed and the amount allowable for medical expenses under the Act, and ordered defendant-carrier to pay the cost of the action, including attorneys' fees, pursuant to N.C.G.S. § 97-88.

Defendants moved the Commission to reconsider its order; for an evidentiary hearing; and, in the alternative, to amend its order. These motions were denied on 6 March 1996, and defendants appealed to the Court of Appeals. The Court of Appeals reversed the Commission, holding that, by reimbursing Medicaid, defendants' responsibility for past medical expenses under the 7 February 1995 opinion and award had been met. The Court of Appeals further reversed the Commission's 19 December 1995 award of attorneys' fees to plaintiff and intervenor. On 6 November 1997, this Court allowed plaintiff and intervenor's joint petition for discretionary review.

[1] As an initial matter, we must address defendants' contention that the Commission lacked subject matter jurisdiction to enter its orders of 19 December 1995 and 6 March 1996. Defendants' position is that while the Commission has authority to determine the fees of health-care providers and approve the providers' charges, it exceeds the Commission's statutory jurisdiction to make a determination as to whether a health-care provider may receive payment pursuant to workers' compensation laws subsequent to accepting payment from Medicaid.

The jurisdiction of the Commission is limited and conferred by statute. *See Clark v. Gastonia Ice Cream Co.*, 261 N.C. 234, 238, 134 S.E.2d 354, 358 (1964); *Letterlough v. Akins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962). Section 97-91 of the North Carolina General Statutes provides that "[a]ll questions arising under [the Workers' Compensation Act] . . . shall be determined by the Commission, except as otherwise herein provided." N.C.G.S. § 97-91 (1991). Thus, it is well established that the Commission is not a court with general implied jurisdiction. *See Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985). However, the Commission "possesses such judicial power as is necessary to administer the Workers' Compensation Act." *Id.* at 138, 337 S.E.2d at 483. This Court has recognized that the General Assembly intended the Commission to have

continuing jurisdiction of proceedings begun before it. *Id.* at 139, 337 S.E.2d at 484. We believe that the Commission's "supervisory power over its judgments," *id.* at 140, 337 S.E.2d at 485, includes the authority to enter orders to enforce those judgments. The authority to set and approve medical fees is granted to the Commission by statute. N.C.G.S. §§ 97-26(a), -90(a) (Supp. 1997). Having found that defendants are liable for plaintiff's reasonable and necessary medical expenses, the Commission retains jurisdiction over the case to determine which expenses must be paid and in what amount.

Defendants contend that the Commission did not have statutory jurisdiction to determine whether a medical provider's agreement with Medicaid precludes that provider from receiving payment pursuant to workers' compensation law subsequent to accepting payment under Medicaid. The primary issue, defendants argue, involves the interpretation and application of federal and state statutes and regulations enacting and implementing the Medicaid program. In this way, defendants frame the issue as a collateral dispute outside the scope of the Commission's jurisdiction. Defendants rely on *Eller v. J&S Truck Servs.*, 100 N.C. App. 545, 397 S.E.2d 242 (1990), *disc. rev. denied*, 328 N.C. 271, 400 S.E.2d 451 (1991), in which the Court of Appeals held that, despite its authority to approve attorneys' fees under N.C.G.S. § 97-90, the Commission's jurisdiction did not extend to cover a dispute between the plaintiff's attorneys over the division of those fees. We do not find *Eller* persuasive.

In this case, on 7 February 1995, the Commission ordered defendants to pay the reasonable and necessary medical expenses of plaintiff. Defendants did not appeal from that award. Approximately nine months later, plaintiff's attorney informed the Commission by letter that "[a] dispute has arisen between the parties regarding the extent to which the defendants are liable for past medical." The Commission treated plaintiff's letter as a motion to, in effect, require defendants to comply with the February opinion and award by paying the full amount owed pursuant to the Act. The issue before the Commission in this case is not analogous to the disagreement between the plaintiff's attorneys over the division of a lump sum awarded as fees in *Eller*. Here, the Commission was required to determine whether defendants had fulfilled their obligation to pay reasonable and necessary medical expenses under a duly entered award. We conclude that the Commission acted properly to enforce its earlier judgment and that it did not exceed the scope of its statutory authority. On this issue, we affirm the Court of Appeals.

[2] We now come to the substance of this case: whether an employer who denies liability but is ultimately ordered to pay an employee's medical expenses under this state's workers' compensation law may fulfill this obligation by reimbursing Medicaid for amounts paid to medical providers for a portion of the cost of the employee's medical treatment. We begin by reviewing the relevant statutory schemes.

The Workers' Compensation Act, N.C.G.S. ch. 97 (1991 & Supp. 1997), was enacted "in 1929 to both 'provide swift and sure compensation to injured workers without the necessity of protracted litigation,' and to 'insure[] a limited and determinate liability for employers.' " *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 203, 443 S.E.2d 716, 718-19 (1994) (quoting *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 709, 295 S.E.2d 458, 460 (1982)) (alteration in original). The rights of the employee and the liability of the employer under the Act "are founded upon mutual concessions" by which each party "surrenders rights and waives remedies" previously available. *Lee v. American Enka Corp.*, 212 N.C. 455, 462, 193 S.E. 809, 812 (1937). "The basic operating principle of the Act is that an employee is automatically entitled to certain benefits whenever he suffers either a personal injury by accident occurring in the course of the employment and arising out of it, or incurs an occupational disease." *Charlotte-Mecklenburg Hosp. Auth.*, 336 N.C. at 204, 443 S.E.2d at 719. The Act requires the employer to provide medical compensation to the injured employee, and the Commission may order medical compensation if the employer does not provide it. *Id.*; N.C.G.S. § 97-25.

Medicaid, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v (1994), was enacted by Congress in 1965 to establish a federal-state cooperative system of providing medical assistance to "families with dependent children and . . . aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396. Each participating state must develop a plan for medical assistance which complies with the requirements of Title XIX. *See Harris v. McRae*, 448 U.S. 297, 301, 65 L. Ed. 2d 784, 794 (1980); *see also Lackey v. N.C. Dep't of Human Resources*, 306 N.C. 231, 235, 293 S.E.2d 171, 175 (1982). North Carolina has elected to participate in the Medicaid program and has adopted a state plan for medical assistance. N.C.G.S. §§ 108A-54 to -70.5 (1997); 10 NCAC ch. 26. Medicaid, as implemented by the coordinate state plans, is intended only as a safety net for those unable to otherwise obtain adequate medical care, and thus,

state plans must take steps to ensure that Medicaid is the payor of last resort. *See, e.g.*, 42 U.S.C. § 1396a(a)(25)(A) (directing that a state plan for medical assistance must provide "that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services").

The purposes of these two statutory schemes do not appear to be inconsistent.

Congress has the power to preempt state law by virtue of the Supremacy Clause of Article 4 of the United States Constitution. The United States Supreme Court has stated:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.
>
> . . . .
>
> The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law.

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69, 90 L. Ed. 2d 369, 381-82 (1986) (citations omitted).

Defendants contend, and the Court of Appeals agreed, that federal law controls the outcome of this case because the portion of the state medical assistance plan allowing providers to accept payment from third parties, formerly 10 NCAC 26K .0006(c) (Apr. 1990), now .0006(e) (Jan. 1996), conflicts with federal Medicaid regulations. Defendants assert that intervenor and other medical-care providers may not receive the outstanding portion of the cost of plaintiff's treatment ordered by the Commission because they previously accepted

payment from Medicaid. They point to 42 C.F.R. § 447.15, which states that a participating provider must accept, as payment in full, amounts paid by the Medicaid agency and any copayment required by the plan to be paid by the individual. By invoking this federal regulation, defendants seek to avoid full compliance with the order of the Commission that they pay the medical expenses of plaintiff which the Commission may determine to be reasonable and necessary.

Defendants rely on *Evanston Hosp. v. Hauck*, 1 F.3d 540 (7th Cir. 1993), *cert. denied*, 510 U.S. 1091, 127 L. Ed. 2d 215 (1994), in which a hospital filed an action against the Illinois Department of Public Aid (IDPA), the state Medicaid agency. The plaintiff-hospital sought to return a partial payment made by IDPA for the care of a formerly indigent patient in order to file a suit against the patient after he won a $9.6 million judgment in a tort action stemming from his accident. The United States Court of Appeals for the Seventh Circuit rejected the hospital's attempt to return the Medicaid payment and seek the full amount of the original bill from the now-solvent patient. In so holding, the *Evanston* court accused the hospital of attempting "to turn Medicaid upside down by converting the system into an insurance program for hospitals rather than for indigent patients." *Id.* at 544.

We note several distinguishing features of *Evanston* that convince us it is not controlling under the circumstances of the instant case. Significantly, this is not an action brought by a provider as an attempt to "get out of" an agreement with Medicaid. Additionally, *Evanston* involved a plaintiff's recovery under tort law, not an award pursuant to workers' compensation law. The decisive factor, however, is that the health-care providers in this case, including intervenor, are not seeking any additional payment from plaintiff, the patient. Unlike *Evanston*, intervenor and the other health care providers in this case seek to recover, under the Workers' Compensation Act, directly from defendant-carrier, which was obligated by order of the Commission to pay plaintiff's reasonable medical expenses. In the instant case, the state Medicaid program has already accepted reimbursement from defendants; Medicaid is now out of the picture, and it remains the responsibility and duty of the Commission to determine what medical expenses defendants are liable for and in what amounts.

Defendants' position is that plaintiff's medical-care providers that accepted Medicaid payments have been paid in full; thus, defend-

ants' obligation under the Commission's opinion and award was fulfilled by reimbursing Medicaid. If accepted, this position would effectively allow employers and workers' compensation carriers to substitute the Medicaid reimbursement rate for the Commission's fee schedule for medical expenses. To construe federal Medicaid statutes and regulations as preempting the state workers' compensation law under these circumstances would permit employers and carriers to reap a financial windfall in savings on medical expenses by denying liability for workplace injuries. This result would clearly undermine a central purpose of the Act, which is to provide "swift and sure" compensation without protracted litigation.

We do not find the state Workers' Compensation Act and federal Medicaid statutes or regulations to be in conflict. Neither do we find that, by establishing the Medicaid program, Congress expressed a clear intent to preempt state workers' compensation law or to relieve an employer of any part of its responsibility to provide medical compensation to an injured employee. We have examined the federal Medicaid statutes and regulations put forth by defendants, and we find no specific language therein referring to workers' compensation. Nor do we find any language which may reasonably be construed as relieving an employer from its obligation under state workers' compensation law to pay the reasonable medical expenses of an injured employee. Enforcement of the Act does not obstruct the objectives of Congress in enacting Medicaid. Moreover, it is not "physically impossible" to comply with both federal Medicaid law and the state law of workers' compensation. Thus, we conclude that the obligation of defendants to pay the reasonable and necessary medical expenses of plaintiff, and the ability of intervenor and other providers to accept such payment, is not controlled or preempted by federal Medicaid statutes or regulations.

We emphasize that there is no dispute in this case that intervenor and other medical-care providers sought payment from Medicaid because defendant-employer denied liability for plaintiff's injuries, and there is no contention that Medicaid was billed by intervenor or other providers prior to exploring the existence of other sources of payment in violation of state or federal Medicaid law.

For the foregoing reasons, we hold that the Commission's 19 December 1995 order directing defendants to pay intervenor and plaintiff's other health-care providers the difference between the amount reimbursed to Medicaid and the amount allowable under the Act was a proper exercise of its authority. We further hold that the

Commission correctly applied the workers' compensation law of this State and that such law is not preempted by federal Medicaid law. We therefore reverse the Court of Appeals' holding that the Commission's 19 December 1995 order was in error. Because of this decision, it is unnecessary to address plaintiff and intervenor's additional argument that this appeal was not properly before the Court of Appeals. We remand to the Court of Appeals for further remand to the Industrial Commission for reinstatement of the 19 December 1995 order.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

LIBERTY MUTUAL INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. PATRICIA E. DITILLO, EXECUTRIX OF THE ESTATE OF JOHN JOSEPH DITILLO; PAULA C. BURGOON, ADMINISTRATRIX OF THE ESTATE OF RALPH JEAN CLARK; DONNA T. STILWELL, ADMINISTRATRIX OF THE ESTATE OF CHARLES BRUCE STILWELL; RELIANCE INSURANCE COMPANY; AND DAY & ZIMMERMAN, INC.

No. 220A97

(Filed 8 May 1998)

Insurance § 509 (NCI4th)— personal automobile policies—UM coverage—reduction for workers' compensation benefits

The limitation of liability provision in the uninsured motorist (UM) section of personal automobile policies reducing UM coverage for amounts paid or payable under workers' compensation law is authorized by N.C.G.S. § 20-279.21(e) without regard to characterization of the coverage as "mandatory" or "voluntary" under the Financial Responsibility Act. Therefore, UM coverage in personal automobile policies owned by the driver and a passenger of a vehicle leased by their employer for the driver's use was not available to their estates for their deaths in a collision with an uninsured motorist where the workers' compensation benefits paid or payable to their survivors exceed the UM coverage of the policies.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 125 N.C. App. 701, 482 S.E.2d 743 (1997), affirming in part and reversing in part a judgment entered

1 February 1996 by Helms (William H.), J., in Superior Court, Union County. On 5 June 1997, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 19 November 1997.

Dean & Gibson, L.L.P., by Rodney Dean and D. Christopher Osborn, for plaintiff-appellant and -appellee Liberty Mutual Ins. Co.

Golding Meekins Holden Cosper & Stiles, L.L.P., by Harvey L. Cosper, Jr. and Scott A. Beckey, for plaintiff-appellant and -appellee State Farm Mutual Automobile Ins. Co.

Ronald H. Cox for defendant-appellant and -appellee Paula Burgoon, administratrix of the estate of Ralph Clark.

John E. Hodge, Jr., for defendant-appellant and -appellee Donna Stilwell, administratrix of the estate of Charles Stilwell.

Kennedy Covington Lobdell & Hickman, L.L.P., by Wayne Huckel, for defendant-appellees Reliance Ins. Co. and Day & Zimmerman, Inc.

FRYE, Justice.

This case arises out of an automobile accident on 31 January 1991 in which Charles Bruce Stilwell (Stilwell), Ralph Jean Clark (Clark), and John Joseph Ditillo (Ditillo) were killed. The issue to be decided is whether the uninsured motorist (UM) coverage in personal automobile policies owned by Stilwell and Clark is available to their estates where the amount of workers' compensation benefits exceeds the UM coverage limit of each policy. Based on N.C.G.S. § 20-279.21(e) and our recent decision in *McMillian v. N.C. Farm Bureau Mut. Ins. Co.*, 347 N.C. 560, 495 S.E.2d 352 (1998), the answer is no.

All facts pertinent to this case were stipulated to by the parties and, thus, are not in dispute. At the time of the accident, Stilwell, Clark, and Ditillo were employees of Day & Zimmerman, Inc. (D&Z) and were acting in the course and scope of their employment. At the time of the accident, Stilwell was the operator of a 1991 Dodge automobile that was leased for his use by D&Z, and Clark and Ditillo were passengers. D&Z was insured by its workers' compensation carrier, Reliance Insurance Company (Reliance). Pursuant to the Workers' Compensation Act, N.C.G.S. ch. 97 (1991 & Supp. 1997), D&Z and

Reliance filed with the North Carolina Industrial Commission written admissions of liability for the deaths of Stilwell, Clark, and Ditillo. D&Z and Reliance are liable under the Workers' Compensation Act to Donna T. Stilwell, widow of Stilwell, and Patricia E. Ditillo, widow of Ditillo, for compensation in the sum of $162,400 each and are liable to the three daughters of Clark for compensation in the total sum of $130,997.62.

Donna T. Stilwell, Paula C. Burgoon, and Patricia E. Ditillo, as personal representatives of the estates of Stilwell, Clark, and Ditillo, respectively, each commenced a wrongful death action against the operators and owners of the other vehicles involved in the accident. The wrongful death cases were consolidated for trial, and the liability issues were tried at the 28 November 1994 Special Civil Jury Session of Superior Court, Union County. A jury determined that the negligence of Francisco Landaverde Covarrubias (Covarrubias) was the sole proximate cause of the collision that resulted in the deaths of Stilwell, Clark, and Ditillo. At the time of the accident, Covarrubias was operating an uninsured motor vehicle and was an uninsured motorist as defined by N.C.G.S. § 20-279.21.

Prior to 31 January 1991, Liberty Mutual Insurance Company (Liberty Mutual) had issued and delivered to Donna T. and Charles Bruce Stilwell, named insureds, a policy of personal automobile insurance that was in full force and effect at the time of the accident. The Liberty Mutual policy has UM coverage limits for bodily injury in the amount of $100,000 per person and $300,000 per accident. State Farm Mutual Automobile Insurance Company (State Farm) had issued and delivered to Ralph Jean Clark, named insured, a personal automobile policy that was also in full force and effect at the time of the accident. The State Farm policy also has UM coverage limits of $100,000/$300,000. There was no UM coverage under any policy of insurance listing as an insured vehicle the 1991 Dodge leased to D&Z and operated by Stilwell at the time of the accident.

Subsequent to the filing of the wrongful death actions, Liberty Mutual and State Farm filed the declaratory judgment action which is the subject of this case. Various cross-claims followed, filed by and against the personal representatives of Stilwell and Ditillo,[1] D&Z, and Reliance.

1. Ditillo's estate did not participate in the appeal to this Court. Patricia E. and John Joseph Ditillo were named insureds under a personal automobile policy issued by Nationwide Mutual Insurance Company, of which the UM coverage limits of $50,000 have been paid in full and are not the subject of any further claims.

The ultimate question in this case is whether the Liberty Mutual and State Farm policies owned by Stilwell and Clark provide any UM coverage to their estates because the amount of workers' compensation benefits to their survivors exceeds the UM coverage limits in each policy. Both the Liberty Mutual and the State Farm policies contain identical limitation of liability and exclusionary provisions in the UM coverage section. The limitation of liability provision in the UM coverage section of each policy provides, in part:

> Any amount otherwise payable for damages under this coverage shall be reduced by all sums:
>
> . . . .
>
> 2. Paid or payable because of the ***bodily injury*** under any of the following or similar law:
>
> a. workers' compensation law . . . .

The exclusion (exclusion "C") in the insuring agreement of the UM coverage section of each policy provides:

> C. This coverage shall not apply directly or indirectly to benefit any insurer or self-insurer under any of the following or similar law:
>
> 1. workers' compensation law . . . .

For purposes of the declaratory judgment action, the parties stipulated, *inter alia*, to the following:

> In determining the extent of insurance coverage liability, the court may treat each case as though a judgment was entered against the uninsured driver in an amount in excess of the combination of all applicable insurance coverages under these policies plus the amount of any applicable workers' compensation benefits.

The parties also stipulated that "Covarrubias is judgment-proof."

On 1 February 1996, the trial court entered a judgment in the declaratory judgment action on the stipulated facts. The trial court first determined that the Ditillo and Clark estates were precluded from any recovery under the Liberty Mutual policy issued to Stilwell because: (1) Ditillo and Clark were not persons for whom the Motor Vehicle Safety and Financial Responsibility Act (Financial Responsibility Act) required coverage beyond the terms of the policy;

(2) the terms of the Liberty Mutual policy both reduced the amount of UM coverage that would otherwise be available by the amount of any workers' compensation benefits and excluded any coverage that would benefit a workers' compensation carrier; and (3) in this case, the amount of the workers' compensation benefits exceeded any coverage available to Clark or Ditillo. Next, the trial court determined that, as to the estate of Stilwell, the limiting and exclusionary language in the Liberty Mutual policy's UM coverage would preclude recovery beyond the mandatory $25,000 coverage set forth in the Financial Responsibility Act. Therefore, the trial court ordered that the Stilwell estate recover $25,000 from Liberty Mutual, subject to a workers' compensation lien by Reliance. Using the same reasoning, the court ordered that the Clark estate recover $25,000 from State Farm under its policy, subject to a workers' compensation lien by Reliance. Finally, the trial court found that, pursuant to the parties' stipulation, there was no judgment "insufficient to compensate the subrogation claim of the workers' compensation carrier." The court thus concluded that it had no jurisdiction to apportion the insurance proceeds between the estates and the workers' compensation carrier under N.C.G.S. § 97-10.2(j) and ordered disbursement of the monies subject to Reliance's liens in accordance with N.C.G.S. § 97-10.2(f).

All parties appealed to the Court of Appeals, which subsequently reversed that portion of the trial court's order reducing the UM coverage available to the Stilwell and Clark estates to $25,000 each. The Court of Appeals concluded that exclusion "C" in the Liberty Mutual and State Farm policies had "the same practical effect" as the limitation of liability provision and that both were unenforceable because they conflicted with the Financial Responsibility Act. *Liberty Mut. Ins. Co. v. Ditillo*, 125 N.C. App. 701, 705-06, 482 S.E.2d 743, 745-46 (1997). The Court of Appeals opinion in this case was filed prior to *McMillian v. N.C. Farm Bureau Mut. Ins. Co.*, 347 N.C. 560, 495 S.E.2d 352.

Plaintiffs, Liberty Mutual and State Farm, appealed on the basis of Judge Greene's dissent, which agreed with the trial court that the limitation of liability and exclusionary provisions were enforceable as to amounts in excess of the mandatory UM coverage of $25,000. Plaintiffs focus primarily on distinguishing the limitation of liability provision, which had been held by previous decisions of the Court of Appeals to be unenforceable, from exclusion "C," which had not previously been ruled upon. Plaintiffs also attempt to distinguish *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 462 S.E.2d 650 (1995),

arguing that the majority decision of the Court of Appeals incorrectly concluded that UM coverage above $25,000 was mandatory under the Financial Responsibility Act. We conclude, however, that this Court's decision in *McMillian*, permitting enforcement of the limit of liability provision and overruling in part *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647, *disc. rev. denied*, 327 N.C. 484, 396 S.E.2d 614 (1990), and its progeny, is determinative of plaintiffs' obligations in this case. It is therefore unnecessary to address either the validity of exclusion "C" or the extent to which UM coverage under the Liberty Mutual and State Farm policies was mandatory. Because there is no recovery under the UM coverage of either the Liberty Mutual or the State Farm policy, we also do not address the issue of apportionment of insurance proceeds under N.C.G.S. § 97-10.2(j) brought forward on appeal by defendants Stilwell and Burgoon. Furthermore, we conclude that a decision as to additional issues raised by the parties is unnecessary in this case and that discretionary review as to those issues was improvidently allowed.

In *McMillian*, this Court examined the validity of a UM limit of liability provision identical to the one contained in the Liberty Mutual and State Farm policies. Key to our analysis was the language of N.C.G.S. § 20-279.21(e), which provides in pertinent part:

> Such motor vehicle liability policy need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workers' compensation law . . . .

N.C.G.S. § 20-279.21(e) (Supp. 1997). We held that

> under the clear wording of N.C.G.S. § 20-279.21(e), the limit of liability provision in defendants' policies at issue in this action is authorized and defendant UM carriers are entitled to reduce coverage to Mr. McMillian by the amount of workers' compensation he has already received.

McMillian, 347 N.C. at 565, 495 S.E.2d at 354-55.

As in *McMillian*, the UM coverage at issue in the instant case is contained in the insureds' own personal automobile policies. In *McMillian*, we found no statutory basis for the distinction between personal and business policies reached by the Court of Appeals, and we concluded that N.C.G.S. § 20-279.21(e) authorized a reduction of UM coverage by the amount paid to the insured as workers' compensation benefits. *Id.* at 565, 495 S.E.2d at 354. Likewise, the UM limit of

liability provision in the Liberty Mutual and State Farm policies at issue in this case is authorized by N.C.G.S. § 20-279.21(e), and plaintiff UM carriers are permitted to reduce coverage for Stilwell and Clark by the amount of workers' compensation benefits paid or payable. In this case, the workers' compensation benefits paid or payable to the survivors of Stilwell and Clark, $162,400 and $130,997.62 respectively, exceed the $100,000 per person UM coverage in the Liberty Mutual and State Farm policies. Because the limit of liability provision reducing UM coverage for amounts paid or payable under workers' compensation law is authorized by the Financial Responsibility Act, coverage may be reduced without regard to its characterization as "mandatory" or "voluntary" under the Act. *Cf. Bray*, 341 N.C. 678, 462 S.E.2d 650 (holding that the family member/household-owned exclusion contained in automobile insurance policy was contrary to the Financial Responsibility Act and therefore unenforceable as to the mandatory UM coverage contained in the policy).

For the foregoing reasons, we conclude that the Court of Appeals erred in holding that the limitation of liability provision, and by extension exclusion "C," in the Liberty Mutual and State Farm policies is unenforceable as conflicting with the Financial Responsibility Act. We hold that the limitation of liability provision in the UM coverage section of the Liberty Mutual and State Farm policies is authorized by N.C.G.S. § 20-279.21(e) and that, to the extent workers' compensation benefits were paid or are payable, Liberty Mutual and State Farm are entitled to reduce the UM coverage available under the respective automobile insurance policies. Moreover, because the decision in this case results in no UM coverage for Stilwell and Clark, there are no insurance proceeds available upon which Reliance, the workers' compensation carrier, could assert a claim. We therefore specifically decline to decide whether a workers' compensation carrier has a right under N.C.G.S. § 97-10.2 to a lien on UM benefits paid to an employee in a case where the UM coverage limits exceed the amount of workers' compensation benefits.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART; REVERSED IN PART.

STATE OF NORTH CAROLINA v. STEVEN VAN McHONE

No. 148A91-2

(Filed 8 May 1998)

1. **Criminal Law § 969 (NCI4th Rev.)— first-degree murder—post-conviction—motion for appropriate relief—right to hearing and presentation of evidence—constitutional issues**

A defendant in a capital first-degree murder post-conviction proceeding was not entitled to a hearing and to present evidence on his motion for appropriate relief simply because his motion was based in part upon asserted denials of his rights under the Constitution of the United States. N.C.G.S. § 15A-1420(c)(1) provides that any party is entitled to a hearing on questions of law or fact unless the court determines that the motion is without merit, and N.C.G.S. § 15A-1420(c)(7) provides that a defendant is entitled to have the trial court make conclusions of law and state its reasons before denying the motion when defendant asserts with specificity in his motion that his conviction was obtained in violation of the Constitution of the United States. However, (c)(7) is not an expansion of defendant's right to be heard or to present evidence; it is merely a directive to the trial court to make written conclusions of law and to give its legal reasoning for meaningful appellate review. Moreover, (c)(7) must be read *in para materia* with (c)(3), so that the trial court must determine the motion without an evidentiary hearing when the motion presents only questions of law, including constitutional law. Finally, the court may deny the motion without any hearing either on questions of law or fact if it determines from the motion and any supporting or opposing information that the motion is without merit.

2. **Criminal Law § 969 (NCI4th Rev.)— first-degree murder—post-conviction—motion for appropriate relief—issues of fact—hearing**

A defendant in a capital first-degree murder post-conviction proceeding was entitled to an evidentiary hearing before the trial court ruled on his motion for appropriate relief where defendant contended for the first-time at a non-evidentiary hearing on his supplemental motion that the State had sent to the trial court a proposed order denying defendant's original motion without providing defendant with a copy; the State acknowledged at the hear-

ing that it sent a proposed order to the court which the court signed; the trial court summarily denied the motion; and the State submitted to the Supreme Court in its response to defendant's petition for writ of certiorari an affidavit that defendant's counsel had been mailed a copy of the State's proposed order. The trial court was presented with a question of fact when defense counsel contended at the hearing that the State had submitted a proposed order without providing defendant with a copy. The trial court must conduct a hearing for the taking of evidence and must make written findings when the court is unable to rule upon the motion without the hearing of evidence. The Supreme Court is not the appropriate forum for resolving issues of fact.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the 9 December 1996 order of Freeman, J., in Superior Court, Surry County, denying defendant's motion for appropriate relief. Heard in the Supreme Court on 16 December 1997.

Michael F. Easley, Attorney General, by Valérie B. Spalding, Special Deputy Attorney General, for the State.

Kenneth Rose, Director, Center for Death Penalty Litigation, and Cindy F. Adcock, Duke University School of Law, for defendant-appellant.

Paul M. Green on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

MITCHELL, Chief Justice.

On 4 June 1990, defendant was indicted by the Surry County Grand Jury on two counts of first-degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury. After a capital trial held at the 25 February 1991 Criminal Session of Superior Court, Surry County, the jury found defendant guilty of both counts of first-degree murder, on the theory of premeditation and deliberation, and guilty of the assault. After a capital sentencing proceeding held pursuant to N.C.G.S. § 15A-2000, the jury recommended the death penalty for each first-degree murder conviction. The trial court entered judgment sentencing defendant to death for each murder. The trial court also entered judgment sentencing defendant to ten years' imprisonment for the conviction of assault with a deadly weapon with intent to kill. Defendant appealed to the North Carolina Supreme Court, and on 8 October 1993, this Court

found no error in the convictions or sentences. *State v. McHone*, 334 N.C. 627, 435 S.E.2d 296 (1993). Defendant subsequently petitioned the United States Supreme Court for a writ of certiorari, which was denied. *McHone v. North Carolina*, 511 U.S. 1046, 128 L. Ed. 2d 220 (1994). It would serve no useful purpose in determining the issues presented here to further review the evidence presented at defendant's original trial.

On 17 January 1995, defendant filed a motion for appropriate relief pursuant to chapter 15A, article 89 of the North Carolina General Statutes. On 20 January 1995, defendant filed a motion seeking discovery and for production by the State of exculpatory information. The State filed its response in opposition to defendant's discovery motion on 14 June 1995. The State filed its answer and motion to deny defendant's motion for appropriate relief on 10 May 1996.

By an order filed 26 August 1996, the trial court denied defendant's motion for appropriate relief without hearing arguments by defendant or the State and without conducting an evidentiary hearing. The trial court made no specific rulings as to defendant's motion for discovery.

On 13 September 1996, defendant filed a motion to vacate the trial court's order denying his motion for appropriate relief. At the same time, defendant filed a supplemental motion for appropriate relief pursuant to N.C.G.S. § 15A-1415(g). A hearing on defendant's motion for appropriate relief as supplemented was held on 9 December 1996. On that same date, the trial court issued an order denying defendant's motion for appropriate relief and denying defendant's discovery motion. We allowed defendant's petition for writ of certiorari to review that 9 December 1996 order of the trial court.

[1] Defendant first contends that under N.C.G.S. § 15A-1420(c), he was entitled to a hearing on questions of law and fact arising from the grounds for relief asserted in his supplemental motion. He argues that this is so because, in his motion as supplemented, he alleged specific errors of constitutional law. For the following reasons, we conclude that the mere fact that some of the grounds for relief set forth by defendant were based upon asserted violations of defendant's rights under the Constitution of the United States did not entitle him to a hearing or to present evidence.

N.C.G.S. § 15A-1420 provides that "[a]ny party is entitled to a hearing on questions of law or fact . . . *unless* the court determines

that the motion is without merit." N.C.G.S. § 15A-1420(c)(1) (1997) (emphasis added). Subsection (c)(7) of the statute also provides that if a defendant asserts with specificity in his motion for appropriate relief that his conviction was obtained in violation of the Constitution of the United States, the defendant is entitled to have the trial court make conclusions of law and state its reasons before denying the motion. N.C.G.S. § 15A-1420(c)(7). However, we do not read subsection (c)(7) as an expansion either of defendant's right to be heard or his right to present evidence. Instead, this provision is merely a directive to the trial court to make written conclusions of law and to give its legal reasoning for entering its order, such that its ruling can be subjected to meaningful appellate review. Therefore, summary denial without conclusions and a statement of the trial court's reasoning is not proper where the defendant bases his motion upon an asserted violation of his constitutional rights.

Subsection (c)(7) mandates that "the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted." N.C.G.S. § 15A-1420(c)(7). However, this subsection of the statute must be read *in pari materia* with the other provisions of the same statute. Therefore, when a motion for appropriate relief presents only questions of law, including questions of constitutional law, the trial court *must* determine the motion without an evidentiary hearing. N.C.G.S. § 15A-1420(c)(3); *State v. Bush*, 307 N.C. 152, 166-67, 297 S.E.2d 563, 574 (1982). Further, if the trial court can determine from the motion and any supporting or opposing information presented that the motion is without merit, it *may* deny the motion without any hearing either on questions of fact or questions of law, including constitutional questions. N.C.G.S. § 15A-1420(c)(1). Therefore, it does not automatically follow that, because defendant asserted violations of his rights under the Constitution of the United States, he was entitled to present evidence or to a hearing on questions of fact or law. For example, when a motion for appropriate relief presents only a question of constitutional law and it is clear to the trial court that the defendant is not entitled to prevail, "the motion is without merit" within the meaning of subsection (c)(1) and may be dismissed by the trial court without any hearing. *Id.* Likewise, where facts are in dispute but the trial court can determine that the defendant is entitled to no relief even upon the facts as asserted by him, the trial court may

determine that the motion "is without merit" within the meaning of subsection (c)(1) and deny it without any hearing on questions of law or fact. *Id.* Defendant's contention that he was entitled to a hearing and entitled to present evidence simply because his motion for appropriate relief was based in part upon asserted denials of his rights under the Constitution of the United States is without merit.

[2] However, defendant also contends in the present case that he was entitled to an evidentiary hearing before the trial court ruled on his motion for appropriate relief as supplemented because some of his asserted grounds for relief required the trial court to resolve questions of fact. We find this contention to have merit. N.C.G.S. § 15A-1420(c)(1) mandates that "[t]he court must determine . . . whether an evidentiary hearing is required to resolve questions of fact." If the trial court "cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact." N.C.G.S. § 15A-1420(c)(4). Under subsection (c)(4), read *in pari materia* with subsections (c)(1), (c)(2), and (c)(3), an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law, or the motion is made pursuant to N.C.G.S. § 15A-1414 within ten days after entry of judgment.

At the 9 December 1996 hearing, defendant contended for the first time that in August 1996, the State had sent to the trial court a proposed order denying defendant's original motion for appropriate relief without providing defendant with a copy. This matter was not raised or referred to in defendant's original or supplemental motion for appropriate relief. During the 9 December 1996 hearing, the State acknowledged that it did send a proposed order to the trial court and that the trial court signed the State's proposed order dismissing defendant's original motion for appropriate relief. Defendant contended at the 9 December hearing that since neither he nor his counsel were served with a copy of the proposed order, the State had engaged in an improper *ex parte* communication with the trial court in violation of his rights to due process under the state and federal constitutions. Thus, during the 9 December 1996 hearing, defendant orally moved for the first time to have the August 1996 order denying his original motion for appropriate relief vacated because of the *ex parte* contact. The trial court summarily denied that motion and entered its 9 December 1996 order denying defendant's motion for appropriate relief as supplemented.

In its response to defendant's petition to this Court for writ of certiorari, the State submitted an affidavit from a legal assistant with the district attorney's office. In that affidavit, the legal assistant stated that she had mailed defendant's counsel a copy of the State's proposed order by certified mail, return receipt requested. A copy of a receipt for certified mail was attached to the affidavit, which the State contends establishes that defendant's counsel's office received a copy of the proposed order on 13 May 1996.

In determining whether an evidentiary hearing is necessary, the trial court not only considers defendant's motion for appropriate relief, but also "any supporting or opposing information presented." N.C.G.S. § 15A-1420(c)(1). When defense counsel contended at the 9 December 1996 hearing that the State had submitted a proposed order to the trial court and had not provided defendant or his counsel with a copy and that this was an improper *ex parte* contact concerning the original order denying defendant's motion for appropriate relief, the trial court was presented with a question of fact which it was required to resolve. When a trial court is unable to "rule upon the motion without the hearing of evidence," the trial court "must conduct a hearing for the taking of evidence, and must make findings of fact." N.C.G.S. § 15A-1420(c)(4). The defendant has a right to be present at any such evidentiary hearing and to be represented by counsel. *Id.* The trial court erred in denying defendant's supplemental motion without an evidentiary hearing.

This Court is not the appropriate forum for resolving issues of fact, even though the State's affidavit was filed here. We therefore reverse the order of the trial court and remand this case to that court in order that it may make findings of fact, *inter alia*, as to whether defendant or defendant's counsel was served with a copy of the original proposed order. Given this result, we need not review the remaining assertions in defendant's motion for appropriate relief as supplemented.

Defendant also contends that the trial court erred in failing to permit his motion for discovery and thereby contravened N.C.G.S. § 15A-1415(f). We have recently explained the extent to which the State must make discovery in connection with post-conviction motions for appropriate relief in capital cases. *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998). On remand, the trial court shall be required to reconsider its ruling on defendant's discovery motion in light of our opinion in *Bates*, an opinion which was not available to the trial court when it previously considered this matter.

For the foregoing reasons, we reverse the trial court's order denying defendant's motion for appropriate relief and remand this case to that court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

WENDY H. POOLE v. COPLAND, INC. AND JOHN HAYNES

No. 145PA97

(Filed 8 May 1998)

1. Intentional Infliction of Mental Distress § 3.1 (NCI4th)—thin skull rule—proper application

There was no error in the application of the thin skull rule in an action for the intentional infliction of emotional distress by sexual harassment where the trial court charged the jury that it would have to find that the individual defendant's wrongful actions under the same or similar circumstances could reasonably have been expected to injure a person of ordinary mental condition, the evidence permitted a finding of liability before application of the thin skull rule, and the jury was instructed that it must so find.

2. Intentional Infliction of Mental Distress § 3.1 (NCI4th)—thin skull rule—instructions—effect on person of ordinary mental condition

The trial court's instructions on the thin skull rule in an action for the intentional infliction of emotional distress by sexual harassment adequately informed the jury that it could not find that plaintiff had been injured by a flashback to her suppressed mental problems until it first found that the individual defendant's actions could have caused severe emotional distress to a person of ordinary mental condition.

3. Intentional Infliction of Mental Distress § 3.1 (NCI4th)—thin skull rule—exacerbation of dissociative disorder—instructions on liability—injury to person of ordinary mental condition

The trial court's instructions on the thin skull rule in an action for the intentional infliction of emotional distress did not

improperly allow the jury to find liability based solely on a finding that the individual defendant's conduct exacerbated plaintiff's preexisting dissociative disorder; rather, the instructions clearly told the jury that it must find that the wrongful actions under the same circumstances could reasonably have been expected to injure a person of ordinary mental condition before it could hold defendants liable for all the harmful consequences of the individual defendant's actions.

4. Intentional Infliction of Mental Distress § 3.1 (NCI4th)—thin skull rule—instructions during damages phase—absence of prejudice

Defendant was not prejudiced by the fact that thin skull instructions in an action for the intentional infliction of emotional distress were given during the part of the charge on damages rather than during the liability phase.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 125 N.C. App. 235, 481 S.E.2d 88 (1997), awarding defendant Copland, Inc. a new trial and reversing a judgment entered by Hudson, J., on 16 November 1994, in Superior Court, Alamance County. Heard in the Supreme Court 17 November 1997.

In this action, the plaintiff sued John Haynes for intentional and negligent infliction of emotional distress. She sued Copland, Inc., her former employer, for ratification of Haynes' conduct, negligent retention and supervision of Haynes, and imputed liability.

The plaintiff testified that during a one-year period while she was working for defendant Copland, she was intimidated on many occasions by defendant Haynes, a fellow worker. On one occasion, they were discussing the relative merits of Camaro and Mustang automobiles when Haynes told the plaintiff she "looked like the type of person that needed somebody to go up inside [her] about two car lengths deep." The plaintiff asked Haynes not to talk to her in that way. She reported the incident to her supervisor, Bill White.

The plaintiff testified to numerous other similar incidents, including an occasion when Haynes asked the plaintiff if she was happily married and whether she had "had a man lately." Haynes told her: "You haven't had a man until you've had me. . . . I've got twelve inches hanging." Another time, the plaintiff turned around to find Haynes standing behind her with his pants unzipped. She asked Haynes what

he was doing, and he replied: "Well, I was going to show you what a real man felt like . . . ." Later, Haynes told her that once she "had" him, she would never go back to her husband. She testified he told her that her husband, Kevin, "had better hold tight to me at night because [Haynes] would slide in right beside of Kevin and f--- my eyes out and make Kevin like it." Although the plaintiff reported these incidents to White, he told her that Haynes "was just a youngun', to ignore him," and that Haynes "was only picking."

Haynes asked the plaintiff if she was a natural redhead and said: "There's not but one way for me to find out that you're a true redhead . . . . I just need to see your p---y hair." Haynes asked the plaintiff if she gave "blow jobs." On another occasion, the plaintiff and several others were in White's office when Haynes grabbed his crotch and asked her: "[H]ave you made up your mind whether or not you want some of this or not?" The plaintiff told White: "Bill, you see. You see I'm not lying. Why do you let this go on?" According to the plaintiff, White laughed, telling her to let it go and that Haynes was "just joking."

On the day before the last day she worked at Copland, the plaintiff was in the parking lot with her husband. Haynes was there. He grabbed his crotch and made an obscene gesture toward the plaintiff. The plaintiff reported this incident to her superiors. The next day, a meeting was held, with the plaintiff and Haynes in attendance. Also present were the plaintiff's superiors, including the president of the corporation. Haynes admitted that he had grabbed his crotch in the parking lot the previous day, and he was terminated at that meeting. The plaintiff's employment was terminated later that day.

The plaintiff testified that the harassment caused her to cry when she came home from work and that she had trouble sleeping and had nightmares. She said, "I got to where I couldn't eat. I was throwing up green phlegm all the time. My bowels wouldn't move." Her relationship with her husband also suffered.

The plaintiff also testified to a history of sexual abuse. As a child, she had been locked in a closet by a friend of her father's for two weeks, with her hands and feet bound with duct tape. The man took her out on several occasions to rape her. At the age of nine, she was sexually molested. She gave birth to an illegitimate child at the age of fifteen. She then married the child's father, a physically abusive drug addict, at the age of sixteen and divorced him when she was twenty-one years of age. An uncle sexually molested her when she was eigh-

teen years of age. The plaintiff's father was an alcoholic who physically abused her and her mother and sister.

Two psychiatrists and a clinical psychologist testified for the plaintiff. They testified that the plaintiff was suffering from posttraumatic stress disorder, dissociative disorder, and depression. A posttraumatic stress disorder occurs when a person has had a traumatic experience, and he or she reexperiences the trauma again and again.

A dissociative disorder occurs when a person has had a bad experience and rather than being stored normally in the brain as a memory, it is broken into several parts and stored in the brain so the person does not remember it and does not have to face it. A traumatic experience can cause the parts to reunite, and the person then remembers the bad experience. This is called an abreaction or flashback.

The experts testified that the plaintiff had a dissociative disorder in regard to the experiences she had while growing up. The experiences at Copland had caused a flashback, and all the earlier experiences were remembered. This caused serious mental problems for the plaintiff. At the end of the evidence, the court dismissed all claims except the claim for intentional infliction of emotional distress against Haynes and the claims against Copland for ratification of Haynes' conduct and negligent retention of Haynes.

The jury awarded the plaintiff $2,000 in actual damages and $5,000 in punitive damages against Haynes. The jury awarded the plaintiff $50,000 in actual damages and $250,000 in punitive damages against Copland. Haynes did not appeal.

The Court of Appeals ordered a new trial for an error in the charge. We allowed petitions for discretionary review by both parties.

Daniel H. Moore and Hunt and White, by Octavis White, George Hunt, and Andrew Hanford, for plaintiff-appellant.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., and Denis E. Jacobson, for defendant-appellant.

WEBB, Justice.

This case brings to the Court a question as to the application of the "thin skull" rule. This rule provides that if the defendant's misconduct amounts to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered by the plaintiff

notwithstanding the fact that these damages were unusually extensive because of the peculiar susceptibility of the plaintiff. *Lockwood v. McCaskill*, 262 N.C. 663, 670, 138 S.E.2d 541, 546 (1964).

The plaintiff recovered damages in this case because of a flashback resulting from her dissociative disorder. She was allowed to recover the full extent of her damages from the defendant because of her peculiar susceptibility to matters that cause severe emotional distress. This is an application of the thin skull rule.

[1] Defendant Copland asserts that there was error in the trial because the jury was allowed to consider the thin skull damages when it determined the liability issue. This, says the defendant, let the jury find liability without finding that defendant Haynes' action could have caused severe emotional distress in a person of ordinary susceptibility. We disagree.

There was testimony by Kim Ragland, a clinical psychologist, that a person of ordinary sensibilities with no prior sexual history could be affected the same way the plaintiff was affected in this case. The trial court charged the jury that it would have to find that Haynes' wrongful actions under the same or similar circumstances could reasonably have been expected to injure a person of ordinary mental condition. The evidence permitted a finding of liability before application of the thin skull rule, and the jury was instructed that it must so find. We presume the jury followed the court's instructions. There was no error in the application of the thin skull rule.

[2] The Court of Appeals held that the superior court failed to adequately charge that the jury could not find the plaintiff had been injured by a flashback to her suppressed mental problems until it first found that Haynes' actions could have caused severe emotional distress to a person of ordinary mental condition. The plaintiff assigns error to this holding by the Court of Appeals. We believe this assignment of error has merit.

The court charged the jury as follows:

> Now, members of the jury, in deciding whether the plaintiff's injury was a foreseeable consequence of the defendant Haynes' wrongful actions, you must determine whether such wrongful actions under the same or similar circumstances could reasonably have been expected to injure a person of ordinary mental condition. If so, the harmful consequences from the defendant's wrongful acts would be reasonably foreseeable and

therefore would be a proximate cause of plaintiff's injury. Under such circumstances the defendant would be liable for all the harmful consequences which occur even though these harmful consequences may be unusually extensive because of the peculiar or abnormal mental condition which happened to be present in the plaintiff.

The court later charged:

> Once again, members of the jury, in deciding whether the plaintiff's injury was a foreseeable consequence of the defendant Haynes' wrongful actions, you must determine whether such wrongful actions under the same or similar circumstances could reasonably have been expected to injure a person of ordinary mental condition. If so, the harmful consequences from the defendant's wrongful acts would be reasonably foreseeable and therefore would be a proximate cause of the plaintiff's injury. Under such circumstances the defendant would be liable for all the harmful consequences which occurred even though these harmful consequences may be unusually extensive because of the peculiar or abnormal mental condition which happened to be present in the plaintiff.

These were adequate instructions on this feature of the case.

Defendant Copland contends it was error to give this instruction because there is no evidence in the record that Haynes' conduct exacerbated the plaintiff's preexisting dissociative disorder. The Court of Appeals correctly dealt with this question, and we did not allow review on it.

[3] Defendant Copland also contends that the instruction was erroneous because it allowed the jury to find liability based solely on a finding that Haynes' conduct exacerbated the plaintiff's preexisting condition. We disagree. The instruction clearly told the jury that it must find that the "wrongful actions under the same . . . circumstances could reasonably have been expected to injure a person of ordinary mental condition" before it could hold defendant Copland liable for all the harmful consequences of Haynes' action.

Defendant Copland also contends under this assignment of error that the thin skull rule applies to only physical, not mental, injuries. The Court of Appeals answered this question adversely to the defendant, and we did not allow review on this issue.

[4] Finally, defendant Copland contends that the charge was in error because the instructions were given during the part of the charge on damages rather than during the liability phase. We note that in Copland's assignment of error, it says it was error to let the thin skull rule be considered during the liability phase of the case. We cannot hold this was error. Assuming this part of the charge should have been given during instructions on the liability issue, the defendant was not prejudiced. The jury was properly charged as to how damages were to be calculated, and we assume the jury followed the court's charge.

For the reasons given in this opinion, we reverse the Court of Appeals and remand for reinstatement of the judgment of the superior court.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. HERMAN ANTHONY RORIE

No. 330PA97

(Filed 8 May 1998)

Criminal Law § 1324 (NCI4th Rev.)— first-degree murder—pretrial conference—prosecutor's failure to request—sanction—prohibition of capital trial—exceeding inherent authority

The trial court's order prohibiting the State from seeking the death penalty in a first-degree murder prosecution as a sanction for the district attorney's failure to timely file a petition for a special pretrial conference as required by Rule 24 of the Rules of Practice for the Superior and District Courts exceeded the trial court's inherent authority to enforce the Rules of Practice since the order is potentially in conflict with the mandate of the General Assembly in the capital sentencing statute that evidence or lack of evidence of an aggravating circumstance dictates whether a defendant will be tried capitally or noncapitally for first-degree murder; the order impermissibly impinges on the district attorney's obligation under the North Carolina Constitution to prosecute all criminal actions in the superior courts of his district; and the order impermissibly limits the right of the people to

have defendant, if permitted by the evidence, prosecuted and punished to the full extent of the law for this crime. N.C. Const. art. IV, § 13; N.C. Const. art. IV, § 18; N.C.G.S. § 7A-34.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered by Beal, J., on 9 May 1996 in Superior Court, Mecklenburg County, granting defendant's motion to prohibit the State from seeking the death penalty. Heard in the Supreme Court 18 December 1997.

Michael F. Easley, Attorney General, by Gail E. Weis, Assistant Attorney General, for the State-appellant.

Susan J. Weigand, Assistant Public Defender, and Jean B. Lawson, for defendant-appellee.

PARKER, Justice.

The issue in this case is whether the trial court, as a sanction for the district attorney's violation of Rule 24 of the General Rules of Practice for the Superior and District Courts ("Rules of Practice"), exceeded its authority by prohibiting the State from seeking the death penalty where defendant is charged with first-degree murder. At the outset we note that an assistant district attorney signed the pleadings in this case and that this assistant along with another assistant district attorney appeared for the State at the pertinent hearing. As used in this opinion, the term district attorney refers to the elected district attorney and assistant district attorneys.

On 12 December 1995 defendant was arrested and charged with first-degree murder pursuant to a warrant for the 26 November 1995 murder of Marion Horton McIlwaine. On 13 December 1995 the Office of the Public Defender was appointed to represent defendant. On 24 January 1996 defendant waived his right to a probable cause hearing.

Over the next three months, defendant served multiple discovery requests upon the State but received no information in return. On 29 April 1996 defendant filed a motion to compel discovery and a motion to prohibit the State from seeking the death penalty on the ground that the State had not timely filed a petition for a special pretrial conference as required by Rule 24 of the Rules of Practice. The next day, 30 April 1996, the State provided defendant with a partial response to defendant's discovery requests and a copy of a petition for a Rule 24 conference.

On 1 May 1996 the trial court heard defendant's motions and on 9 May ordered the State to provide full discovery and sanctioned the State for the district attorney's Rule 24 violation by granting defendant's motion to prohibit the State from seeking the death penalty. In its order the trial court found, *inter alia*, that the superior court obtained jurisdiction of the case when defendant waived probable cause on 24 January 1996 and that on the day defendant filed his motion to prohibit the State from seeking imposition of the death penalty, ninety-seven days had passed since the superior court obtained jurisdiction. The trial court then concluded as follows:

> Based upon the foregoing FINDINGS OF FACT, the Court FINDS AS FACT AND CONCLUDES AS A MATTER OF LAW, that the most important purpose of Rule 24 is to assure that the Defendant has effective assistance of counsel and that on these facts, there has been a substantial violation of the defendant's rights to effective assistance of counsel by virtue of the state's failure to timely file its Rule 24 Petition and the Court will preclude the state from seeking the death penalty.

Thereafter, on 9 September 1996 defendant was indicted for first-degree murder, common law robbery, felonious breaking and entering, larceny of automobile, and three counts of habitual felon.

On 17 July 1997 the State petitioned this Court for a writ of certiorari, which was allowed, to review the trial court's 9 May 1996 interlocutory order precluding the State from seeking the death penalty.

Rule 24 of the Rules of Practice provides:

> There shall be a pretrial conference in every case in which the defendant stands charged with a crime punishable by death. No later than ten days after the superior court obtains jurisdiction in such a case, the district attorney shall apply to the presiding superior court judge or other superior court judge holding court in the district, who shall enter an order requiring the prosecution and defense counsel to appear before the court within forty-five days thereafter for the pretrial conference.

Gen. R. Pract. Super. and Dist. Ct. 24, Ann. R. N.C. 22 (1998). Rule 24 further outlines that the court and parties at the conference are to consider "the nature of the charges against the defendant," "the ex-

istence of evidence of aggravating circumstances," and "timely appointment of assistant counsel for an indigent defendant when the State is seeking the death penalty." *Id.* at 23. The Rule 24 conference is an administrative device designed to clarify the charges against the defendant and to assist the prosecutor, defense counsel, and the trial judge in determining whether sufficient evidence of an aggravating circumstance exists for the State to seek the death penalty and whether the defendant is entitled to assistant counsel under N.C.G.S. § 7A-450(b1). A defendant does not gain or lose any rights at the conference. *State v. Chapman*, 342 N.C. 330, 338-39, 464 S.E.2d 661, 666 (1995), *cert. denied*, —— U.S. ——, 135 L. Ed. 2d 1077 (1996). Rule 24's ten-day time limitation clearly contemplates that cases which may be tried capitally are to be identified as early as possible in the process.

Conceding that the trial court had inherent authority to enforce Rule 24 of the Rules of Practice, the State contends that the order exceeded the scope of that inherent authority. The State argues that the order was inconsistent with the mandatory provisions of N.C.G.S. § 15A-2000 and that the order was not reasonably necessary to the administration of justice. For the reasons which follow, we agree that the trial court's order exceeded the scope of its inherent authority.

Article IV, Section 13 of the North Carolina Constitution provides:

> (2) *Rules of Procedure.* The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. If the General Assembly should delegate to the Supreme Court the rule-making power, the General Assembly may, nevertheless, alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court for the Superior Court or District Court Division.

Pursuant to this provision of the state Constitution, the legislature enacted the following statute:

> The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts sup-

> plementary to, and not inconsistent with, acts of the General Assembly.

N.C.G.S. § 7A-34 (1995).

Read together, these two provisions vest in the General Assembly the authority to promulgate rules of procedure for the superior courts and limit this Court's rule-making authority for the superior court to rules which are not inconsistent with acts of the General Assembly. Similarly, enforcement of the Rules of Practice promulgated by this Court cannot be effected in a manner inconsistent with the Constitution or acts of the General Assembly.

In discussing the inherent powers of a court, this Court has stated:

> "[T]he inherent powers of a court do not increase its jurisdiction but are limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." *Hopkins v. Barnhardt*, 223 N.C. 617, 619-20, 27 S.E.2d 644, 646 (1943). In order for a court's power to be inherent, "it must be such as is reasonably necessary for the exercise of its proper function and jurisdiction in the administration of justice and such as is not granted or denied to it by the Constitution or by a constitutionally enacted statute." Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 13 (1974).

State v. Gravette, 327 N.C. 114, 124, 393 S.E.2d 865, 871 (1990) (alteration in original).

Under Article IV, Section 18 of the North Carolina Constitution, "[t]he District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district." In exercising this obligation, the district attorney is authorized, consistent with the evidence, to prosecute to the full extent of the law. Moreover, the people of the State, not the district attorney, are the party in a criminal prosecution. N.C. Const. art. IV, § 13(1); *see also Simeon v. Hardin*, 339 N.C. 358, 368, 451 S.E.2d 858, 865 (1994).

While the district attorney has broad discretion to decide in a homicide case whether to try a defendant for first-degree murder, second-degree murder, or manslaughter, *State v. Lawson*, 310 N.C. 632, 643-44, 314 S.E.2d 493, 500-01 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985), the district attorney has no discretion to

decide whether to try a defendant capitally or noncapitally for first-degree murder. N.C.G.S. § 15A-2000 (1997); *State v. Britt*, 320 N.C. 705, 710, 360 S.E.2d 660, 662 (1987). Evidence or lack of evidence of an aggravating circumstance, not the district attorney's discretion, dictates whether the defendant tried for first-degree murder will be subject to a capital sentencing proceeding if convicted or adjudicated guilty of the capital felony. *Id.*

In the instant case, at the hearing on defendant's motion to prohibit imposition of the death penalty, the district attorney did not indicate whether there was evidence to support an aggravating circumstance. Both parties' briefs in this Court recite that defendant was subsequently indicted for felonious breaking and entering, common law robbery, and larceny of automobile in connection with the murder, thus suggesting that evidence of an aggravating circumstance enumerated in N.C.G.S. § 15A-2000(e) may exist.

Under the trial court's order, notwithstanding what evidence of an aggravating circumstance or circumstances may exist, the district attorney is precluded from trying defendant capitally for first-degree murder. However, under the capital sentencing statute, the district attorney cannot try defendant noncapitally for first-degree murder if evidence of an aggravating circumstance exists. Thus, the trial court's order is potentially in conflict with the mandate of the General Assembly in the capital sentencing statute and impermissibly impinges on the district attorney's obligation under the North Carolina Constitution to prosecute all criminal actions in the superior courts of his district. The order also impermissibly limits the right of the people to have defendant, if permitted by the evidence, prosecuted and punished to the full extent of the law for this most serious crime. For these reasons the sanction imposed for the district attorney's violation of a rule for the superior court promulgated by this Court pursuant to N.C.G.S. § 7A-34 exceeds the court's inherent authority to enforce the Rules of Practice, and the order cannot stand.

In reaching this conclusion, we appreciate that the trial court, without any previous guidance from this Court, was conscientiously fashioning a sanction which would both get the district attorney's attention and eliminate any possible prejudice to defendant resulting from the district attorney's failure to petition for the required hearing within the time prescribed. We remind the district attorneys that Rule 24 of the Rules of Practice is mandatory. Repeated violations of the rule manifesting willful disregard for the fair and expeditious prose-

cution of capital cases may result in citation for contempt pursuant to N.C.G.S. § 5A-11(7) or other appropriate disciplinary action against the district attorney.

REVERSED.

STATE OF NORTH CAROLINA v. CLIFTON HAROLD PEARSON, JR.

No. 165PA97

(Filed 8 May 1998)

1. Searches and Seizures § 81 (NCI4th)— traffic stop—consent to search car—driver frisked as standard procedure—not justified

The circumstances did not justify a nonconsensual search of defendant's person where defendant was stopped for his driving, he was issued a warning ticket and consented to a search of his car, he was frisked by one officer while another searched the car, and cocaine was found on his person. Defendant was stopped at 3:00 p.m. on an interstate highway and had a slight odor of alcohol but not enough to be charged with driving while impaired, which should not give rise to a reasonable suspicion of criminal activity; the nervousness about which a trooper testified is not significant because many people become nervous when stopped by a state trooper; the variance in the statements of the defendant and his fiancée about where they had been the night before did not show criminal activity; the officers testified defendant was frisked because it was standard procedure to do so when a vehicle was searched; the officers had never before encountered defendant and were not aware of any criminal record or investigation for drugs pertaining to him; defendant was polite and cooperative; the bundle in his pants was not obvious and was not noticed by either officer; and defendant had been in the presence of the trooper for over ten minutes, including being left alone in the patrol car while the trooper talked to defendant's fiancée, without making any movement or statement to indicate that he had a weapon.

2. Searches and Seizures § 61 (NCI4th)— traffic stop—consent to search vehicle—defendant told his person would be searched—acquiescence not consent

The conclusion of a superior court judge that a defendant in a cocaine possession and trafficking prosecution had consented to a search of his person was erroneous where defendant was stopped in mid-afternoon for his driving; he was polite and cooperative; the officer detected alcohol but not enough to charge him with driving while impaired; defendant was in the officer's presence for about ten minutes before the search and was left alone in the patrol car at one point; defendant had made no movement or statement to indicate that he had a weapon; the trooper asked defendant for permission to search defendant's car and defendant signed a consent form; another trooper arrived and was asked by the first to frisk defendant while defendant's car was searched; both troopers testified that standard procedure requires frisking every individual whose car is searched; the second trooper told defendant that he was going to search him and requested that defendant place his hands on the back of the patrol car; and cocaine was found on defendant's person. The consent signed by defendant applied only to the vehicle and cannot be broadened to include his person and the acquiescence of the defendant when the officer told him he would frisk him was not a consent, considering all of the circumstances. There must be a clear and unequivocal consent before a defendant can waive his constitutional rights.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a unanimous decision of the Court of Appeals, 125 N.C. App. 676, 482 S.E.2d 16 (1997), affirming the denial of the defendant's motion to suppress evidence by Cornelius, J., on 12 October 1995 in Superior Court, Guilford County. Heard in the Supreme Court 13 October 1997.

On 19 June 1995, defendant was indicted for trafficking in cocaine by transporting more than 28 grams but less than 200 grams, trafficking in cocaine by possession of more than 28 grams but less than 200 grams, possession with intent to sell and deliver a controlled substance, and felonious possession of a controlled substance. The defendant moved to suppress the evidence found as a result of the search of his person. On 12 October 1995, the defendant's motion was heard in the superior court.

The testimony at the hearing tended to show the following: On 12 October 1994, at approximately 3:00 p.m., the defendant was driving south on Interstate 85 in Guilford County. His fiancée was a passenger in his car. State Trooper Timmy Lee Cardwell was also traveling south on Interstate 85 that afternoon. Trooper Cardwell noticed that the defendant's car drifted back and forth in its lane and that the defendant was driving below the posted speed limit. Trooper Cardwell stopped the defendant.

The defendant produced a valid driver's license and registration. Trooper Cardwell then asked the defendant to sit in the patrol car. While in the patrol car, Trooper Cardwell detected a slight odor of alcohol on the defendant. He also said that he observed that the defendant was nervous and had a rapid heart rate. However, the trooper determined that the defendant was tired, not impaired from alcohol. The defendant told Trooper Cardwell that he had had little sleep the previous night. He said that he and his fiancée had left the Charlotte area the day before and spent the night at his parents' home near the Virginia state line.

Trooper Cardwell next spoke with the defendant's fiancée in the defendant's car while the defendant remained seated in the patrol car. She said that the couple had spent the previous night in New York visiting the defendant's parents. On each trip to and from the defendant's car, Trooper Cardwell looked into the car for drugs or weapons. He saw nothing suspicious.

Trooper Cardwell returned to his patrol car and asked the defendant for permission to search his car. The defendant consented and signed a consent form. Trooper Cardwell then issued the defendant a warning ticket for his driving and called for assistance. At this point, the defendant had been stopped for approximately ten minutes.

Trooper William Joseph Gray responded to Trooper Cardwell's request for assistance. When Trooper Gray arrived at the scene, Trooper Cardwell asked Trooper Gray to frisk the defendant while Trooper Cardwell searched the defendant's car. Both troopers testified that standard procedure requires the frisking of every person whose car is searched.

Trooper Gray informed the defendant that he was going to search him and requested that the defendant place his hands on the back of Trooper Cardwell's patrol car. The defendant did so. While frisking the defendant, Trooper Gray discovered a large, hard object in defendant's crotch area. The object was removed from the defend-

ant's person and was discovered to be small bags of cocaine and marijuana taped together with fabric softener strips.

The superior court found facts consistent with the evidence and concluded that the defendant signed the consent to search form freely and voluntarily and did not object to the search of his person or vehicle. The court overruled the defendant's motion to suppress. The defendant subsequently entered pleas of guilty to the two counts of trafficking cocaine. The State dismissed the remaining charges, and the defendant was sentenced to thirty-five to forty-two months' imprisonment. The defendant appealed pursuant to N.C.G.S. § 15A-979(b).

The Court of Appeals affirmed the decision of the superior court. The defendant is before this Court on appeal from a constitutional question; we also allowed discretionary review.

Michael F. Easley, Attorney General, by John J. Aldridge III, Assistant Attorney General, for the State.

Walter L. Jones for the defendant-appellant.

American Civil Liberties Union of North Carolina Legal Foundation, by Sandy S. Ma, amicus curiae.

WEBB, Justice.

[1] The Court of Appeals, in finding the seizure of contraband was proper, did not rely on the order of the superior court, which held the defendant consented to the search. The Court of Appeals held the search and seizure was lawful without a consent. This was error.

When an officer observes conduct which leads him reasonably to believe that criminal conduct may be afoot, he may stop the suspicious person to make reasonable inquiries. If he reasonably believes that the person is armed and dangerous, the officer may frisk the person to discover a weapon or weapons. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968); *State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992); *State v. Peck*, 305 N.C. 734, 291 S.E.2d 637 (1982). The State argues and the Court of Appeals held that the evidence that the defendant had an odor of alcohol, acted "nervous and excited," and made statements inconsistent with his fiancée's statement as to their whereabouts the night before supports findings that the two officers had a reasonably articulable suspicion that the defendant may have been armed and dangerous. We disagree.

We cannot hold that the circumstances considered as a whole warrant a reasonable belief that criminal activity was afoot or that the defendant was armed and dangerous. The defendant was stopped at 3:00 p.m. on an interstate highway. Both officers testified that he was polite and cooperative. He had a slight odor of alcohol but not enough to be charged with driving while impaired. This should not give rise to a reasonable suspicion of criminal activity.

The nervousness of the defendant is not significant. Many people become nervous when stopped by a state trooper. The variance in the statements of the defendant and his fiancée did not show that there was criminal activity afoot. The officers testified the defendant was frisked because it was standard procedure to do so when a vehicle is searched.

The officers had never before encountered the defendant. They were not aware of any criminal record or investigation for drugs pertaining to him. The defendant was polite and cooperative. The bundle in his pants was not obvious and was not noticed by either officer.

The defendant had been in the presence of Trooper Cardwell for over ten minutes. Cardwell had placed the defendant in his patrol car without a frisk. He left the defendant alone in the patrol car while he talked to the defendant's fiancée. The defendant had not made any movement or statement which would indicate that he had a weapon.

We hold that the circumstances in the instant case did not justify a nonconsensual search of the defendant's person. We, therefore, reverse the holding of the Court of Appeals as to this issue.

The State relies on *State v. McGirt*, 122 N.C. App. 237, 468 S.E.2d 833 (1996), *aff'd per curiam*, 345 N.C. 624, 481 S.E.2d 288, *cert. denied*, — U.S. —, 139 L. Ed. 2d 121 (1997). In *McGirt*, the Court of Appeals held, and we affirmed, that it was lawful for an officer to frisk a person who had been removed from a vehicle when the officer knew that the defendant was a convicted felon who was under investigation for cocaine trafficking and that cocaine dealers normally carry weapons. None of these facts are present here. *McGirt* is not precedent for this case.

The State also relies on *State v. Beveridge*, 112 N.C. App. 688, 436 S.E.2d 912 (1993), *aff'd per curiam*, 336 N.C. 601, 444 S.E.2d 223 (1994). In that case, the Court of Appeals held, and we affirmed, that

evidence of cocaine seized in a "pat down" search of the defendant after he had been removed from a vehicle should have been excluded. The defendant in that case appeared to be under the influence of some impairing substance. The basis of the holding in that case was that the search was intrusive. The Court of Appeals said that the officer was justified under *Terry* in frisking the defendant but that when the "pat down" did not reveal a weapon, the search should have been stopped. If the search was too intrusive, it was unlawful regardless of *Terry*. The mention of *Terry* in *Beveridge* was not necessary to a resolution of the case. It was dictum. *Beveridge* is not precedent for this case.

[2] The Court of Appeals decided the case on the ground that there was a proper protective search, and did not reach the question of whether there was a consent to the search. This was the ground upon which the superior court decided the case.

The superior court relied on the consent to search the vehicle signed by the defendant and the fact that he did not object when he was searched to conclude the defendant consented to the search. This was error. The consent signed by the defendant applied only to the vehicle. We cannot broaden the consent to include the defendant's person. N.C.G.S. § 15A-223(a) (1997). We also cannot hold that the acquiescence of the defendant when the officer told him he would frisk him was a consent, considering all the circumstances. There must be a clear and unequivocal consent before a defendant can waive his constitutional rights. *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967).

Because we have held that the search of the defendant was unlawful, we reverse the decision of the Court of Appeals and remand for further remand to the Superior Court, Guilford County, to vacate the defendant's plea of guilty.

REVERSED AND REMANDED.

GEORGE A. GRIFFIN AND BRENDA GRIFFIN, PLAINTIFFS V. SAMUEL GRIFFIN, JO BULLOCK, CHARLIE LANKFORD, DOROTHY LANKFORD AND KENNETH DAVID BULLOCK, DEFENDANTS V. MICHAEL GRIFFIN, DONNA GRIFFIN, GEORGE F. GRIFFIN, AND FRANCIS ANDREWS, THIRD PARTY DEFENDANTS

No. 276PA97

(Filed 8 May 1998)

Pleadings § 61 (NCI4th)— filing of adoption petition—motion for Rule 11 sanctions—imposition of sanctions for other pleadings

Where an attorney was given notice of a motion for the imposition of sanctions upon him for his filing of an adoption petition, the trial court erred by imposing sanctions on the attorney for the filing of pleadings for which the attorney had not received notice that sanctions would be sought. In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him. N.C.G.S. § 1A-1, Rule 11.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a unanimous, unpublished decision of the Court of Appeals, 126 N.C. App. 224, 491 S.E.2d 564 (1997), affirming the imposition of sanctions against attorney Charles Henderson by Corbett, J., at the 11 September 1995 session of District Court, Johnston County. Heard in the Supreme Court 17 December 1997.

The controversy in this case began when Samuel Griffin murdered his wife, Marie Griffin, and was sentenced to life in prison. Samuel Griffin and Marie Griffin had two children, Samuel Griffin II, born in 1985, and Catherine Marie Griffin, born in 1987.

George Griffin, the nephew of Samuel Griffin, and his wife, Brenda Griffin, filed this action for the custody of the two children in District Court, Jones County, on 19 September 1990. Jo Bullock, a defendant in the action, was the sister of Marie Griffin and is married to Kenneth David Bullock. Charlie and Dorothy Lankford were the parents of Marie Griffin.

In August 1991, an order was entered granting primary custody to the plaintiffs with visitation to the Bullocks. In March 1992, a consent order was entered switching this arrangement and awarding primary custody to the Bullocks with visitation to the plaintiffs. In the mean-

time, on 25 February 1992, Michael Griffin, the brother of Samuel Griffin, and his wife, Donna Griffin, who were not parties to this case at that time, filed through their attorney Charles Henderson a petition for the adoption of the two children. This petition was filed without notice to any of the parties to this action. On 23 April 1992, the clerk of superior court entered an interlocutory order tentatively approving the adoption and giving custody of the two children to Michael and Donna Griffin. On 28 April 1992, the Bullocks made a motion pursuant to N.C.G.S. § 1A-1, Rule 11 to sanction Mr. Henderson for filing the adoption proceeding. The Bullocks contended that the adoption proceeding was filed to harass them and disrupt the orders of the court in this custody case.

On 1 May 1992, the clerk of superior court, pursuant to an order by the district court, rescinded the interlocutory order tentatively approving the adoption and giving custody of the children to Michael and Donna Griffin. Michael and Donna Griffin then intervened in this case. The venue of the case was then changed from Jones County to Onslow County and finally to Johnston County.

The Bullocks' motion for sanctions against Mr. Henderson was heard on 11 September 1995, and the trial court entered its order on 15 November 1995. The court did not impose sanctions for the matters alleged in the Bullocks' motion, but it *sua sponte* imposed sanctions for ten pleadings filed with the court which it said were filed for an improper purpose in violation of Rule 11; the court held that five of the pleadings were not well grounded in fact or law. The court ordered Mr. Henderson to pay counsel fees for the Bullocks.

The Court of Appeals affirmed the imposition of sanctions except for the filing of two affidavits which were not signed by Mr. Henderson. The case was remanded for a recalculation of attorneys' fees.

We allowed discretionary review for Mr. Henderson.

Bailey & Dixon, L.L.P., by Gary S. Parsons and John M. Kirby, for appellant Charles Henderson.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellees Jo and Kenneth David Bullock.

WEBB, Justice.

Charles Henderson had been given notice by the Bullocks that they would seek to have sanctions imposed upon him for filing a peti-

tion for an adoption. After the hearing, the court did not impose sanctions for the filing of the adoption petition. It did, however, on its own motion, impose sanctions for the filing of pleadings for which Mr. Henderson had not received notice that such sanctions would be sought. We agree with Mr. Henderson that this was error.

"Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994). The Court of Appeals held that Mr. Henderson received adequate notice of the sanctions to be imposed against him. This is so, said the Court of Appeals, because (1) Mr. Henderson had full notice that he was under consideration for Rule 11 sanctions, (2) the district court issued a detailed order reciting findings of fact informing him why the sanctions had been imposed, and (3) Mr. Henderson fully participated in the hearing at which sanctions were imposed.

We do not agree with the Court of Appeals. It is not adequate for the notice to say only that sanctions are proposed. The bases for the sanctions must be alleged. *Taylor v. Taylor Prods. Inc.*, 105 N.C. App. 620, 629, 414 S.E.2d 568, 575 (1992), *overruled on other grounds by Brooks v. Giesey*, 334 N.C. 303, 317, 432 S.E.2d 339, 347 (1993). In this case, the notice actually misled Mr. Henderson as to what sanctions would be imposed. Mr. Henderson was notified that sanctions were proposed for filing the adoption proceeding, but sanctions were imposed for something else. The fact that the court made detailed findings of fact in the order for sanctions is not adequate. In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him. The fact that Mr. Henderson participated in the hearing and did the best he could do without knowing in advance the sanctions which might be imposed does not show a proper notice was given.

For the reasons stated in this opinion, we reverse the Court of Appeals and remand for further remand to the District Court, Johnston County, to vacate the order imposing sanctions on Mr. Henderson.

REVERSED AND REMANDED.

CAULEY v. ELIZABETH CITY SCHOOLS

No. 77P98

Case below: 128 N.C.App. 532

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

CONNELLY v. N.C. FARM BUREAU MUT. INS. CO.

No. 145P98

Case below: 128 N.C.App. 750

Petition by plaintiff's for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

COPPLEY v. COPPLEY

No. 137P98

Case below: 128 N.C.App. 658

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

DAILEY v. LANCE, INC.

No. 9P98

Case below: 128 N.C.App. 185

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998.

DEASON v. J. KING HARRISON CO.

No. 591A97

Case below: 127 N.C.App. 514

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 May 1998.

EDWARDS v. WEST

No. 129P98

Case below: 125 N.C.App. 742

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 May 1998.

EVANS v. TED PARKER HOME SALES

No. 158P98

Case below: 129 N.C.App. 115

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

FERGUSON v. KILLENS

No. 168P98

Case below: 128 N.C.App. 131

Motion by petitioner for temporary stay allowed 24 April 1998.

FRENCH BROAD ELEC. MEM. CORP. v. FARMER

No. 113P98

Case below: 128 N.C.App. 748

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

GLICKMAN v. COMPUTER INTELLIGENCE, INC.

No. 609P97

Case below: 127 N.C.App. 753

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998.

IN RE OWENS

No. 122PA98

Case below: 128 N.C.App. 577

Petition by appellant for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1998. Motion by Attorney General to dismiss appeal denied 6 May 1998.

IN RE PHILLIPS

No. 141P98

Case below: 128 N.C.App. 732

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

NATIONWIDE MUTUAL INS. CO. v. DEMPSEY

No. 116P98

Case below: 128 N.C.App. 641

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

PARIS v. WOOLARD

No. 65P98

Case below: 128 N.C.App. 416

Petition by third-party defendant (Agency Services, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998.

PEZZELLA v. MORTLOCK

No. 100P98

Case below: 128 N.C.App. 532

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 May 1998.

PLYMOUTH v. GLEN RAVEN MILLS

No. 84P98

Case below: 128 N.C.App. 533

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

PRUITT v. POWERS

No. 119P98

Case below: 128 N.C.App. 585

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

ROANOKE PROPERTIES LTD. PART. v.
ROANOKE HARBOUR, INC.

No. 11P98

Case below: 128 N.C.App. 185

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998.

SMITH v. PRIVETTE

No. 83P98

Case below: 128 N.C.App. 490

Motion by plaintiffs (Smith, Cahall, & Newman) to dismiss Notices of Appeal allowed 6 May 1998.

STATE v. BASDEN

No. 159A93-2

Case below: Duplin County Superior Court

Petitioner's motion is allowed for the limited purpose of remanding this case to the Superior Court, Duplin County, for reconsideration of the discovery issue in light of this Court's opinion in *State v. Bates*, 348 N.C. 29, —— S.E.2d ——, 1998 WL 1151 (April 3, 1998) (No. 145A91-3); in all other respects, the motion is denied 7 May 1998.

STATE v. BRIGHT

No. 329P97

Case below: Mecklenburg County Superior Court

Petition by Attorney General for writ of certiorari to review superior court order is allowed 7 May 1998 for the limited purpose of entering an order vacating the trial court's order pursuant to *State v. Rorie*, 348 N.C. 226, —— S.E.2d —— (1998).

STATE v. CLARK

No. 29P98

Case below: 128 N.C.App. 87

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 May 1998.

STATE v. CREECH

No. 120P98

Case below: 128 N.C.App. 592

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

STATE v. FLOWERS

No. 553A94

Case below: Rowan County Superior Court

Motion by defendant to stay execution and to stay proceedings in superior court denied 8 April 1998. Motion by defendant for stay of execution dismissed 21 April 1998. Motion by Attorney General to vacate stay of execution entered by Martin, J., Superior Court, Rowan County on 22 April 1998 is allowed 22 April 1998.

Upon consideration of the petition by Doris Flowers for a writ of certiorari to review the order of the Superior Court, Rowan County, the following order was entered:

The execution scheduled for 24 April 1998 is hereby stayed. The petition for writ of certiorari is treated as a motion for the

appointment of Doris Flowers as next friend for the defendant Wendell Flowers for the purpose of petitioning the Superior Court, Rowan County, for an evidentiary hearing to determine said defendant's competency under G.S. 15A-1001(a) to proceed to execution. The motion is allowed for that limited purpose only. David K. Williams, Jr., the petitioning attorney, is hereby appointed as counsel for the limited purpose of representing Doris Flowers as next friend of the defendant Wendell Flowers in said hearing. The Superior Court, Rowan County, is directed to order payment of funds to permit evaluation of defendant by a mental health expert, and for testimony by said expert.

Said hearing shall be completed and an order determining defendant's competency entered within thirty days of the date of this order. The Superior Court, Rowan County, shall certify to this Court, within 20 days of the entry of its order, a copy of said order and a transcript and record of the proceedings. By order of the Court in conference, this the 23rd day of April 1998.

Motion by Doris Flowers to withdraw request for competency hearing previously ordered denied 8 May 1998.

STATE v. HOOVER

No. 128PA98

Case below: 128 N.C.App. 749

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 May 1998.

STATE v. JACKSON

No. 126PA98

Case below: 128 N.C.App. 626

Petition by defendant for discretionary review allowed only as to the issue of whether a prior no contest plea can constitute a conviction within the meaning of G.S. 14-7.1; otherwise, the petition is denied 7 May 1998.

STATE v. JORDON

No. 58P98

Case below: 128 N.C.App. 469

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998.

STATE v. LeBLANC

No. 332P97

Case below: Mecklenburg County Superior Court

Petition by Attorney General to review superior court order is allowed 7 May 1998 for the limited purpose of entering an order vacating the trial court's order pursuant to *State v. Rorie*, 348 N.C. 226, —— S.E.2d —— (1998).

STATE v. LeGRANDE

No. 215A96-2

Case below: Stanly County Superior Court

Petition by Appellate Defender for stay of execution and remand of case for hearing in Stanly County Superior Court is allowed 7 May 1998 for the limited purpose of remanding this case to the Superior Court, Stanly County, for consideration of whether defendant should be appointed counsel, and defendant shall have 90 days to file a motion for appropriate relief from the date of the trial court's order appointing or denying counsel.

STATE v. MALETTE

No. 79PA98

Case below: 128 N.C.App. 749

Petition by defendant for writ of supersedeas allowed 6 May 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1998.

STATE v. McCLAIN

No. 89P98

Case below: 128 N.C.App. 533

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998. Motion by Attorney General to dismiss appeal allowed 6 May 1998.

STATE v. McRORIE

No. 331P97

Case below: Mecklenburg County Superior Court

Petition by Attorney General for writ of certiorari to review superior court order is allowed 7 May 1998 for the limited purpose of entering an order vacating the trial court's order pursuant to *State v. Rorie*, 348 N.C. 226, — S.E.2d — (1998).

STATE v. MURPH

No. 4P98

Case below: 128 N.C.App. 187

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998.

STATE v. PEARSON

No. 131P98

Case below: 127 N.C.App. 756

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 May 1998.

STATE v. PHEIFFER

No. 135P98

Case below: 128 N.C.App. 753

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

STATE v. ROWSEY

No. 490A93-2

Case below: Alamance County Superior Court

Petition by defendant for writ of certiorari is allowed 7 May 1998 for the limited purpose of remanding this case to the Superior Court, Alamance County, for reconsideration of the discovery issue in light of this Court's opinion in *State v. Bates*, 348 N.C. 29, — S.E.2d —,1998 WL 1151 (April 3, 1998) (No. 145A91-3).

STATE v. SCHOFF

No. 85P98

Case below: 128 N.C.App. 432

Notice of Appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 7 May 1998. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 May 1998.

STATE v. SHORE

No. 124P98

Case below: 128 N.C.App. 749

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998.

STATE v. SPRINGS

No. 69P98

Case below: 128 N.C.App. 532

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 May 1998.

STATE v. THOMPSON

No. 80PA98

Case below: 128 N.C.App. 547

Petition by defendant for writ of supersedeas allowed 6 May 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1998.

STATE v. TREECE

No. 150P98

Case below: 129 N.C.App. 93

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 7 May 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

STATE v. WILSON

No. 97PA98

Case below: 128 N.C.App. 688

Petition by Attorney General for writ of supersedeas allowed 7 May 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 May 1998.

STEWART v. STEWART

No. 90P98

Case below: 128 N.C.App. 754

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 7 May 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

STREET v. INTEGRATED SYSTEM SOLUTIONS CORP.

No. 127P98

Case below: 128 N.C.App. 749

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998. Motion by plaintiff (Street) for sanctions denied 6 May 1998.

TEDDER v. ALFORD

No. 12P98

Case below: 128 N.C.App. 27

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998.

UPCHURCH v. UPCHURCH

No. 82P98

Case below: 128 N.C.App. 461

Petition by defendant (Upchurch, Sr.) for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998. Petition by defendant (Upchurch, Jr.) for discretionary review pursuant to G.S. 7A-31 denied 7 May 1998.

WALDEN v. BURKE COUNTY BD. OF EDUC.

No. 36P98

Case below: 128 N.C.App. 532

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1998.

PETITIONS TO REHEAR

DEPT. OF TRANSPORTATION v. HUMPHRIES

No. 232PA97

Case below: 347 N.C. 649

Petition by Attorney General to rehear pursuant to Rule 31 denied 7 May 1998.

SWANN v. LEN-CARE REST HOME, INC.

No. 522A97

Case below: 348 N.C. 68

Petition by plaintiff to rehear pursuant to Rule 31 dismissed 7 May 1998.

STATE OF NORTH CAROLINA v. ANDRE LAGUAN FLETCHER

No. 117A96

(Filed 9 July 1998)

1. **Searches and Seizures § 80 (NCI4th)— investigatory stop of defendant—reasonable suspicion**

Officers had reasonable suspicion to make an investigatory stop of defendant where one officer received information from two witnesses that, around the time an automobile had been broken into by breaking a window, a tall black male wearing dark pants and a white t-shirt had been acting suspiciously nearby, had picked up a cement block and walked toward the location of the automobile, and moments later had run down an alleyway; the second officer received a transmission from the first officer to be on the lookout for a tall black male wearing a white t-shirt and moving in a certain direction; and the second officer saw defendant, a person fitting this description, just moments later within two blocks of the location specified.

2. **Arrest and Bail § 63 (NCI4th); Evidence and Witnesses § 1611 (NCI4th)— probable cause for arrest—incriminating statements—recovery of evidence—not fruits of unlawful arrest**

Officers had probable cause to arrest defendant for breaking and entering an automobile where officers made an investigatory stop of defendant based upon his proximity in time and location to the crime scene and a physical description of the race, gender and clothing of the suspect by two witnesses, and a short time later one witness identified defendant as the person she had seen acting suspiciously near the automobile around the time of the breaking and entering. The hour-long detention of defendant in a patrol car was reasonable since probable cause was established shortly after the stop. Therefore, incriminating statements subsequently made by defendant about a murder and the recovery of property stolen from the murder victim as a result of those statements were not the fruits of an unlawful arrest.

3. **Evidence and Witnesses § 1259 (NCI4th)— custodial interrogation—statement not invocation of right to silence**

Defendant's statement to officers during custodial interrogation that he would be willing to take them to where he had dis-

carded stolen property after he had gotten some sleep was not an invocation of his Fifth Amendment rights to silence and to have interrogation cease; thus, it was not error for the trial court to admit into evidence defendant's subsequent incriminating statement or the fruits of that statement.

4. Jury § 123 (NCI4th)— capital case—jury voir dire—no attempt to stake out jurors on death penalty

The trial court did not improperly fail to prohibit the State from staking out prospective jurors in a capital case with respect to whether they could vote for the death penalty where the prosecutor's questions simply attempted to determine whether the jurors could follow the law in imposing the death penalty and did not presume evidentiary facts or require that the jurors pledge themselves to a position under any given set of evidentiary facts.

5. Jury § 123 (NCI4th)— capital case—jury voir dire—weighing of aggravating circumstances—no attempt to stake out jurors

The trial court did not improperly fail to prohibit the State from staking out prospective jurors with respect to whether they would weigh aggravating circumstances more heavily than mitigating circumstances where the prosecutor's questions asked the jurors if they could weigh the significance of the aggravating and mitigating circumstances rather than the relative number of aggravators and mitigators, which questions simply asked the jurors if they could follow the long-settled law.

6. Jury § 123 (NCI4th)— capital case—jury voir dire—finding of particular aggravating circumstance—vote for death penalty—improper stake-out question

Defense counsel's question to a prospective juror in a capital trial as to whether the juror would automatically vote for the death penalty if the jury found the especially heinous, atrocious or cruel aggravating circumstance was an inappropriate stake-out question. Even if defense counsel's question were held to be a proper attempt under *Morgan v. Illinois*, 504 U.S. 719, to determine whether this juror would automatically vote for the death penalty without regard for mitigating circumstances, defendant was not prejudiced by the exclusion of this question where the trial court allowed defendant's challenge for cause to remove the juror after subsequent questioning exposed the juror's inability to be impartial and consider mitigating circumstances.

7. Jury § 259 (NCI4th)— peremptory challenge—absence of racial discrimination—sufficient determination

The trial court made a sufficient ultimate determination that there was no purposeful racial discrimination in the State's peremptory strike of a prospective juror when the court denied defendant's *Batson* motion and entered the conclusion of law that the prosecutor's reasons for excluding the juror, his expressed lack of confidence in the court system and his prior record, were "race neutral and sufficient to justify the peremptory challenge."

8. Jury § 259 (NCI4th)— peremptory challenge—male black prospective jurors—racially discriminatory strike of one—discrimination in strike of second not shown

The trial court's finding of no racial discrimination in the State's peremptory strike of a black potential juror in this capital trial based upon his prior record and his expressed lack of confidence in the judicial system was not error because the court found that the prosecutor's explanation that he peremptorily struck the only other black male in the same panel for his membership in the NAACP, an organization that opposed the death penalty, was not racially neutral and was pretextual where the trial court considered the State's explanations as to the two black male jurors together; the *prima facie* case as to both jurors was not particularly strong given that one black female juror had already been accepted and placed on the jury; and the trial court's determination that the prosecutor's explanation of the strike of the other juror was not race-neutral was predicated as much upon the manner in which the explanation was made as upon the substance of the explanation in that the court found that, when asked to articulate a race-neutral reason to excuse the other juror, the prosecutor did not immediately offer the juror's NAACP membership as the reason but supplied this rationale only after studying the juror's information sheet at length.

9. Jury § 259 (NCI4th)— peremptory challenge—lack of confidence in judicial system—no racial discrimination

The trial court did not err by failing to find intentional racial discrimination in the State's peremptory strike of a black prospective juror for his expressed lack of confidence in the judicial system on the basis of disparate questioning of black and white prospective jurors about their views of the judicial system

where the record shows that the prosecutor questioned many prospective jurors, irrespective of race, on their beliefs and feelings about the fairness of the judicial system, and although the questions often were varied in form, the same basic information was sought in each case.

10. Jury § 259 (NCI4th)— peremptory challenge—race-neutral reasons—passed juror—one common factor—racial discrimination not shown

Although acceptance by the State of white prospective jurors similarly situated to black prospective jurors who have been peremptorily stricken is a factor to be considered in determining whether there has been purposeful racial discrimination, the trial court did not err in failing to find that a black prospective juror was stricken for impermissible racially discriminatory reasons where defendant found a single factor among several articulated by the prosecutor and matched it to a passed white juror who exhibited the same factor.

11. Jury § 257 (NCI4th)— peremptory strike of black jurors—prima facie discrimination not shown

The trial court did not err in finding no *prima facie* case of racial discrimination in the State's peremptory strikes of two black prospective jurors where two of four black jurors had been seated on the jury after the first juror was excused and two of five black jurors had been seated after the second black juror was excused.

12. Criminal Law § 433 (NCI4th Rev.)— prosecutor's closing argument—no comment on defendant's right not to testify

The prosecutor did not improperly comment during closing argument on defendant's failure to testify where the prosecutor's remarks were directed toward defendant's failure to offer evidence to rebut the State's case, not at defendant's failure to take the stand himself. The prosecutor's comment that two people know what happened on the night of the murder, one of them is dead, and "the other one is sitting right here" was merely an argument that defendant is in fact the killer; the argument concerning unanswered questions about what happened that night recognizes that the jury might have some unanswered questions which do not prevent the jury from finding defendant guilty beyond a reasonable doubt; and the argument that defendant pled not guilty and thereby required the State to prove the case, read in

context, is an argument that the State has done what the State was required to do and that, based on the evidence presented, defendant's presumption of innocence was overcome. None of these arguments were so grossly improper as to require intervention by the trial court *ex mero motu*.

13. Criminal Law § 1384 (NCI4th Rev.)— capital sentencing—mitigating circumstance—mental or emotional disturbance—erroneous failure to submit

The trial court erred by failing to submit to the jury in a capital sentencing proceeding the statutory mitigating circumstance that the capital felony was committed while defendant was under the influence of a mental or emotional disturbance where a psychologist who evaluated defendant several times between his arrest and trial testified (1) that under times of stress, defendant might not perceive reality correctly and that it was likely that defendant had been in a stress-overload situation for a very long time based on his environment and psychological problems, and (2) given defendant's lack of any violent history, defendant would have had to have been "in a very psychotic state or really out of it on drugs" to attack and kill in the manner in which the victim was killed. This testimony was sufficient to link defendant's mental or emotional state to the time of the killing, and a reasonable juror could conclude from this evidence that defendant was under a mental or emotional disturbance at the time of the killing. N.C.G.S. § 15A-2000(f)(2).

14. Criminal Law § 1382 (NCI4th Rev.)— capital sentencing—mitigating circumstance—no significant criminal history—erroneous failure to submit

The trial court erred by failing to submit to the jury in a capital sentencing proceeding the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where the evidence tended to show that defendant had a history of stealing since he was a child and that, since 1990, he had been convicted of two counts of felonious breaking and entering, three counts of felonious larceny, felonious possession of stolen property, misdemeanor breaking and entering, five counts of misdemeanor larceny, and assault on a female; the breaking and entering and larceny charges involved only unoccupied vehicles, and there was no evidence prior to the killing of the victim in this case that defendant broke into anyone's home; and numerous witnesses testified that defendant's larcenous history is devoid of

any violence, aggressive or physical behavior, or confrontation with the victims of the larcenies. Given the largely nonviolent nature of defendant's prior criminal activities, a juror could reasonably have concluded that defendant had no significant history of prior criminal activity.

Chief Justice MITCHELL dissenting.

Justice FRYE dissenting in part.

Justice WHICHARD joins in this dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Warren, J., at the 29 January 1996 Criminal Session of Superior Court, Rutherford 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 first-degree burglary and robbery with a dangerous weapon was allowed 19 December 1996. Heard in the Supreme Court 17 November 1997.

Michael F. Easley, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

Ann L. Hester for defendant-appellant.

PARKER, Justice.

Defendant was indicted 7 September 1994 for first-degree murder, first-degree burglary, and robbery with a dangerous weapon. In January 1996 he was tried capitally and found guilty of first-degree murder upon theories of (i) malice, premeditation, and deliberation and (ii) felony murder. He was also found guilty of first-degree burglary and robbery with a dangerous weapon. Following a capital sentencing proceeding, the jury recommended a sentence of death for the murder, and the trial court entered judgment accordingly. For the first-degree burglary conviction, the trial court entered a consecutive sentence of imprisonment for fifty years, and for the robbery conviction, a consecutive sentence of forty years. We find no error meriting reversal of defendant's convictions. However, for the reasons stated herein, we conclude that defendant is entitled to a new capital sentencing proceeding.

On 17 August 1994 Georgia Ann Dayberry Hamrick ("victim"), eighty-three, was battered and knifed to death in her home in

Spindale, Rutherford County, North Carolina. The State's evidence tended to show that defendant broke into the victim's home, beat her to find out where her valuables were, and then cut her throat. He took several rings, two of which he sold over the next couple of days for $250.00 and $60.00.

In the early morning hours of Wednesday, 17 August, during a summer rainstorm, defendant pulled out the top corner of the front storm door of the victim's house, breaking the pane of glass, and kicked in the wooden door to get inside. Defendant awakened the victim and, taking her into the various rooms of her house, battered her over the head to force her to give him money and jewelry. Blood drops stained the dining room table and floor, and blood spatter stained the dining room curtains and walls. The kitchen cabinets and walls also bore blood spatter, and a large amount of blood was pooled on the kitchen floor and table. The victim attempted to defend herself against the blows but was overpowered. Defendant then cut the victim's throat with a kitchen knife, exposing and lacerating the jugular vein, and left the house. The victim, still alive, was able to move down the hall to her bedroom, where she collapsed in a chair and died.

Searches of defendant's house, located about two hundred yards from the victim's house, produced from defendant's closet a pair of wet Fila tennis shoes whose soles were consistent with shoe prints, in both dust and blood, found in the victim's house and on her front door. A pawn ticket for $60.00, dated Thursday, 18 August, was found in the purse of defendant's girlfriend, Lisa Hill. The ticket was for a diamond and sapphire ring that the victim's family members testified had belonged to the victim. A second of the victim's rings was found behind the television in defendant's house. A search of defendant's car produced a small silver sewing kit that had belonged to the victim.

Upon interrogation, defendant revealed that in the early morning hours of 17 August, he remembered waking up in his house and sitting and looking at ten or twelve rings, not knowing where they came from. He also said that, at that time, he could see in his mind a white woman with a knife, as if he were having some type of vision. He told the police that he was scared because he did not know where the rings came from. He also told the police that on 18 August he and Hill sold one of the rings to a jewelry store and pawned another at a pawn shop. The police recovered these two rings, and the victim's family members testified that they had belonged to the victim. As for the

rest of the rings, defendant said he put some of them in a trash can in a convenience store restroom and some more in a gutter behind a shop in town. The police recovered six rings from the restroom and three more from the gutter where defendant had indicated. Police confirmed that all the rings belonged to the victim.

Defendant presented evidence that despite his possession of the victim's rings there was not enough evidence linking defendant to the burglary and murder; he also presented evidence that the crimes were committed by a person who was seen around the time of the crimes by various eyewitnesses and whom the police never found. Defendant's clothes and shoes, seized from his home, did not produce any evidence of microscopic glass fragments expected to be left from the breaking of the glass in the front storm door, nor did the clothes or shoes test positive for human blood. None of the fingerprints and palm prints found in the victim's home matched defendant's. The Fila shoe prints found in the victim's home, while not inconsistent with a pair of Filas owned by defendant, did not reveal any of the characteristic nicks and cuts present on defendant's shoes.

A witness who lived in the victim's neighborhood testified that during the storm on the night of the murder she saw a man in a yellow raincoat walk by her house in the direction of the victim's house and that a short time later she heard some loud "pops" coming from that direction. She testified that the man's appearance was not consistent with that of defendant. Another witness testified that she saw a man in the neighborhood who was wearing a yellow raincoat, acting very suspiciously and driving a white Grand Am. She also testified that the man's face and general appearance were inconsistent with defendant's appearance.

In short, defendant's argument at trial was that no conclusive blood, hair, fiber, or glass evidence was found on defendant's clothes, in his car, or in his house; and no evidence was presented by the State regarding the identity of the man in the yellow raincoat.

PRETRIAL ISSUES

Defendant first contends that the trial court erroneously admitted into evidence defendant's statements produced as a result of custodial interrogation and the stolen property recovered as a result of information provided in those statements, in violation of the Fourth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Specifically, defendant asserts

(i) that the Spindale Police stopped him without reasonable suspicion and arrested him without probable cause and (ii) that as a result of the illegal seizure and unlawful arrest, special agents of the State Bureau of Investigation ("SBI") obtained incriminating statements from him and statements that led to the recovery of stolen property. These statements and the property, defendant contends, were the fruits of an illegal seizure and should not have been admitted at trial. We disagree with defendant.

Evidence presented at the suppression hearing concerning the facts and circumstances surrounding defendant's detention and arrest are as follows. At 9:03 p.m. on 18 August 1994, Spindale Police Officer Chris Justice responded to a report of an automobile breaking and entering at the Uptown Beauty Salon located on Main Street in Spindale. When Officer Justice arrived there at 9:09 p.m., Ms. Patsy Hodge reported that she had been inside the salon having her hair done and that when she left she discovered that someone had broken out the right window of her vehicle. Ms. Derlene Watson, the proprietor of the beauty salon, told Officer Justice that while the salon staff had been working on Ms. Hodge's hair, Ms. Watson had seen a tall black male wearing a white t-shirt and dark colored pants walking back and forth on the sidewalk in front of the salon, "just acting suspicious to her." While at the salon, Officer Justice also spoke with Mr. Ray Sprouse, a local resident who told Justice he had seen a black male pick up a cement block from in front of a building and walk back toward the beauty salon and then, about a minute later, saw the same man run down an adjacent alleyway. After talking with Ms. Hodge, Ms. Watson, and Mr. Sprouse, Officer Justice broadcast a description to other officers on his walkie-talkie of a black male wearing a white t-shirt and dark pants who had fled on foot down the alley.

Within five minutes of Officer Justice's broadcast of the description, Spindale Police Officer Glen Harmon saw a person fitting the description in front of the Methodist Church on Main Street, roughly two blocks from the beauty salon, walking toward the rear of the church with a soft drink in his hand. Officer Harmon met the person, the defendant, at the back gate of the church and told him that he fit the description of a suspect in a vehicle breaking and entering that had just occurred uptown and that defendant "needed to just stay right there for a second" while he radioed Officer Justice to come. Officer Harmon then told defendant that he needed to search him for weapons and asked defendant if he was carrying any weapons.

Defendant said he had no weapons and had nothing to do with a breaking and entering; then, beginning to get upset, defendant emptied his pockets and threw the contents on the ground, saying, "Search me, search me." Officer Harmon recognized defendant as a suspect in the Hamrick murder which had occurred the day before.

At this point at 9:15 p.m., Officer Justice arrived; he too recognized defendant as a suspect in the murder case. Officers Harmon and Justice put defendant in the back of a patrol car and radioed for another officer to pick up Ms. Watson from the beauty shop and bring her to the Methodist Church to see if she could identify defendant as the person she had observed outside her shop. It took "several minutes" for Ms. Watson to be brought to the Methodist Church. When she arrived the officers shined a flashlight on defendant in the back of the patrol car, and she identified defendant as the person she had seen going back and forth in front of the salon. Defendant then remained in the back of the patrol car at the Methodist Church for about thirty more minutes while the officers conferred with the Assistant Chief of Police on what to do with defendant since he was also a suspect in the Hamrick murder case.

At 10:11 p.m. Officer Justice drove the patrol car with defendant in the backseat back to the beauty shop area so that Mr. Sprouse could see if defendant was the person he had seen pick up the cement block and then later run through the alley. Defendant was kept in the backseat of the patrol car, and the officers shined a flashlight on him so that Mr. Sprouse could identify him. Mr. Sprouse could not identify defendant's face but did indicate that defendant's clothes were of the same type as the clothes on the person he had seen. Defendant was then told he was under arrest and was transported to the police station, arriving there at 10:37 p.m.

Defendant was booked at the station, and his clothes were taken for possible evidence of glass fragments from the automobile window. Defendant was then transported at about 11:00 p.m. to a magistrate and charged with breaking and entering a motor vehicle. The magistrate, who was the same magistrate who had earlier that evening issued a warrant for police to search defendant's house for evidence in the Hamrick murder investigation, set bond in the amount of $100,000 on the breaking and entering charge. Defendant was then fingerprinted and taken to the Rutherford County jail, arriving sometime between 11:30 p.m. and 12:00 a.m. At 1:20 a.m. SBI Special Agents Bruce Jarvis and Andy Cline questioned defendant

about evidence linking defendant to the Hamrick murder; it was during this questioning that defendant made the statements which he now contends should have been suppressed.

[1] Defendant first argues that the trial court erred in concluding that Officer Harmon possessed sufficient factual justification for detaining defendant as defendant walked past the Methodist Church. In *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), the United States Supreme Court recognized the right of a law enforcement officer to detain a person for investigation of a crime without probable cause to arrest him if the officer can point to specific and articulable facts that, with inferences from those facts, create a reasonable suspicion that the person has committed a crime. *State v. Lovin*, 339 N.C. 695, 703, 454 S.E.2d 229, 234 (1995). As the United States Supreme Court has stated:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response."

State v. Jackson, 302 N.C. 101, 105, 273 S.E.2d 666, 670 (1981) (quoting *Adams v. Williams*, 407 U.S. 143, 145, 32 L. Ed. 2d 612, 616-17 (1972)).

Here, Officer Justice received information from Ms. Watson that around the time that the automobile was broken into, a tall black male with dark pants and a white t-shirt had been acting suspiciously nearby; Officer Justice also received information from Mr. Sprouse that, at about the same time, a black male wearing dark pants and a white t-shirt had picked up a cement block and walked toward the location of the automobile and then, moments later, had run down an alleyway. Officer Harmon received a transmission from Officer Justice to be on the lookout for a tall black male wearing a white t-shirt and black pants who was seen on foot at a certain location and moving in a certain direction. Officer Harmon saw a person fitting the description just moments later and within two blocks of the location specified.

We hold from these facts that the proximity in time and location and the accuracy of the physical description of the race, gender, and clothing of the suspect gave the officers reasonable suspicion to

make an investigative stop of defendant. *See State v. Lovin*, 339 N.C. at 703-04, 454 S.E.2d at 234 (reasonable suspicion existed, even though there was no witness to crime itself, where police had description of person seen driving victim's car as having "a lot of hair," a gold watch and large frame glasses; information about where the car was headed; and information that the person acted suspiciously); *State v. Rinck*, 303 N.C. 551, 558-60, 280 S.E.2d 912, 919-20 (1981) (reasonable basis for directing defendants to stop existed where, while there was no witness to the homicide, two men were seen acting suspiciously at victim's house late at night and, within about thirty minutes of the homicide, were seen walking along the road within two hundred feet of victim's house); *State v. Buie*, 297 N.C. 159, 162, 254 S.E.2d 26, 28 (reasonable grounds to stop defendant where woman reported intruder in motel room at 4:10 a.m. and gave description to police of a black male wearing dark clothing, approximately 5' 11" tall and weighing about 190 pounds, and where twenty minutes after the report and five to ten minutes after a radio transmission of the description, an officer saw defendant near the scene of the crime, wet, as if he had been running or perspiring heavily, and wearing a gold-colored leisure suit), *cert. denied*, 444 U.S. 971, 62 L. Ed. 2d 386 (1979).

[2] Defendant next argues that even if the initial stop was properly and lawfully based on reasonable suspicion, the nature and length of the detention of defendant, that is, secured in a patrol car from shortly after 9:15 p.m. until 10:11 p.m., exceeded the permissible scope of an investigative stop without probable cause. We disagree with defendant's argument and hold that the length and nature of the detention was reasonable since probable cause was in fact established shortly after the stop.

The Fourth Amendment requires that an investigatory stop be brief and that officers pursue an investigation in a diligent and reasonable manner to confirm or dispel their suspicion quickly. *United States v. Sharpe*, 470 U.S. 675, 686, 84 L. Ed. 2d 605, 615-16 (1985). Defendant notes that absent probable cause to arrest, the United States Supreme Court has never permitted a detention as intrusive as the hour-long detention of defendant in the patrol car. In this case, however, the officers diligently and reasonably pursued the investigation and quickly succeeded in receiving confirmation of defendant's identity, which raised the level of suspicion that defendant committed the breaking and entering from reasonable suspicion to probable cause.

At or slightly after 9:15 p.m., defendant was made to sit in the patrol car. He was not handcuffed. The record shows that defendant sat in the patrol car for a short period of time, "several minutes," while the officers waited for Ms. Watson to arrive and identify defendant. When Ms. Watson arrived, she identified defendant as the person she had seen in front of the beauty shop. We conclude that the identification made by Ms. Watson, in conjunction with Mr. Sprouse's description, provided the officers with probable cause to believe that defendant was the person who committed the breaking and entering of Ms. Hodge's vehicle.

> The existence of probable cause depends upon "whether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense."

State v. Bright, 301 N.C. 243, 255, 271 S.E.2d 368, 376 (1980) (alterations in original) (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145 (1964)). Mr. Sprouse's information about a black male wearing dark pants and a white t-shirt who picked up a cement block and walked toward the beauty shop and then later ran down an alley strongly links a person of that description to the crime; Ms. Watson's information about seeing a black male in a white t-shirt and dark pants acting suspiciously in front of her shop links that person to the person seen by Mr. Sprouse at about the same time; defendant, who fit the description, was then stopped within two blocks of the crime scene and fifteen minutes of the report of the crime; finally, Ms. Watson's identification of defendant as the person she saw in front of her shop completed the link between defendant specifically and the breaking and entering.

We have compared the facts and circumstances of this case to the facts and circumstances in other cases on this issue; and we conclude that when the officers received the confirmation of Ms. Watson's identification, they possessed reasonably trustworthy information sufficient to warrant a reasonable belief that defendant had committed the breaking and entering and that there was thus probable cause to arrest defendant. This Court has previously held that an officer was provided with probable cause prerequisite to a lawful arrest based on "the proximity of defendant to the location where the offenses were committed and the similarity of defendant's appearance to the description which had been reported to the police." *State*

v. Wrenn, 316 N.C. 141, 147, 340 S.E.2d 443, 447 (1986). In *Wrenn* this Court held that probable cause existed where a burglary report was received at 3:24 a.m. describing the suspect as a white male dressed in dark clothing, possibly wearing a knit hat and armed with a handgun, and where approximately two minutes after receiving the call, an officer saw a vehicle being driven by a white male wearing dark clothing. *See also State v. Joyner*, 301 N.C. 18, 21-22, 269 S.E.2d 125, 128-29 (1980) (probable cause to arrest existed where burglary/rape victim described suspect as black male with facial hair, wearing a toboggan and a green or blue jogging suit with white stripes, and where an officer saw the defendant, who matched the description, three and a half blocks from the crime scene and seven to ten minutes after the commission of the offenses); *State v. Bright*, 301 N.C. at 255-56, 271 S.E.2d at 377 (probable cause existed based on abduction victim's description of the abductor and his vehicle, combined with information from bowling alley employees that the defendant matched the description and was seen in the bowling alley prior to the abduction, and observation by officers that the defendant and his vehicle matched the victim's descriptions); *State v. Tippett*, 270 N.C. 588, 595, 155 S.E.2d 269, 274-75 (1967) (probable cause to arrest existed where burglary victim described suspect as a barefooted white male, not a blond, wearing rough work clothes, and where police, upon arriving at the scene at 1:19 a.m., saw a barefooted male who eluded them and then later, at 3:00 or 3:30 a.m., was seen hiding behind a bush two blocks from the scene of the crime).

Finally, defendant argues that the statements he made to the SBI agents and the property recovered based on those statements should not have been admitted since they were fruits of the illegal seizure or unlawful arrest. Since we have held that there was no illegal seizure or unlawful arrest, this argument necessarily fails. *State v. Lovin*, 339 N.C. at 704, 454 S.E.2d at 235.

[3] Defendant next contends that the trial court erroneously admitted into evidence other statements and evidence procured by the SBI after defendant invoked his constitutional right to remain silent, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Defendant's argument cannot succeed, however, since the record discloses that defendant never requested that interrogation cease.

Pursuant to *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),

the Fifth and Fourteenth Amendments require that during custodial interrogation, if the individual "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74, 16 L. Ed. 2d at 723; *Edwards*, 451 U.S. at 482, 68 L. Ed. 2d at 384. A defendant may terminate custodial interrogation by indicating in any manner that he wishes to remain silent. *State v. Murphy*, 342 N.C. 813, 823, 467 S.E.2d 428, 434 (1996).

In this case at the end of the first portion of defendant's interrogation, at about 4:00 a.m. on 19 August 1994, defendant made a statement that after he had gotten some sleep he would be willing to take the officers to the place where he had thrown some purses he had stolen from breaking into vehicles. The agents concluded the interview and returned defendant to his cell. Shortly thereafter, the agents learned that other officers had recovered two additional rings which belonged to the victim, one from defendant's home and the other from a pawn shop. At 4:20 a.m. they resumed their interrogation of defendant, whereupon defendant made the second portion of his statement.

Defendant asserts that his statement to the officers that he would show them where the purses were once he had gotten some sleep constituted an invocation of his constitutional right to have the interrogation cease. At the hearing on the motion to suppress, the trial court found the following facts: defendant received his *Miranda* warnings and willingly spoke with the agents, he voluntarily signed the interview sheet and *Miranda* form, he did not appear intoxicated or under the influence of drugs or alcohol, the agents concluded the first portion of the interview at approximately 4:00 a.m., within twenty minutes the agents learned that other officers recovered rings belonging to the victim, the agents then resumed their interview of defendant, the interview continued until 6:10 a.m., defendant remained alert and at times emotional, and defendant did not ask for an attorney and did not ask that the interview end.

These findings are binding since they are supported by competent evidence in the record, *State v. Jackson*, 308 N.C. 549, 581-81, 304 S.E.2d 134, 152 (1983); and we agree with the State that the trial court committed no constitutional error in admitting the evidence from defendant's second statement. In *State v. Murphy* this Court concluded that the defendant invoked his Fifth Amendment right to silence when he stood up and stated, "I got nothing to say." *State v. Murphy*, 342 N.C. at 822, 467 S.E.2d at 433. We reasoned that

> the defendant's conduct, in abruptly standing up, combined with his unambiguous statement, "I got nothing to say," were clear indicators that he wished to terminate the interrogation and invoke his right to remain silent. The defendant similarly had indicated a desire to end two prior interrogations by standing up. . . . Finally, the fact that the interrogating officers immediately ceased the interrogation and took the defendant to be "booked" makes it equally clear that the officers understood that the defendant was terminating the interrogation and invoking his right to remain silent.

Id. at 823, 467 S.E.2d at 433-34. Here, by contrast, and contrary to defendant's arguments, defendant made no statement or gesture suggesting that he wished the interrogation to cease. His statement to the officers that he would be willing to take them to where he had discarded some stolen property after he had gotten some sleep was not an invocation of his Fifth Amendment rights. Thus, it was not error for the trial court to admit into evidence defendant's subsequent statement or the fruits of that statement.

JURY SELECTION

Defendant next assigns error to the trial court's supervision of jury *voir dire*, specifically contending that the trial court (i) failed to prohibit the State from staking out prospective jurors with respect to whether they could vote for the death penalty in this case, (ii) failed to prohibit the State from staking out prospective jurors with respect to whether they could weigh aggravating circumstances more heavily than mitigating circumstances, and (iii) prohibited defendant from asking questions of a prospective juror permitted by the United States Constitution under *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992). Defendant contends that the trial court's conduct in these three instances permitted the State to select a jury that would tend to disregard mitigating evidence and automatically vote for the death penalty.

Defendant's arguments concerning jury selection are not persuasive. The trial court properly controlled *voir dire* questioning during jury selection, did not allow the prosecutor to stake out prospective jurors, and did not deny defendant the opportunity to question a prospective juror in accordance with *Morgan*. We have previously outlined the fundamental law on jury selection:

> "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*, [513] U.S. [891], 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), *cert. denied*, — U.S. —, 137 L. Ed. 2d 339 (1997). The trial court may refuse to allow counsel to ask questions that use hypothetical evidence or scenarios to attempt to "stake-out" prospective jurors and cause them to pledge themselves to a particular position in advance of the actual presentation of the evidence. *State v. Larry*, 345 N.C. 497, 509, 481 S.E.2d 907, 914, *cert. denied*, — U.S. —, 139 L. Ed. 2d 234 (1997); *State v. Robinson*, 339 N.C. 263, 271-73, 451 S.E.2d 196, 202 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

[4] In the instant case during jury selection, the trial court overruled defendant's objection to the following question when asked of three prospective jurors by the prosecutor:

> Assuming that you were on a jury which has found the defendant guilty of First Degree Murder, if that jury then at the sentencing phase, finds the existence of aggravating factors and finds that those factors outweigh any mitigating factors, and further finds that the aggravating factors are sufficiently substantial so as to call for the imposition of the death penalty, could that be your verdict in this case which would result in a judgment of death being imposed?

Defendant did not object when the question was asked of thirty-three other prospective jurors. This question by the prosecutor simply attempts to determine from the jurors whether they can follow the law in imposing the death penalty. The question does not presume evidentiary facts, nor does it require that the jurors pledge themselves to a position under any given set of evidentiary facts. The trial court did not abuse its discretion in overruling defendant's objection to the prosecutor's question.

[5] The prosecutor was also permitted to ask the jurors the following question:

> Q. There are a couple of other things I'd like to talk about and make sure that everybody understands the concept about the sentencing phase. We've talked about these aggravating and mitigating factors that you may hear evidence about. Aggravating factors are set out by the legislature, there's a green book that we all read and there are only eleven possible aggravating factors that the state can rely on in any capital case. I believe that if we get to that stage in this case that we may have evidence of two aggravating factors. The legislature has also set out a listing of mitigating factors, but the last one of those is any other factor that the jury considers to be or to have mitigating value; so there literally is an unlimited number of mitigating factors and I would predict that if we get into a sentencing phase in this case that there may be many mitigating factors submitted for your consideration by the defense but the state will be limited by the law to only two in this particular case. So, as we all talked earlier, that's why we're talking about this concept of the weight or the significance that one factor might have. Do all of you agree that, just hypothetically, one factor might have more weight or substance or importance than two or more of another factor, does everybody understand that concept? If you don't, please raise your hand and I'll try in my inarticulate way to explain it, does everybody understand that?
>
> (Affirmative responses.)
>
> Q. Is there any one of you jurors who feels like that if one side or the other has a greater number, simply more factors than the other side that side would necessarily have more weight or would be the winning side, does anybody feel that way?
>
> (Negative responses.)

> Q. In other words, does everyone agree that it might be possible that there might be two aggravating circumstances and that those might yet outweigh or be more significant and more substantial than a greater number of mitigating circumstances? Everybody agree with that concept, that that's possible?
>
> (Affirmative responses.)

Later, the prosecutor asked another panel of prospective jurors, "[D]o all of you understand that this is not a numbers game, that just because one side might get ten and another side might only have two, it's the weight and the significance and the substance of the factors that count, does everybody understand that concept?" These inquiries by the prosecutor do not, as defendant contends, stake the jurors to the proposition that they would weigh aggravating circumstances more heavily than mitigating circumstances. Rather, the questions ask the jurors if they can weigh the significance of the aggravating and mitigating circumstances rather than the relative number of aggravators and mitigators. As such, the questions simply ask the jurors if they can follow the long-settled law. *See State v. Goodman*, 298 N.C. 1, 34-35, 257 S.E.2d 569, 590 (1979) ("It must be emphasized that the deliberative process of the jury envisioned by [N.C.G.S. §] 15A-2000 is not a mere counting process. . . . Nuances of character and circumstance cannot be weighed in a precise mathematical formula."). We note also that defendant did not object to these questions from the prosecutor. The trial court did not err by not intervening *ex mero motu*.

[6] The defense attempted to ask prospective juror Rowlette the following question after the juror had indicated he thought the death penalty would be appropriate if a murder was heinous:

> Q. So if the state proved an aggravating factor or more than one aggravating factor and if the state proved that one of the aggravating factors in this case was especially heinous, atrocious, and cruel, that is an aggravating factor; and then if the defendant introduced evidence of a mitigating factor or factors and you were sitting on the jury and you found those, and in the third step if you were on this jury and your jury found that the aggravating factor or factors outweighed the mitigating factors, we're still going along with this hypothetical, and then if you finally came to that last step that the Judge just outlined and you were weighing whether the aggravating factors outweighed the mitigating factors and also you were deciding whether the aggravating factors,

> when taken into consideration and along with the mitigating were sufficiently substantial to call for the death penalty, that's a lot of words, but if you were to do that, if you were called to do that and the aggravating factor that you had found was heinous, atrocious and cruel, would you automatically vote for the death penalty?

The trial court disallowed the question on the grounds that it improperly created a hypothetical scenario positing a specific finding of the heinous, atrocious, or cruel aggravating circumstance, such that the question would tend to stake the juror to a certain position under that set of facts. The trial court correctly determined that this question is impermissible. " 'Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. . . . Jurors should not be asked what kind of verdict they would render under certain named circumstances.' " *State v. Robinson*, 339 N.C. at 273, 451 S.E.2d at 202 (quoting *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980)). In *Robinson* the defendant attempted to ask prospective jurors if they would be able to follow the trial court's instructions and weigh aggravating and mitigating circumstances and still consider life imprisonment as an option even though defendant had a previous conviction for first-degree murder. *Id.* at 272, 451 S.E.2d at 201-02. We concluded that the question in *Robinson* attempted to " 'stake out' the jurors as to their answers to legal questions before they are informed of legal principles applicable to their sentencing recommendation." *Id.* at 273, 451 S.E.2d at 202. Our analysis in *Robinson* is equally applicable here:

> The question posed [in *Robinson*] does not amount to a proper inquiry as to whether the juror could follow the law as instructed by the trial judge. Rather, the question is an attempt to determine whether or not a juror will be unable to consider a life sentence once he or she learns that defendant had been convicted of a prior murder.

Id. (citation omitted). Here, defendant has attempted to find out from the juror what verdict the juror would render given the finding of a particular aggravating circumstance.

Defendant contends that his question to the juror constituted a proper attempt, pursuant to *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492, to determine whether the juror would automatically vote for the death penalty without regard for mitigating circumstances. But *Morgan* does not require that defendant be allowed to

ask a juror what his or her position would be given a particular aggravating circumstance. *State v. Kandies*, 342 N.C. 419, 441, 467 S.E.2d 67, 78, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996); *State v. Lynch*, 340 N.C. 435, 452, 459 S.E.2d 679, 686 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996).

Moreover, even if we did not hold that this particular question by defense counsel crossed the line from a proper *Morgan* inquiry as to whether a juror would automatically vote for the death penalty to an improper stake-out question, defendant could establish neither prejudice nor a violation of fundamental fairness. The trial court allowed defendant's challenge for cause to remove prospective juror Rowlette after subsequent questioning exposed this juror's possible inability to be impartial and consider mitigating circumstances. Thus, defendant was not forced to accept an undesirable juror. *See State v. Miller*, 339 N.C. 663, 681, 455 S.E.2d 137, 147, *cert. denied*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995).

In sum, we hold that the trial court committed no error in its supervision of jury *voir dire* which would have resulted in a jury biased in favor of the death penalty.

Defendant next assigns error to the trial court's overruling of defendant's objections to the State's impermissible use of peremptory challenges to strike from the jury three black prospective jurors, Greene, Hudson, and Watkins, solely on account of their race. Article I, Section 26 of the Constitution of North Carolina prohibits the use of peremptory challenges for racially discriminatory reasons, *Kandies*, 342 N.C. at 434, 467 S.E.2d at 74, as does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

In *Batson* the United States Supreme Court established a three-part test to determine if the prosecutor has engaged in impermissible racial discrimination in the selection of jurors. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). First, the defendant must establish a *prima facie* case that the prosecutor has exercised a peremptory challenge on the basis of race. *Id.* Second, once the *prima facie* case has been established by the defendant, the burden shifts to the State, which, in order to rebut the inference of discrimination, must offer a race-neutral explanation for attempting to strike the juror in question. *Id.*; *State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 408, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (1997). The explanation must be clear and reasonably specific, but

" 'need not rise to the level justifying exercise of a challenge for cause.' " *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990) (quoting *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88). In stating the race-neutral reason for the peremptory challenge, the prosecutor is not required to provide an explanation that is persuasive or even plausible. The issue at this stage is the facial validity of the prosecutor's explanation; and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. *State v. Barnes*, 345 N.C. 184, 209-10, 481 S.E.2d 44, 57, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 134 (1997). Our courts also permit the defendant at this point to introduce evidence that the State's explanations are merely a pretext. *State v. Gaines*, 345 N.C. at 668, 483 S.E.2d at 408; *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991).

Third, and finally, the trial court must make the ultimate determination as to whether the defendant has carried his burden of proving purposeful discrimination. *Hernandez v. New York*, 500 U.S. at 359, 114 L. Ed. 2d at 405; *State v. Gaines*, 345 N.C. at 668, 483 S.E.2d at 408. As this determination is essentially a question of fact, the trial court's decision of whether the prosecutor had a discriminatory intent is to be given great deference and will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous. *Kandies*, 342 N.C. at 434-35, 467 S.E.2d at 75. " 'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 528 (1985)).

[7] With respect to prospective juror Greene, defendant makes four arguments—one on procedural grounds and three of a more substantive nature—that the trial court erred when it failed to find that the State's peremptory strike was the result of purposeful discrimination. First, defendant contends that the trial court erroneously concluded its analysis upon finding that the State's proffered reason was race-neutral and failed to address the ultimate question of whether defendant had proven racial discrimination. Defendant argues that under these circumstances, there is no factual finding by the trial court on the ultimate issue, and thus no factual finding which is entitled to deferential review by this Court. We conclude, however, that in all practicality, the trial court made a sufficient ultimate determination, finding no purposeful racial discrimination, when it denied defendant's *Batson* motion and entered the conclusion of law that the pros-

ecutor's reasons for excusing Mr. Greene, his expressed lack of confidence in the court system and his prior record, were "race-neutral and sufficient to justify the peremptory challenge." This conclusion by the trial court effectively reached the ultimate issue: whether there was purposeful racial discrimination in the peremptory strike of Mr. Greene. We cannot say that the trial court's determination was clearly erroneous. *State v. Lyons*, 343 N.C. 1, 14, 468 S.E.2d 204, 210, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996).

[8] Second, defendant argues that the trial court erred when it did not find racial discrimination in the strike of prospective juror Greene in that it did not discount the persuasiveness of the prosecutor's explanation as to Mr. Greene in light of the impermissibly race-based rationale given for prospective juror McKinney, the other black male in the same jury panel. The first jury panel at defendant's trial consisted of nine white prospective jurors and three African-American prospective jurors, two of whom were male. The prosecutor proposed to accept the black female juror but exercised his first two peremptory challenges to strike the only two black males, Mr. Greene and Mr. McKinney. Defendant made a *Batson* objection to the two strikes; and the trial court found a *prima facie* case of potential racial discrimination, requiring that the State explain its rationale for excusing the two. The prosecutor offered in explanation that Mr. Greene "said that he thought that the criminal justice system was flawed" and that "he expressed serious reservations about the system and indicated that he thought in many instances it was unfair and I believe he stated that it would be difficult for him to be a part of this system although he could do so, and he stated more than once that he wants to change the system." This explanation is sufficiently supported by the record in the exchange that took place between the prosecutor and Mr. Greene after Greene indicated he had been a defendant in a DWI case:

> Q. The jury is a very integral part of the system and the whole system breaks down without jurors, is there any one of you that holds such negative feelings about the court system that you feel like you just could not in good faith and good conscience be a part of this process? Mr. Greene, do you have such feelings as that?
>
> A. I feel that the justice system is unfair and I have felt that way for some time but I can't change it, but I've seen things in the past that leads me to believe that the justice system is unfair.

Q. Mr. Greene, would your beliefs in that regard do you think interfere with your ability to be a fair and impartial juror in this case?

A. No, sir.

Q. You don't think—

A. No.

Q. Do you harbor some prejudice or ill feeling about the court system and the people who work in it?

A. I just want it to change so it's more fair.

In its findings of fact, the trial court stated: "The Court finds that Mr. Greene has previously been convicted of a misdemeanor and expressed a significant degree of dissatisfaction with the court system. The Court would characterize [Mr. Greene's] expressed attitude towards the court system as hostile." The court concluded that the reasons given to excuse Mr. Greene, his expressed lack of confidence in the court system and his prior record, were racially neutral and sufficient to justify the peremptory challenge.

With respect to prospective juror McKinney, however, the State's explanation for its strike was as follows:

Your Honor, the state would excuse Mr. McKinney primarily because of his acknowledgment in [sic] an association that associates in many instances with being anti-law enforcement and which to my knowledge sponsors and funds a legal defense fund which frequently files briefs in death penalty cases. This man claims to be a member of that organization [namely, the NAACP] and says that it does not take any position on the death penalty and I take issue with that and that is my reason for excusing him from the jury. . . . He's a member of an organization which I strongly associate with being anti-state and anti-death penalty.

The trial court made the following findings of fact with respect to prospective juror McKinney:

12. After being asked to articulate race neutral reasons for excusing the jurors, the state indicated that Mr. McKinney would be excused because he was a member of the National Association for the Advancement of Colored People (NAACP) which, according to the state, had filed *amicus* briefs and otherwise opposed the death penalty.

13. During voir dire, Mr. McKinney indicated that he did not know the position of the NAACP regarding the death penalty and that he did not personally oppose the death penalty.

14. When asked to articulate a race neutral reason to excuse Mr. McKinney, the prosecutor did not immediately offer said reason, but supplied his rationale only after studying Mr. McKinney's juror information sheet at length.

The trial court concluded that the prosecutor's professed reason to excuse Mr. McKinney was "not sufficient to overcome the presumption of discrimination nor was it race neutral," and that it "appeared to the Court to be somewhat pretextual and an after thought." The trial court thus proposed to discard the entire jury panel as the proper means of remedying the discriminatory use of this peremptory challenge. The State at this point elected to withdraw its challenge of Mr. McKinney, and so accepted him as a juror. The court then concluded that the State's withdrawal of its challenge remedied the *Batson* violation with respect to the strike of Mr. McKinney.

Relying on *Gamble v. State*, 257 Ga. 325, 327, 357 S.E.2d 792, 795 (1987), defendant argues that in light of the finding of racial discrimination in the strike of Mr. McKinney, the trial court erred in not finding racial discrimination in the strike of Mr. Greene as well. Defendant contends the finding of racial discrimination as to Mr. McKinney diminished the persuasive value of the State's explanation as to Mr. Greene. From the record in this case, we cannot say that the trial court failed to consider the impermissible strike in evaluating the challenge to Mr. Greene. First, the trial court appears to have considered the State's explanations as to Mr. Greene and Mr. McKinney together, as evidenced by defendant's unified objection to the strikes and the trial court's single order on the matter. Second, the *prima facie* case as to Greene and McKinney was not particularly strong, given that one black prospective juror from the first panel was in fact already accepted and placed on the jury. Finally, the trial court may well have discounted the persuasiveness of the explanation as to Mr. Greene to the extent warranted by the rejected explanation as to Mr. McKinney. Peremptorily striking a prospective juror based upon membership in the NAACP has been held to be race-neutral and not unconstitutionally discriminatory. *See United States v. Payne*, 962 F.2d 1228, 1233 (6th Cir.), *cert. denied*, 506 U.S. 909, 121 L. Ed. 2d 229 (1992). The trial judge's determination as to the McKinney strike was predicated as much upon the manner in which the explanation was

made as upon the substance of the explanation. When asked to articulate his race-neutral reason, the prosecutor could not do so immediately, but had to study Mr. McKinney's juror information sheet at length before supplying his rationale, making the explanation appear to the court to be "somewhat pretextual and an after thought." There was no similar hesitation with respect to prospective juror Greene. For these reasons, given the strength of the rationale for striking Mr. Greene, we conclude that the trial court did not commit clear error in finding no intentional racial discrimination in the strike of Mr. Greene.

[9] Defendant next argues as to the strike of prospective juror Greene that the prosecutor asked black prospective jurors questions designed to provoke disqualifying responses while not asking such questions of white prospective jurors and that this disparate examination was a basis for finding intentional racial discrimination. Specifically, defendant contends that the prosecutor directed multiple questions to Mr. Greene involving whether he thought the criminal justice system was "unfair" or did not treat people the way they should be treated. After a thorough review of the record, we conclude that the prosecutor questioned many prospective jurors, irrespective of race, on their beliefs and feelings about the fairness of the judicial system. The questions were often varied in form, but the same basic information was sought in each case. The trial court did not commit clear error on this ground. Disparate questioning of prospective jurors does not necessarily give rise to *Batson* error. *Thomas*, 329 N.C. at 432, 407 S.E.2d at 147-48.

[10] Finally, as to the strike of prospective juror Greene, defendant argues that the State accepted other jurors, who were white, even though they expressed some reservations about the fairness of the judicial system, yet struck Greene. Defendant contends that differentiation shows purposeful racial discrimination. The acceptance by the State of white prospective jurors similarly situated to black prospective jurors who have been peremptorily stricken is a factor to be considered in determining whether there has been purposeful racial discrimination. *Kandies*, 342 N.C. at 435, 467 S.E.2d at 75; *Robinson*, 330 N.C. at 19, 409 S.E.2d at 298. But defendant's approach in this argument, like that taken by the defendants in both *Robinson* and *Porter*, 326 N.C. at 501, 391 S.E.2d at 152, "involves finding a single factor among [the] several articulated by the prosecutor . . . and matching it to a passed juror who exhibited that same factor." *Robinson*, 330 N.C. at 19, 409 S.E.2d at 298. As we have said previ-

ously, "This approach 'fails to address the factors as a totality which when considered together provide an image of a juror considered . . . undesirable by the State.' " *Id.* (quoting *Porter*, 326 N.C. at 501, 391 S.E.2d at 152). For these reasons we are unable to conclude that the trial court committed clear error in not finding that prospective juror Greene was peremptorily stricken for impermissible racially discriminatory reasons.

[11] Defendant next contends, with respect to the State's peremptory strikes of prospective jurors Hudson and Watkins, that the trial court erred in concluding that defendant had not established a *prima facie case* of racial discrimination by giving too much weight to the presence of black jurors already on the jury. Defendant argues specifically that the trial court's methodology was flawed in that it ignored all factors other than the number of black jurors remaining on the jury.

Our cases have held that one of the factors which a court must consider in determining whether intentional discrimination is present in a particular peremptory strike is whether the State has accepted any black jurors. *State v. Kandies*, 342 N.C. at 435, 467 S.E.2d at 75; *State v. Smith*, 328 N.C. 99, 121, 400 S.E.2d 712, 724-25 (1991). "[O]ne factor tending to refute a showing of discrimination is the State's acceptance of black jurors." *Thomas*, 329 N.C. at 431, 407 S.E.2d at 147. In the present case the State had accepted two black jurors when the prosecutor peremptorily challenged a black prospective juror, Mrs. Hudson. Defendant's *Batson* objection, in its totality, contained the following argument: "As to one of the jurors that's been excluded, that's Mrs. Hudson, the defendant objects at this point to her under the *Batson* case. At this point he's peremptorily excluded three jurors, now two of which are black. That's the extent of my argument." The court, in ruling that defendant had not made out a *prima facie* case with this argument, responded:

> The Court will find that we had a *Batson* hearing yesterday. At that point the prosecution was required to state race neutral reasons for excusing a juror. Pursuant to that hearing one juror [Mr. Greene] was excused after proper reasons were given. At this point the prosecution has accepted two black jurors [this includes Mr. McKinney], has excused one; if Mrs. Hudson is excused, that will be two out of four. I do not find that this raises the presumption required to make the prosecution state its reasons. There are sufficient black jurors remaining on the panel. I

> will also note for the record, however, that Mrs. Hudson's answers to the questions are part of the record. She's indicated ambivalence towards the death penalty which may not rise to the level requiring the Court to excuse her for cause. The court has no doubt that if required to state a reason, the prosecution would be able to present a race neutral reason for excusing Mrs. Hudson. However, I'm not going to require him to do that because I do not formally find that at this point there is a pattern that requires that he do so.

This review of the record reveals that, first, defendant's objection itself was couched in terms of the number of black prospective jurors the prosecution had attempted to strike; so the court was merely responding in terms of the number of black jurors already seated on the jury.[1] Second, it is manifest from the rest of the court's response that it did not ignore all factors other than the number of blacks on the jury panel. Thus, with respect to prospective juror Hudson, we cannot say that the trial court committed clear error in not finding a *prima facie* case of racial discrimination.

Likewise, with prospective juror Watkins, the defense objected to the State's peremptory strike and offered the following rationale for its objection: "The objection is based on the fact that this is, it's obvious that this is a systematic exclusion of black jurors and he continues to do it, black male jurors." The following colloquy then took place between the court and defense counsel:

> THE COURT: All right, there are two black jurors in the pool already seated, one who is male. I'm going on memory here, correct me if I'm wrong; is this the third [black juror] that will be excused?
>
> MR. WILLIS: I believe it is the third.
>
> THE COURT: If Mr. Watkins is excused, [the prosecutor] would have excused three out of five [black jurors], that's beginning to get to be a little bit troublesome, but the ruling of the Court will be that that's not sufficient to create a *prima faci*[*e*] showing of discrimination pursuant to *Batson* [*v.*] *Kentucky*.

1. Note that the State attempted to strike Mr. McKinney, but reinstated him on the jury after the trial court found purposeful racial discrimination in his strike, thus remedying the violation. This is why the State's argument that it had *accepted* two out of three black prospective jurors is not inconsistent with defendant's argument that the State *attempted to strike* two of three black prospective jurors.

Again, the defense invited the trial court's numerical analysis by alleging that the prosecution was carrying out a systematic exclusion of black jurors. While such an analysis is not dispositive, neither is it impermissible; this Court has on a number of occasions utilized a numerical or statistical analysis in determining whether a *prima facie* case of racial discrimination in jury selection exists. *See State v. Ross*, 338 N.C. 280, 285, 449 S.E.2d 556, 561-62 (1994) (minority acceptance rate of 66% failed to establish *prima facie* case of discrimination); *State v. Allen*, 323 N.C. 208, 219, 372 S.E.2d 855, 862 (1988) (minority acceptance rate of 41% failed to establish *prima facie* case of discrimination), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990); *State v. Abbott*, 320 N.C. 475, 481-82, 358 S.E.2d 365, 369 (1987) (acceptance rate of 40% failed to establish *prima facie* case of discrimination). In this case, at this point in jury selection, out of five prospective black jurors, two had been seated on the jury. In sum, we cannot say that the trial court committed clear error in finding no *prima facie* case of racial discrimination as to prospective jurors Hudson and Watkins.

Defendant next argues that the trial court should have considered the third step in the *Batson* analysis and found that the peremptory strike of both Hudson and Watkins was purposefully racially discriminatory. However, as the trial court found no *prima facie* case of discrimination as to this juror and as we have already found no error in that determination, we have no need to proceed to this issue. *State v. Smith*, 347 N.C. 453, 463, 496 S.E.2d 357, 363 (1998); *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386-87 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 618 (1997). The trial court in this case, as in *Williams* and *Smith*, explicitly ruled that defendant failed to make a *prima facie* showing: "I do not find that this raises the presumption required to make the prosecution state its reasons. . . . I'm not going to require [the prosecutor] to [present race-neutral reasons for excusing Mrs. Hudson] because I do not formally find that at this point there is a pattern that requires that he do so." The prosecutor then requested that the trial court allow him to state his reasons for the challenge: "We'd like to do so though if the Court has no objection. . . . Just for the record." Thus, the analysis, which we applied in *State v. Lyons*, 343 N.C. at 11-12, 468 S.E.2d at 208, and in *State v. Robinson*, 336 N.C. 78, 93, 443 S.E.2d 306, 312 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995), has no application here, where the trial court specifically ruled that there was no *prima facie* case of discrimination.

GUILT-INNOCENCE PHASE

[12] Defendant next argues that the trial court committed prejudicial constitutional error in failing to intervene *ex mero motu* to correct the State's improper comment on defendant's failure to testify at trial. Defendant takes exception to the following language from the prosecutor's closing argument:

> That's what happened. Somebody just pulled that [storm] door open. Now do we know what happened to that glass? We don't. It's one of the many, many unanswered things about what happened there in that house that night. Two people know what happened in that house that night. One of them is dead. The other one is sitting right here. So I don't know.
>
> I wish I could answer all these questions. There are a bunch of them. I'm going to talk about some of them. But to think that we're going to come in here and be able to prove to you every single little teeny tiny fact of what happened is ridiculous, members of the jury. I hate to tell you this, but people don't go kicking down folks' doors and slitting their throats in front of a crowd of witnesses. It just doesn't happen.

The prosecutor later argued:

> By the very nature of coming in here and sitting here and pleading not guilty, the State has to prove everything and that's what [defendant] Mr. Fletcher has done. He's hid behind this presumption of justice for as long as he can. But it's gone now. Stripped away by the proof in this case, but we had to prove it to you, and we did.

Finally, at the sentencing hearing, the prosecutor argued:

> [Nonstatutory mitigating circumstance n]umber 10, the defendant, Andre Fletcher, has no recollection of committing the crime for which he has been convicted. I urge you to absolutely reject that statement and write "No" beside it. There is no evidence before you of what Mr. Fletcher remembers or does not remember at this moment in time.

Preliminarily, we note that defendant in this case did not object to any of these arguments; and where a defendant fails to object, an appellate court reviews the prosecutor's argument to determine whether the argument was "so grossly improper that the trial court

committed reversible error in failing to intervene *ex mero motu* to correct the error." *State v. Williams*, 317 N.C. 474, 482, 346 S.E.2d 405, 410 (1986). As we stated previously, "only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, — U.S. —, 136 L. Ed. 2d 160 (1996).

A criminal defendant may not be compelled to testify, and any reference by the prosecutor to a defendant's failure to testify violates the defendant's constitutional right to remain silent. *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994). A prosecutor may, however, properly argue the failure of the defendant to produce evidence. *State v. Richardson*, 342 N.C. at 785-86, 467 S.E.2d at 693; *State v. Young*, 317 N.C. 396, 415, 346 S.E.2d 626, 637 (1986). In this case the prosecutor's remarks were directed toward defendant's failure to offer evidence to rebut the State's case, not at defendant's failure to take the stand himself. The comments are not comparable to comments that have been held improper by this Court and the United States Supreme Court. In *Griffin v. California* the prosecutor argued to the jury, "The defendant certainly knows [the details of the crime]. . . . These things he has not seen fit to take the stand and deny or explain." *Griffin v. California*, 380 U.S. 609, 610-11, 14 L. Ed. 2d 106, 107-08 (1965). In *State v. Reid* the prosecutor said, "The defendant hasn't taken the stand in this case." *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). Defendant argues that the comments made by the prosecutor in this case are similar to those made in *Baymon*, where we held that the trial court erred in failing to grant the defendant's request for a mistrial. *Baymon*, 336 N.C. at 757-59, 446 S.E.2d at 6. The prosecutor there had said, "We don't know how many times the child was [sexually assaulted or abused]. . . . The defendant knows, but he's not going to tell you." *Id.* at 757, 446 S.E.2d at 6. We reasoned that "[t]he implication left by the prosecutor's argument was that defendant knows he is guilty of these and perhaps more assaults, but he is hiding behind his right not to take the stand to avoid admitting it so the jury must decide how many assaults actually occurred." *Id.* at 758, 446 S.E.2d at 6. This case is distinguishable from *Baymon* in that here the prosecutor made no reference, direct or indirect, as to defendant's failure to say anything. The comment that "the other one is sitting right there" is merely an argument that defendant is in fact the killer. The argument concerning unanswered

questions recognizes that the jury might have some unanswered questions which do not prevent the jury from finding defendant guilty beyond a reasonable doubt. Similarly, the argument that defendant pled not guilty and thereby required the State to prove the case, read in context, is an argument that the State has done what the State was required to do and that based on the evidence presented, defendant's presumption of innocence has been overcome. These arguments were not so grossly improper as to manifest extreme impropriety. *State v. Randolph*, 312 N.C. 198, 206, 321 S.E.2d 864, 869-70 (1984). The trial court did not err in failing to intervene *ex mero motu*.

SENTENCING PROCEEDING

Defendant brings forth several issues for review with respect to his capital sentencing proceeding, but we need focus on only two of defendant's contentions.

[13] Defendant first argues that the trial court erroneously failed to submit to the jury the statutory mitigating circumstance that the capital felony was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1997), and that he is, therefore, entitled to a new sentencing proceeding. Defendant did not request the submission of the (f)(2) mitigating circumstance at his sentencing proceeding; but where evidence is presented at a capital sentencing proceeding that may support a statutory mitigating circumstance, the trial court has no discretion as to whether to submit the circumstance. *State v. Skipper*, 337 N.C. 1, 44, 446 S.E.2d 252, 276 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). The trial court must submit the circumstance if it is supported by substantial evidence. *State v. McCarver*, 341 N.C. 364, 398-99, 462 S.E.2d 25, 44-45 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Fullwood*, 329 N.C. 233, 236, 404 S.E.2d 842, 844 (1991). In sum, the test for sufficiency of evidence to support submission of a statutory mitigating circumstance is whether a juror could reasonably find that the circumstance exists based on the evidence. *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990); *State v. Syriani*, 333 N.C. 350, 394, 428 S.E.2d 118, 142, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

In the present case defendant presented evidence from Dr. Anthony Sciara, a psychologist who evaluated defendant a number of times between his arrest and trial. Sciara testified that defendant

"tends to distort his perceptions and at times may even be out of touch with reality" and that under times of stress, "he may actually not perceive reality correctly and may deal with the world inappropriately." Sciara's testing indicated that defendant was in a "stress overload" situation at the time of trial and that it is likely that he had been in a chronic stress overload situation "for a very long time." Sciara indicated that his findings from psychological testing were consistent with defendant's records beginning ten years before the murder, when defendant was ten years old. Sciara also found that defendant was abusing marijuana and, at times, cocaine. Sciara testified that the best indicator of violent behavior in a person is a history of violence, of which defendant had none. Sciara testified that in defendant's case,

> [t]o do the killing as indicated[,] something very different would have had to [have] gone on. He would have had to be in a very psychotic state or really out of it on drugs. Either one of those might have led to this behavior, because then the predictions of doing the consistent thing that he did would be out the window.

The State contends, citing *State v. Geddie*, 345 N.C. 73, 102-03, 478 S.E.2d 146, 161 (1996), *cert. denied*, — U.S. —, 139 L. Ed. 2d 43 (1997), that there is no evidence in the record that defendant was stressed, on drugs, or otherwise out of touch with reality at the time of the killing. In *Geddie* this Court upheld the trial court's failure to submit the (f)(2) mitigator where defendant's psychologist "diagnosed defendant as a substance abuser and antisocial person," but "never testified to any mental disorder or emotional disturbance at the time of the killing." *Id.* at 103, 478 S.E.2d at 161. In this case, however, a juror could reasonably find from Dr. Sciara's testimony that, at the time of the killing, defendant was under the influence of a mental or emotional disturbance. First, Sciara testified that under times of stress, defendant might not perceive reality correctly and that it was likely that defendant had been in a stress-overload situation for a very long time based on his environment and psychological problems. Second, given defendant's lack of any violent history, Sciara testified that defendant would have had to have been "in a very psychotic state or really out of it on drugs" to attack and kill in the manner in which the victim was killed. We hold that this testimony is sufficient to link defendant's mental and emotional state to the time of the killing and that a reasonable juror could conclude from this evidence that defendant was under the influence of a mental or emotional disturbance at the time of the killing. For this reason the trial

court's failure to submit the (f)(2) mitigating circumstance to the jury was error.

[14] Defendant also argues that the trial court erroneously failed to submit to the jury the statutory mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1). As above, defendant's failure to request the submission of the (f)(1) mitigating circumstance does not discharge the trial court from its duty to submit the circumstance if the evidence is sufficient for a juror to reasonably find that the circumstance exists. *State v. Jones*, 346 N.C. 704, 715, 487 S.E.2d 714, 721 (1997). The length of a defendant's criminal history, by itself, is not determinative for purposes of submitting the (f)(1) mitigator. "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." *Geddie*, 345 N.C. at 102, 478 S.E.2d at 161. In *State v. Jones* this Court held that the trial court erred in not submitting the (f)(1) circumstance where the defendant's criminal history consisted of four counts of misdemeanor larceny and two or three felony larceny charges and where there was no evidence presented at trial suggesting that defendant had committed any violent crimes prior to killing the victim. *Jones*, 346 N.C. at 716, 487 S.E.2d at 722. Our analysis in *Jones* emphasizes that the defendant's prior convictions consisted of property crimes rather than violent crimes. In that case we cited a number of cases in which we had previously held that similar histories permitted a rational juror to find as a mitigating circumstance that defendant had no significant history of prior criminal activity. *Id.* A common theme in those cases is the predominantly nonviolent nature of the prior crimes. *State v. Ball*, 344 N.C. 290, 310, 474 S.E.2d 345, 357 (1996) (the defendant had a history of drug use and a conviction for robbery; a conviction for felonious assault, after which altercation he took the victim to the emergency room; and three convictions for forgery), *cert. denied*, — U.S. —, 137 L. Ed. 2d 561 (1997); *State v. Rowsey*, 343 N.C. 603, 619-20, 472 S.E.2d 903, 911-12 (1996) (the defendant had illegally possessed marijuana and a concealed weapon; had been convicted of two counts of larceny, fifteen counts of injury to property, and an alcoholic beverage violation; and at the time of the trial, had been charged with five counts of felony breaking and entering and felony larceny offenses), *cert. denied*, — U.S. —, 137 L. Ed. 2d 221 (1997); *State v. Buckner*, 342 N.C. 198, 234, 464 S.E.2d 414, 434-35 (1995) (the defendant had

seven breaking and entering convictions; a common law robbery conviction in which defendant's co-conspirator, not the defendant, was the instigator or main actor; and a drug-trafficking conviction), *cert. denied*, — U.S. —, 136 L. Ed. 2d 47 (1996); *State v. Lloyd*, 321 N.C. 301, 313, 364 S.E.2d 316, 324 (the defendant had two felony convictions which occurred almost twenty years previously and seven alcohol-related misdemeanor convictions), *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988); *see also State v. Williams*, 343 N.C. 345, 371-72, 471 S.E.2d 379, 393-94 (1996) (the defendant's record consisted of convictions for misdemeanor larceny, two counts of misdemeanor breaking and entering, two counts of misdemeanor larceny, misdemeanor possession of stolen property, carrying a concealed weapon, possession of a weapon of mass destruction, uttering forged papers, misdemeanor assault on a female, and misdemeanor assault with a deadly weapon), *cert. denied*, — U.S. —, 136 L. Ed. 2d 618 (1997); *State v. Walls*, 342 N.C. 1, 56, 463 S.E.2d 738, 767 (1995) (the defendant had convictions for driving while impaired, assault, communicating threats, escape, nonfelonious breaking and entering, receiving stolen goods, possessing a stolen vehicle, and possessing stolen credit cards), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996); *State v. Frye*, 341 N.C. 470, 504, 461 S.E.2d 664, 681 (1995) (witnesses testified that the defendant used drugs extensively and had been incarcerated previously), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996); *State v. Quick*, 337 N.C. 359, 362, 446 S.E.2d 535, 537 (1994) (the defendant had used drugs illegally and had been convicted of larceny, receiving stolen goods, and forgery); *State v. Mahaley*, 332 N.C. 583, 597, 423 S.E.2d 58, 66-67 (1992) (the defendant had no record of criminal convictions, and her prior criminal activities consisted of using illegal drugs and stealing money and credit cards to support her drug habit), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995); *State v. Turner*, 330 N.C. 249, 257, 410 S.E.2d 847, 851 (1991) (the defendant had been convicted of misdemeanor offenses of receiving stolen goods, larceny, assault with a deadly weapon, and worthless check; the defendant's nonadjudicated acts included illegal possession of marijuana, theft when the defendant was a juvenile, sale of marijuana, and possession of a sawed-off shotgun).

In the present case the evidence tended to show that defendant had a history of stealing since he was a child and that he had been convicted of the following offenses since 1990: two counts of felonious breaking and entering, three counts of felonious larceny, felonious possession of stolen property, misdemeanor breaking and

entering, five counts of misdemeanor larceny, and assault on a female. While it is fair to say that defendant stole from others for most of his life and that in recent years he seems to have supported himself largely by stealing and occasionally selling drugs, no testimony was presented that the breaking and enterings and larcenies were connected to any violent behavior. The breaking and entering and larceny charges appear to have involved only unoccupied vehicles; there was no evidence prior to the killing of the victim in this case that defendant broke into anyone's home. Numerous witnesses testified that defendant's larcenous history is devoid of any violence, aggressive or physical behavior, or even confrontation with the victims of the larcenies. The State urges that a total life of crime such as defendant's forbids the submission of the (f)(1) mitigator to the jury and proffers language from our opinion in *State v. Sidden*, in which we held it was not error not to submit the (f)(1) mitigator where

> [t]he evidence showed the defendant had been dealing in the illegal sale of alcohol and drugs all his adult life. This evidence of constant criminal activity culminating in the murder of Garry Sidden, Sr. was such that the jury could not reasonably find that the defendant had no significant history of prior criminal activity.

State v. Sidden, 347 N.C. 218, 232, 491 S.E.2d 225, 232 (1997). But our holding in *Sidden* was predicated upon the additional fact that the defendant there had committed the murder of Garry Sidden, Sr. prior to the two murders for which he was being tried and sentenced. *Id.* This prior murder qualified as the "prior criminal activity" for purposes of the other two murders. *Id.*

Defendant's history of prior criminal activity is less significant than that of criminal defendants in prior cases in which this Court has held that the (f)(1) mitigating circumstance should not be submitted to the jury. *See State v. Daughtry*, 340 N.C. 488, 522, 459 S.E.2d 747, 765 (1995) (the defendant often beat the murder victim, shot an acquaintance in the leg, and was convicted of driving under the influence and assault inflicting serious injury with a large stick), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996); *State v. Jones*, 339 N.C. 114, 157, 451 S.E.2d 826, 850 (1994) (the defendant had three prior violent felony convictions: two counts of felonious assault and one count of robbery), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995); *State v. Skipper*, 337 N.C. at 44, 446 S.E.2d at 276 (the defendant had been convicted in 1978, 1982, and 1984 of assault with a deadly weapon inflicting serious injury); *State v. Sexton*, 336 N.C.

321, 375, 444 S.E.2d 879, 910 (the defendant was convicted for two counts of assault on a female, one of which involved choking a female less than one year before the strangulation of the murder victim; moreover, the defendant testified that he did not remember choking the assault victim, a circumstance strikingly similar to his professed lack of memory about the details of the strangulation of the murder victim), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994); *State v. Jones*, 336 N.C. 229, 247, 443 S.E.2d 48, 56 (the defendant had six or seven times broken into the same convenience store where the murder occurred and had stolen various items from the store and had broken into a pawn shop and stolen several guns, one of which he used to kill the victim), *cert. denied*, 513 U.S. 1003, 130 L. Ed. 2d 423 (1994); *State v. Robinson*, 336 N.C. at 119, 443 S.E.2d at 326 (the defendant had been involved in crime since adolescence; sometimes earned $4,000 to $5,000 per week selling drugs; had been convicted of the robbery of a business and two of its employees; and in the murder for which he was being sentenced, had come from Maryland to sell drugs and commit a robbery).

Given the largely nonviolent nature of defendant's prior criminal activities, we conclude that a juror could reasonably have concluded that defendant had no significant history of prior criminal activity. For this reason the trial court erred by failing to submit the (f)(1) mitigating circumstance for the jury's consideration.

The trial court's error in failing to submit statutory mitigating circumstances where there is sufficient evidence " 'is prejudicial unless the State can demonstrate on appeal that it was harmless beyond a reasonable doubt.' " *Jones*, 346 N.C. at 717, 487 S.E.2d at 722 (quoting *Quick*, 337 N.C. at 363, 446 S.E.2d at 538). Here, the State is not able to demonstrate that the failure to submit either the (f)(2) or the (f)(1) mitigators was harmless beyond a reasonable doubt. As to the (f)(2) mitigator, that defendant was under the influence of a mental or emotional disturbance, we cannot conclude that, had this mitigating circumstance been submitted to the jury, no juror would have found its existence; nor can we conclude with certainty " 'that had this statutory mitigating circumstance been found and balanced against the aggravating circumstances, the jury would still have returned a sentence of death.' " *Quick*, 337 N.C. at 363, 446 S.E.2d at 538 (quoting *Mahaley*, 332 N.C. at 599, 423 S.E.2d at 67-68). As to the (f)(1) mitigator, that defendant had no significant history of prior criminal activity, we note that one or more jurors found as a nonstatutory mitigating circumstance that "[t]he violent nature of the crime for which

the defendant has been convicted is completely out of character with his prior behavior." Given this recognition by one or more members of the jury of defendant's previously nonviolent character, it is reasonably likely that had they been permitted to consider whether his criminal history was significant, one or more jurors would have found this statutory mitigating circumstance as well. For these reasons defendant is entitled to a new capital sentencing proceeding.

We conclude that the guilt-innocence phase of defendant's trial was free from prejudicial error. However, we also conclude that the trial court committed reversible error during the sentencing proceeding by failing to submit the (f)(1) and (f)(2) mitigating circumstances. Therefore, we vacate defendant's death sentence and remand for a new capital sentencing proceeding.

NO ERROR IN GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

Chief Justice MITCHELL dissenting.

In the present case, the State peremptorily challenged two of the three black venire members from the first panel of twelve prospective jurors. The State exercised its first two peremptory challenges against two black prospective jurors, Mr. Greene and Mr. McKinney. Defendant objected, and the trial court conducted a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986) (Equal Protection Clause), and *State v. Crandell*, 322 N.C. 487, 501, 369 S.E.2d 579, 587 (1988) (Article I, Section 26 of the Constitution of North Carolina).

The trial court found, *inter alia*, that defendant is a black man, that the victim was a white female, and that the venire contained "very few blacks." The trial court concluded that defendant had established a *prima facie* case of racial discrimination in the exercise of the State's peremptory challenges and required the State to present racially neutral reasons for its peremptory challenges of Mr. Greene and Mr. McKinney. The trial court concluded that the reasons given by the State for excusing Mr. Greene were racially neutral and therefore sufficient to justify the peremptory challenge. Based on proper findings of fact, however, the trial court concluded that the State's professed reason for excusing Mr. McKinney was "not sufficient to overcome the presumption of discrimination nor was it race

neutral" and that it appeared to the trial court to be "somewhat pretextual and an afterthought." The trial court then proposed to remedy the discriminatory use of this peremptory challenge by excusing the entire initial jury panel of twelve. The State, however, chose to withdraw its peremptory challenge of prospective juror McKinney and to allow him to be seated as a juror, rather than have the trial court excuse the entire panel. For the following reasons, I believe that the trial court reached the correct conclusion in deciding to excuse the entire panel, but erred when it changed its ruling in response to the State's withdrawal of its peremptory challenge of juror McKinney.

In *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994), the trial court concluded that a *Batson* violation had occurred. The defendant sought to have the violation corrected by requesting that the trial court seat the three black jurors the State had removed by peremptory challenges. The trial court declined to seat these jurors and ordered that the jury selection process begin anew with an entirely new panel of prospective jurors. *Id.* at 235, 433 S.E.2d 158-59. On appeal to this Court, the defendant argued that the trial court had erred in applying this remedy for the *Batson* violation. We rejected the defendant's argument.

In *McCollum*, we noted that the Supreme Court of the United States had, in *Batson*, 476 U.S. at 99 n.24, 90 L. Ed. 2d at 90 n.24, expressly declined to express a view on whether the more appropriate remedy for racial discrimination in jury selection was to discharge the venire and select a new jury from a new panel or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated. *McCollum*, 334 N.C. at 235, 433 S.E.2d at 159. However, we then went on to state the following:

> We believe that the better practice is that followed by the trial court in this [*McCollum*] case, and that neither *Batson* nor *Powers [v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991),] requires a different procedure. We recognize and endorse the equal protection right of prospective jurors explained in detail in *Powers*. However, we conclude that the primary focus in a criminal case—particularly a capital case such as this—must continue to be upon the goal of achieving a trial which is fair to both the defendant and the State. To ask jurors who have been improperly excluded from a jury because of their race to then return to the jury to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward either the State or the

> defendant, would be to ask them to discharge a duty which would require near superhuman effort and which would be extremely difficult for a person possessed of any sensitivity whatsoever to carry out successfully. As *Batson* violations will always occur at an early stage in the trial before any evidence has been introduced, the simpler, and we think clearly fairer, approach is to begin the jury selection anew with a new panel of prospective jurors who cannot have been affected by any prior *Batson* violation.

McCollum, 334 N.C. at 236, 433 S.E.2d at 159. We then concluded that even if we assumed *arguendo* that the trial court had erred by failing to seat the prospective jurors who had been improperly excused, the error was harmless beyond a reasonable doubt. *Id.* We said that this was so because the trial court's action had provided the defendant with exactly that which he was entitled to receive—trial by a jury selected on a nondiscriminatory basis. *Id.*

I wish to make it clear here that I do not intend to imply any criticism of the learned trial court. Clearly, it was, and we are, dealing here with an area of the law in which the Supreme Court of the United States has not yet given us clear guidance. The trial court did the best it could when faced with this situation not of its making. However, based upon the reasoning of this Court in *McCollum*, as quoted above, I now conclude that the only remedy for a *Batson* violation which will both be practical and ensure a fair trial is to "begin the jury selection anew with a new panel of prospective jurors who cannot have been affected by any prior *Batson* violation." *Id.* Accordingly, I believe that defendant is entitled to a new trial as a matter of both federal and state constitutional law. For this reason, I respectfully dissent.

Justice FRYE dissenting in part.

As the majority correctly indicates, the use of peremptory challenges for racially discriminatory reasons violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The North Carolina Constitution, Article I, Section 26, also prohibits the exercise of peremptory strikes solely on the basis of race. *State v. Ross*, 338 N.C. 280, 284, 449 S.E.2d 556, 560 (1994). Unfortunately, the trial court's handling of defendant's *Batson* challenges in this case circumvented the procedures established by the United States

Supreme Court and this Court to avoid racial discrimination in the selection of a jury.

The Supreme Court enunciated the procedure that a trial court must utilize when a defendant objects to a prosecutor's use of peremptory challenges to remove prospective jurors of the defendant's race. *Batson*, 476 U.S. at 96-98, 90 L. Ed. 2d at 87-88. This Court has frequently reiterated this procedure. *See, e.g., State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990). First, a defendant must make out a *prima facie* case of racial discrimination, which he may do by showing:

> (1) he is a member of a cognizable racial minority, (2) members of his racial group have been peremptorily excused, and (3) racial discrimination appears to have been the motivation for the challenges.

Id. But see also Powers v. Ohio, 499 U.S. 400, 113 L. Ed. 2d 411 (1991) (modifying *Batson* by holding that a defendant has standing to object to racially discriminatory use of peremptory challenges even if there is not racial identity between defendant and the excused juror); *State v. Beach*, 333 N.C. 733, 430 S.E.2d 248 (1993). If the defendant succeeds in establishing a *prima facie* case, the burden shifts to the State to come forward with a race-neutral reason for each challenged peremptory strike. *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991). The rebuttal must be clear, reasonably specific, and related to the particular case to be tried. *Id.* at 17, 409 S.E.2d at 297. The defendant also "has a right of surrebuttal to show that the prosecutor's explanations are a pretext." *Porter*, 326 N.C. at 497, 391 S.E.2d at 150. Finally, "[o]nce 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.' " *State v. Bond*, 345 N.C. 1, 20-21, 478 S.E.2d 163, 173 (1996) (quoting *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991)), *cert. denied*, —— U.S. ——, 138 L. Ed. 2d 1022 (1997). The procedure used by the trial court in this case cut short the inquiry required to establish whether the State's given reasons were nondiscriminatory.

The majority concludes that the trial court correctly determined that defendant had not established a *prima facie* case of racial discrimination in the peremptory challenges of two black prospective jurors, Mrs. Hudson and Mr. Watkins. I disagree.

At the time of the peremptory challenges of Mrs. Hudson and Mr. Watkins, the State had already peremptorily challenged two of three black venire members from the first panel of prospective jurors. The prosecutor exercised his first two peremptory challenges against two black prospective jurors, Mr. Greene and Mr. McKinney. Defendant objected. The trial court conducted a *Batson* hearing and found, *inter alia*, that defendant is a black man, that the victim was a white female, and that the venire contained "very few blacks." Concluding that defendant had established a *prima facie* case of racial discrimination in the exercise of the State's peremptory challenges, the trial court required the State to come forward with race-neutral reasons for the strikes. The trial court concluded that the reasons given to challenge Mr. Greene were race-neutral and sufficient to justify the peremptory challenge. However, as to Mr. McKinney, the trial court concluded that the proffered reason for the strike was not race-neutral and appeared to be pretextual. The trial court concluded that the entire jury panel should be discarded to remedy the discriminatory use of a peremptory challenge. The State chose to withdraw its challenge of juror McKinney rather than discard the entire jury panel.

Following the State's peremptory challenge of the next black prospective juror, Mrs. Hudson, defendant again objected. After noting that a *Batson* hearing had previously been conducted, the trial court stated:

> *At this point the prosecution has accepted two black jurors*, has excused one; if Mrs. Hudson is excused, that will be two out of four. I do not find that this raises the presumption required to make the prosecution state its reasons. There are sufficient black jurors remaining on the panel.

(Emphasis added.) The trial court declined to find that defendant had made a *prima facie* case of racial discrimination in the State's peremptory challenge of Mrs. Hudson.

I disagree with the majority's conclusion that the trial court was correct in this ruling. The trial court found that the prosecutor had "accepted" the seating of two black jurors and had excused one; however, the State "accepted" juror McKinney only after the court decided to remedy the racial discrimination by dismissing the entire jury panel.

Likewise, when Mr. Watkins was subsequently peremptorily challenged, the State had exercised peremptory challenges against four of

five black jurors, even though it ultimately "accepted" two of five. In response to defendant's *Batson* objection, the trial court again noted that two black jurors in the pool had been seated. The trial court then stated that while it was "a little bit troublesome" that three out of five black jurors would have been excused by the State, it would not find that defendant had made out a *prima facie* case of discrimination under *Batson*.

I believe that the trial court erred in both instances by ignoring the State's prior attempt to exercise a peremptory challenge in a racially discriminatory manner and focusing instead on the number of black jurors seated. This evidence of purposeful discrimination is especially significant in light of the circumstances of this case, where defendant is a black man charged with the murder of an elderly white woman. Such circumstances make this a case especially "susceptible to racially discriminatory jury selection." *State v. Thomas*, 329 N.C. 423, 431, 407 S.E.2d 141, 147 (1991).

The majority finds it unnecessary to address defendant's argument that the trial court failed to make findings under the third step of the *Batson* analysis because of its conclusion that the trial court did not err in finding no *prima facie* case of discrimination. However, I believe that defendant sufficiently raised "an inference of purposeful discrimination," *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 88, such that the trial court should have proceeded to conduct a further inquiry. The trial court should have made findings and conclusions as to whether the State's reasons were legitimate and race-neutral or pretextual and discriminatory. In this case, the trial court failed to "rule[] on the ultimate question of intentional discrimination." *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405.

For the foregoing reasons, I would hold that the trial court erred by concluding that defendant failed to establish a *prima facie* case of racial discrimination as to the peremptory challenges of prospective jurors Hudson and Watkins. I would therefore remand this case to the trial court for a hearing on the *Batson* issue. If the State's articulated reasons for the challenges are determined to be race-neutral, defendant is entitled to produce evidence to rebut the State's reasons and prove that the State engaged in purposeful racial discrimination. If defendant can meet this burden, then he must be awarded a new trial.

Justice WHICHARD joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. EDWARD LEMONS

No. 377A95

(Filed 9 July 1998)

1. Constitutional Law § 344 (NCI4th)— capital murder—prospective jurors—oath outside defendant's presence—no right to be present

A capital first-degree murder defendant's constitutional rights to be present at every critical stage of his trial were not violated when the trial court failed to require that prospective jurors take their oath in defendant's presence. The trial court's remarks to the jurors once they were brought into the courtroom demonstrate that the jurors had been preliminarily sworn, oriented, and qualified for jury service without regard to any particular case or trial and defendant had no right to be present when they were preliminarily sworn in.

2. Constitutional Law § 344 (NCI4th)— capital murder—individual voir dire—prospective jurors outside courtroom—clerk's administrative question—right to be present—not violated

A capital first-degree murder defendant's constitutional rights to be present at every critical stage of his trial were not violated where voir dire was conducted on an individual basis, prospective jurors awaiting questioning were in a room outside the courtroom, and the clerk entered the room outside the presence of defendant and asked whether anyone had not filled out a jury questionnaire. The clerk merely sought to carry out the administrative duties which the trial court had requested, the challenged communications did not relate to the consideration of defendant's guilt or innocence, and defendant failed to demonstrate how his presence would have been useful to the defense.

3. Constitutional Law § 261 (NCI4th)— sign on courtroom door—entry only to those with business before the court—search for weapons—no violation of public trial

A capital first-degree murder defendant's constitutional right to a public trial was not violated where the trial court allowed the bailiff to post a sign on the courtroom door advising members of the public not to enter unless they had business in the court and

stating that all who entered would be searched for weapons. The sign was an attempt to ensure the orderliness of the courtroom proceedings, even defense counsel was a proponent of the device, and it was not an order of closure. Defendant's family, the press, or others interested in observing the trial were not eliminated and defendant did not show that anyone was prevented from entering. Finally, under these facts, defendant cannot demand a new trial upon the assertion of an alleged violation of the constitutional rights of a third person. U.S. Const. amend. VI; N.C. Const. art. I, § 18.

4. Evidence and Witnesses § 318 (NCI4th)— first-degree murder—subsequent assault—admissible—identity

The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting testimony concerning an assault ten days after the murders and related photographs where the murder victims were taken by surprise, confined in the trunk of a car, forced to strip and then were robbed and shot in the head, and the assault victim was also taken by surprise, assaulted, robbed, and shot in the back of the head using the same gun that killed one of the murder victims. The evidence was relevant to identity and the trial court gave a limiting instruction.

5. Criminal Law § 45 (NCI4th Rev.)— first-degree murder—aiding and abetting—mere presence—friend exception

The trial court did not err in a capital prosecution for first-degree murder by instructing the jury on the friend exception to the mere presence rule where the evidence showed that defendant and Leggett were first cousins and that defendant moved in with Leggett's family upon relocating to North Carolina; defendant met Teague while living with his cousin; defendant left a house on the night of the murder in a strange car which he knew had been stolen "from some crackheads"; defendant knew the victims were in the trunk and that Teague and Leggett were getting ready to rob some people; defendant went to his aunt's house with Leggett and Teague after the murders, where he lived until he was arrested; and Teague remained in contact with defendant and informed him when he sold one of the weapons used in the murders. The evidence was sufficient to support the inference that defendant, by his presence, communicated to Leggett and Teague his intent to render aid in the commission of the crime should it become necessary.

6. Criminal Law § 461 (NCI4th Rev.)— capital murder—prosecutor's argument—deterrent effect

The trial court did not abuse its discretion by failing to intervene *ex mero motu* in the prosecutor's argument in a first-degree murder prosecution where defendant contended that the prosecutor improperly argued the general deterrent effect of the death penalty, but the prosecutor focused on the gravity of the jury's duty and its responsibility to follow the law.

7. Criminal Law § 444 (NCI4th Rev.)— first-degree murder—prosecutor's argument—defendant and defense witness as liars—no plain error

The prosecutor's remarks in a capital first-degree murder prosecution were not so prejudicial and grossly improper as to require the trial court to intervene *ex mero motu* where defendant contended that the prosecutor referred to defendant and a defense witness as liars, but the prosecutor instead characterized portions of the testimony as inaccurate and untrue.

8. Criminal Law § 447 (NCI4th Rev.)— first-degree murder—prosecutor's argument—defense expert

The prosecutor's remarks disparaging defendant's expert witness in a capital first-degree murder prosecution were neither prejudicial nor grossly improper in light of the testimony concerning the restriction or suspension of the witness's license and where defense counsel herself asked the jury not to hold the witness against defendant.

9. Criminal Law § 467 (NCI4th Rev.)— first-degree murder—prosecutor's argument—characterization of defendant's acts

There was no gross impropriety requiring the trial court to intervene *ex mero motu* in a capital first-degree murder prosecution where defendant contended that the prosecutor argued, contrary to the evidence, that the female victim had been sexually assaulted, but the prosecutor's statement merely characterized the actions of defendant and his accomplices and did not imply that defendant or his accomplices actually sexually assaulted the victim. The characterization of the dehumanizing acts committed by defendant was supported by the facts.

10. Criminal Law § 456 (NCI4th Rev.)— first-degree murder—prosecutor's argument—comparison to Holocaust—no plain error

A prosecutor's argument in a first-degree murder prosecution comparing defendant to the Gestapo and his conduct with the Holocaust was extreme but, in context, did not require the trial court to intervene *ex mero motu*.

11. Criminal Law § 807 (NCI4th Rev.)— first-degree murder—instructions—aiding and abetting

There was no plain error in a capital first-degree murder prosecution in the trial court's instruction on aiding and abetting where the trial court adhered to the pattern jury instructions on aiding and abetting and never used the phrases at issue in the cases cited by defendant.

12. Jury § 260 (NCI4th)— first-degree murder—jury selection—peremptory challenges—no racial discrimination

The trial court did not err in a capital first-degree murder prosecution by permitting the State to exercise peremptory challenges in a racially discriminatory manner where the excusals were not racially motivated and were not clearly erroneous. HIV dementia was a possible issue in the case; one juror was excused due to her feelings and experience with psychology and with HIV, and the other because he had worked as a health-care technician at Cherry Hospital for seventeen years and felt that he would be inclined to accept the testimony of a psychiatrist.

13. Criminal Law § 1335 (NCI4th Rev.)— capital sentencing—hearsay statements of accomplice admitted—no abuse of discretion

The trial court did not abuse its discretion in a capital sentencing hearing by admitting the hearsay statements of an accomplice (Teague) where defendant's accomplices claimed their Fifth Amendment privilege and refused to testify, defendant was allowed to offer testimony from two inmates that one of the accomplices had said that defendant had not been the shooter, and the State offered in rebuttal statements from the accomplices to law enforcement officers that defendant had shot the victims. The State during sentencing must be permitted to present any competent, relevant evidence relating to defendant's character or record which substantially supports the imposition of the death penalty. Once defendant offered evidence in support of the (f)(4)

mitigating circumstance and the nonstatutory mitigating circumstance that he was not the actual shooter, the State was entitled to present evidence rebutting that claim.

14. Criminal Law § 1346 (NCI4th Rev.)— capital sentencing—new evidence on intent—*Enmund* instruction refused

The trial court did not err in a capital sentencing proceeding by refusing to instruct the jury on the *Enmund/Tison* requirements where defendant contended that there was new evidence introduced during sentencing that was relevant to defendant's intent to kill. The sole consideration at the separate sentencing hearing is the appropriate punishment and reconsideration of defendant's guilt is irrelevant. Furthermore, defendant could have presented this evidence during the guilt phase had he so chosen.

15. Criminal Law § 1344 (NCI4th Rev.)— capital sentencing—instructions—*Enmund* instruction—not required

The trial court did not err by refusing to instruct a capital sentencing jury on the *Enmund/Tison* requirements where the jury was instructed on the friend exception to the mere presence rule. The State's evidence demonstrated that defendant had the *mens rea* required for conviction based on malice, premeditation, and deliberation and, accordingly, no *Enmund/Tison* instruction was required.

16. Criminal Law § 1388 (NCI4th Rev.)— capital sentencing—mitigating circumstances—impaired capacity—not submitted

The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired where defendant testified that he was not doing drugs and that there was nothing wrong with his "ability to comprehend what's going on and understand," he further testified that there was nothing wrong with him on the night of the murders and that he knew these crimes were illegal, and an expert forensic psychiatrist testified that defendant knew the difference between right and wrong and that defendant had no confusion of thinking, no bipolar disorder, was in touch with reality, and was oriented to time, place, and circumstances. There was no testimony or evidence suggesting that defendant's capacity to understand right from wrong or

to conform his conduct to the law was impaired at the time of the murder.

17. Criminal Law § 1336 (NCI4th Rev.)— capital sentencing—evidence of several robberies—no prejudice

The trial court did not abuse its discretion in a capital sentencing proceeding by admitting evidence of several robberies where defendant attempted to introduce a statement by the cellmate of an accomplice to a detective with portions excluded; the court denied the motion to redact; defendant called the inmate to the witness stand and requested that he read to the jury the statement that he had given the detective; and the statement contained references to the robberies. There was no prejudice in the portion of the statement relating to one of the robberies because it was made clear to the jury that defendant had no part in that robbery, and the evidence of the other two robberies was relevant to the course of conduct aggravating circumstance.

18. Criminal Law § 1370 (NCI4th Rev.)— capital sentencing—aggravating circumstances—especially heinous, atrocious, and cruel

There was no plain error in a capital sentencing proceeding in the instruction on the aggravating circumstance that the murder was especially heinous, atrocious, or cruel where defendant contended that the instruction given impermissibly allowed the jury to find the circumstance based on the intent and actions of defendant's accomplices, but, as in *State v. Syriani*, 333 N.C. 350, the instruction passes constitutional muster. Furthermore, the focus throughout sentencing was on the conduct of defendant rather than his accomplices and did not permit the jurors to find aggravating circumstances based on the actions of defendant's accomplices. The evidence showed that the victim was kidnapped, confined in the trunk of a car, and driven around while defendant and his accomplices contemplated her robbery; she was forced to strip naked in front of her kidnappers and was searched for money and drugs; and, after witnessing the murder of her companion, she was killed as she begged for her life. Furthermore, the jury failed during the sentencing proceeding to find the existence of the statutory mitigating circumstance that this murder was actually committed by another person and that defendant was only an accomplice.

19. Criminal Law § 1365 (NCI4th Rev.)— capital sentencing—aggravating circumstances—avoiding arrest or effecting escape

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance as to one of two victims that the murder was committed for the purpose of avoiding or preventing a lawful arrest where defendant argued that there was evidence that his accomplices were motivated by this purpose, but no competent evidence that defendant was similarly motivated; however, defendant conceded at trial that this victim was killed to eliminate her as a witness. N.C.G.S. § 15A-2000(e)(4) speaks only of avoiding or preventing a lawful arrest; it need not be defendant's arrest.

20. Criminal Law § 1402 (NCI4th Rev.)— death sentence—not disproportionate

A death sentence was not disproportionate where the evidence supports each aggravating circumstance found, the sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor, and this case is distinguishable from each of the seven cases in which a death sentence was found disproportionate. Although defendant's two accomplices both received life sentences and defendant argues that there is no clear evidence indicating that he was more culpable and that there is a possibility that he was less culpable than either of them, the jury could reasonably find that defendant's actions warranted the death penalty.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of death entered by Smith (W. Osmond, III), J., on 18 August 1995 in Superior Court, Wayne County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments for two counts each of first-degree kidnapping and robbery with a firearm was allowed 17 July 1997. Heard in the Supreme Court 11 March 1998.

Michael F. Easley, Attorney General, by John G. Barnwell and Teresa L. Harris, Assistant Attorneys General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine C. Fodor, Assistant Appellate Defender, for defendant-appellant.

ORR, Justice.

This case arises out of the shooting deaths of Margaret Strickland and Bobby Gene Stroud. On 5 July 1994, defendant was indicted for two counts of first-degree murder, two counts of first-degree kidnapping, two counts of armed robbery, and one count of conspiracy to commit armed robbery and murder. Prior to trial, the State took a voluntary dismissal of the conspiracy charge. Defendant was tried before a jury, and on 11 August 1995, the jury found defendant guilty of all remaining charges. Following a capital sentencing proceeding, based upon the jury's finding defendant guilty of both murders on the basis of premeditation and deliberation and the felony murder theory, the jury recommended sentences of death for each of the murder convictions. In accordance with the jury's recommendation, the trial court entered two sentences of death. The trial court additionally sentenced defendant to forty years' imprisonment for each of the first-degree kidnapping convictions and for each of the armed robbery convictions, to be served consecutively to each other and concurrently with the sentences of death.

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.

At trial, the State's evidence tended to show the following: On the night of 21 January 1994, defendant was playing cards with Edna Raynor at her house. While at Raynor's, defendant's cousin, James Leggett, phoned defendant and told him that he and Kwame Teague were on their way to pick defendant up. When they arrived, defendant got into the car with Leggett and Teague, and they drove off. According to defendant, when he asked where the car came from, Teague said to "ask the people in the back." When defendant asked "if there was someone in there," referring to the trunk, he heard a man moan.

The three men then proceeded to a field near Rollingwood subdivision in Wayne County. Upon reaching the field, the two victims, Strickland and Stroud, were ordered out of the trunk at gunpoint and forced to strip. Stroud was then shot three times with a .25-caliber pistol, and Strickland was shot three times with a .32-caliber pistol. Subsequently, Leggett, Teague, and defendant went to the home of Bernice Lemons, defendant's aunt, where they spent the night.

The next day, the bodies of the victims were discovered in a field near Rollingwood Drive. Bobby Ray Kelly, a special deputy for the Sheriff's Department, arrived at the scene within approximately twelve to fifteen minutes of being notified of a possible shooting. Once there, Deputy Kelly secured the area and waited for additional help.

Subsequently, the bodies were identified as those of Bobby Gene Stroud and Margaret Strickland. Dr. Debra Radish, an expert in the field of pathology, performed the autopsy on Stroud. Dr. Radish testified that there were three separate gunshot wounds to Stroud's body. In Dr. Radish's opinion, Stroud "most likely" died five to ten minutes after suffering from a gunshot wound that entered his body in the left anterior temple and exited on the right of the anterior or front midline. The wound track was "from left to right through the brain slightly upward from the front to the back of his head." In Dr. Radish's opinion, "the cause of death in this case was due to [a] gunshot wound of the head."

Dr. Karen Chancellor, also an expert in the field of forensic pathology, performed the autopsy on Strickland. Although Strickland was shot three times, the bullets inflicted four wounds because one of them entered through her right forearm and struck her in the chest. One gunshot wound was above Strickland's left ear. In Dr. Chancellor's opinion, the gun was held no farther than one or two inches from Strickland's head when this wound was inflicted. Dr. Chancellor concluded that Strickland died from the "gunshot wound to the head and to the chest."

Ten days after the murders, on 31 January 1994, defendant assaulted and shot James Taylor in Taylor's home. Taylor's wound, however, was not fatal. Ballistics tests established that the gun which was used in the Taylor assault was also used in the Strickland murder. On the same day as the Taylor assault, defendant was arrested.

After being informed of his *Miranda* rights, defendant made several statements to police. In his final statement, defendant told the police that he was at Edna Raynor's house when Leggett and Teague phoned and told him that they were on their way to pick him up. Defendant stated that once they arrived,

> [he] asked where the car came from. Kwame said ask the people in the back. I turned around and said, yo, is someone in there. I heard a man moan. I said, man, you are bull shitting me. I said

> what's up. Kwame said make sure your prints ain't in this car. I looked and Kwame and Larry both had on white rubber gloves. Kwame drove for a little ways and stopped in a field with hills of dirt and tall weed.

According to defendant, Kwame then got the victims out of the car and ordered them to undress. Defendant stated that

> Kwame pulled the man's pants off. The man took his own shirt off. The woman had pulled off, pulled all her clothes off. She was squatted on the ground. The man was lying on his side. Kwame grabbed the man and said, I am fixing to do him. Kwame shot him in the back of the head more than once. The woman started screaming and started running. Larry shot up in the air and ran and caught the woman. Larry made her lie, correction, Larry made her lay on the ground. She sat on her butt. Kwame asked her if she knew him. She stuttered. She hesitated. Kwame said, do her, Larry. Do her. Larry shot her in the back of the head. She started treating [sic] to get up. Larry slung her on the ground and shot her again in the side of the head. He shot her again in the stomach. We got back in the car.

The defendant also presented evidence during the guilt phase. Denio Edwards, a friend of defendant's, testified that he was with defendant, Jerry Newsome, and others at James Taylor's house on 30 January 1994. He testified that he heard defendant say that he had "made a lick against two white people for several thousand dollars" but that he did not hear defendant say he had killed two white people. Defendant testified that on 21 January 1994, Edna Raynor took him to her house, where he played cards and had one mixed drink. Defendant's testimony concerning the events on the night of 21 January 1994 mirror his statement to law enforcement officers as set out above. Defendant admitted that he lied to law enforcement officers in his first statement when he said that he did not get into the car with Teague and Leggett. He also admitted that he tried to get Raynor to provide him with an alibi and that she refused. He denied, however, that he planned the kidnapping and robbery of Stroud and Strickland and asserted that the only person he shot was James Taylor.

During the sentencing phase, defendant presented several witnesses who testified regarding defendant's family background and upbringing. Defendant also presented the testimony of James Davis and Antoine Dixon. The trial court allowed their testimony after both

Leggett and Teague asserted their Fifth Amendment privilege against self-incrimination. Davis, Leggett's cellmate in the Wayne County jail, testified that Leggett told him that he, Teague, and defendant "robbed somebody in the woods." He also stated that Leggett told him that Teague shot the man and that Leggett shot the woman in the back of her head.

Dixon testified that during February and March 1994, he was in jail with Leggett. According to Dixon, Leggett said that during the robbery, defendant started "hitting the man with his fists." Dixon further testified that Leggett said that Teague shot the man, and then he, Leggett, shot the woman in the head twice.

In rebuttal, the State presented the testimony of Sergeant Ken Taylor. Taylor testified that in Leggett's first statement to the police, he denied any involvement in the kidnappings, robberies, and murders. In his second statement, Leggett admitted involvement but stated that it was defendant who had shot the gun. Detective George Raecher also testified concerning a statement that Teague made to the police. In the statement, Teague admitted involvement in the crimes but denied actually firing the gun. Instead, Teague claimed that defendant "shot the man while he was laying [sic] on the ground." Teague further stated that as he ran off, he heard several more shots.

I.

On appeal, defendant first contends that his constitutional right to be present at every stage of his capital trial was violated. Specifically, defendant contends that this right was violated when (a) the jurors took their oath outside of defendant's presence, and (b) the clerk spoke with prospective jurors outside of defendant's presence. Defendant argues that these incidents violate the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. We do not agree.

The Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution guarantee the right of a criminal defendant to be present at every critical stage of his trial. *State v. Buchanan*, 330 N.C. 202, 208, 410 S.E.2d 832, 836 (1991). Our Court has interpreted the North Carolina Constitution as guaranteeing the accused the right to be present at "all times during the trial when any-

thing is said or done which materially affects defendant as to the charge against him." *State v. Chapman*, 342 N.C. 330, 337-38, 464 S.E.2d 661, 665 (1995), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996).

[1] First, we will address defendant's contention that the trial court violated his constitutional rights by failing to require that prospective jurors take their oath in defendant's presence. Defendant argues that "[t]he swearing in of prospective jurors is a critical part of the trial, which the defendant is constitutionally entitled to view."

In *State v. Workman*, 344 N.C. 482, 476 S.E.2d 301 (1996), this Court stated that "[d]efendant's right to be present at all stages of his trial does not include the right to be present during preliminary handling of the jury venires before defendant's own case has been called." *Id.* at 498, 476 S.E.2d at 309. This Court went on to state that

> [defendant] had no right to be present when prospective jurors were preliminarily sworn, oriented and qualified for jury service in general, without regard to any particular case or trial. Further, because defendant Workman's trial had not yet commenced, these "proceedings" could not have been conducted during a stage of defendant Workman's capital trial.

Id. at 498, 476 S.E.2d at 310.

Similarly, in the present case, defendant had no right to be present when the prospective jurors were preliminarily sworn in. The trial court's introduction of the parties and other remarks to the prospective jurors once they were brought into the courtroom demonstrate that the jurors had been preliminarily sworn, oriented, and qualified for jury service generally, without regard to any particular case or trial.

[2] Second, defendant contends that his constitutional right to be present was violated by the clerk's *ex parte* contact with jurors. Defendant argues that the selection of the jury is a stage of a capital trial at which defendant must be present. Defendant further argues that because there is no record of the content of the clerk's contact with the jurors, and in particular, nothing showing that the clerk's contact was limited to the juror questionnaire inquiry, the violation of defendant's right to be present cannot be held harmless.

In the present case, *voir dire* was conducted on an individualized basis. Prospective jurors awaiting questioning were located in a room

outside the courtroom. During jury selection, defense counsel brought to the trial court's attention the fact that the clerk had entered the room where prospective jurors were gathered and communicated with them outside the presence of defendant. The following exchange took place between the trial court and defense counsel:

> [DEFENSE COUNSEL]: Your Honor, we were just handed another questionnaire indicating—by the bailiff—that there was someone else who also had not filled out a jury questionnaire. I know [the district attorney] discussed it and had asked that you bring the jury back in and make inquiry if there was anyone else who hadn't filled out a questionnaire, to go ahead so we do not have that problem again. Apparently the clerk asked that question back there. I don't know if it was verified, I have no idea what was said. I would just like to make sure that we don't have any other communication that way again. And, of course, if there is a need to check again to see if there's anyone else who has not done a questionnaire.
>
> THE COURT: I don't think the clerk's communication with the jury would be improper, in that the clerk is responsible for seeing that the jurors are assembled here or summoned to be here, so forth. And one of the requirements, as I understand, in this case, was that either an order or agreement that jury questionnaires would be submitted to jurors to be filled out [sic]. So it seems to me the clerk was just carrying out that duty. Now, if you have any evidence of other communication —
>
> [DEFENSE COUNSEL]: I have no idea what was communicated, your Honor. All I know is I'm handed a questionnaire. And I'm not questioning the situation. I'm just saying it's not on the record. Everything is supposed to be on the record with this jury . . . . But in any event, I have no other evidence of anything else, your Honor.

In *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995), this Court addressed the issue of whether the trial court erred in ordering the bailiff to engage in unrecorded communications with prospective jurors. Defendant specifically complained of the trial court's instructing the bailiff to "have the jurors fill out the [jury *voir dire*] questionnaires and then duplicate them." *Id.* at 86, 446 S.E.2d at 551. Defendant also noted that the trial court instructed the bailiff to "put the jurors in the jury room on break" and to "have them to return back to the jury room."

Id. Further, defendant complained of the clerk's administrative duties of calling the jury roll and explaining to the jurors what time they needed to arrive at court. This Court noted that the challenged communications "were of an administrative nature and did not relate to the consideration of defendant's guilt or innocence" and concluded that defendant's presence would not have had a reasonably substantial relation to his opportunity to defend. *Id.*

The same can be said in the present case. In distributing and gathering the questionnaires, the clerk merely sought to carry out the administrative duties which the trial court had requested. As we stated in *Bacon*, "[d]efendant has failed to demonstrate how his presence would have been useful to his defense in these instances, and we thus conclude that no constitutional violation has occurred." *Id.* at 86, 446 S.E.2d at 551-52. For the same reason, we hold that there has been no violation of defendant's constitutional rights. Accordingly, this assignment of error is overruled.

II.

[3] Next, defendant contends that the trial court violated the constitutional mandate that courts be open to the public. U.S. Const. amend. VI; N.C. Const. art. I, § 18. Specifically, defendant argues that the sign posted on the courtroom door advising members of the public not to enter unless they had business in the court violated his constitutional rights. We disagree.

In the present case, prior to the beginning of jury selection, the bailiff requested the permission of the trial court to post a sign on the entrance to the courtroom. The following exchange occurred with regard to the posting of the sign:

> THE COURT: Mr. Hartzog, I believe you want to bring something to the Court's attention on the record?
>
> THE BAILIFF: Yes sir. We got a brief notice, with the Court's permission, to put on the door the notice "do not enter courtroom unless you have business in here. All persons entering or opening courtroom doors will be searched for weapons." We've used a very similar notice in murder trials in the past, and they work very well.
>
> THE COURT: And I believe you indicated to me counsel for the defendant, as well as the state, have viewed that sign?
>
> THE BAILIFF: Yes, sir.

THE COURT: Let me ask on the record, then. Does the defendant have any objection? Does the defendant consent to the posting of that sign?

[DEFENSE COUNSEL]: Your Honor, we don't have a problem to the posting, but we suggest it be posted at the other superior court door, as well. They'd be entering at both doors. Maybe that's the rule of the Court, in both superior courts. I would just contend that would be appropriate for both doors for this defendant.

THE COURT: And does the state consent to such sign?

[THE STATE]: I really don't care, your Honor. That's fine.

The North Carolina Constitution requires that "[a]ll courts shall be open." N.C. Const. art. I, § 18. Additionally, the Sixth Amendment to the United States Constitution mandates that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. However, as the United States Supreme Court has noted, "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute." *Globe Newspaper Co. v. Superior Ct. for Norfolk County*, 457 U.S. 596, 606, 73 L. Ed. 2d 248, 257 (1982). The United States Supreme Court has stated that a trial judge may "in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18, 65 L. Ed. 2d 973, 992 n.18 (1980). The Supreme Court further noted that in determining whether such limitations are warranted, the focus should be on " 'whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.' " *Id.* at 581-82, 65 L. Ed. 2d at 992 (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574, 85 L. Ed. 1049, 1053 (1941)).

In *People v. Colon*, 71 N.Y.2d 410, 521 N.E.2d 1075, 526 N.Y.S.2d 932, *cert. denied*, 487 U.S. 1239, 101 L. Ed. 2d 943 (1988), the New York Court of Appeals succinctly discussed some of the limitations which may be placed on a defendant's right to a public trial. In *Colon*, the New York court stated that

> [t]he right to a public trial has always been recognized as subject to the inherent power of trial courts to administer the activities of the courtroom; suitably within the trial court's discretion is the power to monitor admittance to the courtroom, as the circum-

> stances require, in order to prevent overcrowding, to accommodate limited seating capacity, to maintain sanitary or health conditions, and generally to preserve order and decorum in the courtroom.

Id. at 416, 521 N.E.2d at 1078, 526 N.Y.S.2d at 935. Further, it has been stated that "[w]e should not be hasty to reverse a trial judge's actions in establishing order in his courtroom, unless his actions are not designed to maintain dignity, order, and decorum, and instead deny or abridge unwarrantedly the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Commonwealth v. Berrigan*, 509 Pa. 118, 132, 501 A.2d 226, 234 (1985).

In North Carolina, the presiding judge is authorized to "impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings." N.C.G.S. § 15A-1034(a) (1997). It is apparent from the record that the posting of the sign was an attempt to ensure the orderliness of the courtroom proceedings. Even defense counsel was a proponent of this device. In fact, defense counsel requested that the sign be placed at each entrance to the courtroom. As this Court stated in *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981), "[w]hile every reasonable presumption will be indulged against a waiver of fundamental constitutional rights by a defendant in a criminal prosecution, a defendant may waive the benefit of constitutional guarantees by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." *Id.* at 341-42, 279 S.E.2d at 801 (citation omitted).

Further, in the present case, it is important to note that we are not dealing with an order of closure, but rather with the posting of a sign. This sign indicated that only persons having business in the courtroom were allowed to enter. However, this did not eliminate such persons as defendant's family, the press, or others interested in observing the trial. Defendant has failed to bring to our attention any person who was prevented from entering the courtroom. Further, notifying persons entering the courtroom that they will be "searched for weapons" is certainly a legitimate and permissible measure to maintain the orderliness of the courtroom. *See Brown v. Doe*, 2 F.3d 1236 (2d Cir. 1993) (holding that security measures taken at a state courthouse are so peculiarly within the purview and discretion of the state judiciary as to be beyond review on a habeas corpus petition

absent a strong showing that the measures taken were inherently prejudicial and that defendant suffered actual prejudice), *cert. denied*, 510 U.S. 1125, 127 L. Ed. 2d 403 (1994).

In support of his position, defendant cites to both *Globe Newspaper Co.*, 457 U.S. 596, 73 L. Ed. 2d 248, and *Richmond Newspapers, Inc.*, 448 U.S. 555, 65 L. Ed. 2d 973. However, these cases are not applicable to the present case. Both *Globe* and *Richmond* assert the public's right of access to criminal trials under the First and Fourteenth Amendments to the United States Constitution. As this Court noted in *State v. Burney*, 302 N.C. 529, 276 S.E.2d 693 (1981), "[d]efendant cannot demand a new trial upon the assertion of an alleged violation of the constitutional rights of a third person under these particular facts." *Id.* at 537, 276 S.E.2d at 698.

Accordingly, we hold that, under the facts and circumstances of this case, defendant's constitutional right to a public trial was not violated. This assignment of error is without merit.

III.

[4] Next, defendant contends that the trial court erred by admitting evidence of an unrelated assault allegedly committed by defendant. Defendant argues that the State's reliance on this evidence "was so extensive and prejudicial that it rose to the level of a due process violation under the Fourteenth Amendment [to] the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution." Defendant contends that the use of this evidence entitles him to a new trial. We do not agree.

In the present case, the State attempted to consolidate the charges against defendant arising out of the Strickland/Stroud murders with the charges pending against defendant involving the assault of James Taylor. The trial court denied the State's motion to consolidate these charges. However, the trial court subsequently ruled that the evidence regarding the Taylor assault was admissible under Rule 404(b) for the purposes of showing identity, motive, and intent. Defendant concedes that some limited evidence about the assault was admissible under Rule 404(b) because "it tended to show that the defendant had possession of one of the guns used in the charged crimes ten days after the homicides." However, defendant maintains that many of the details admitted into evidence "were entirely unrelated to this purpose and should have been excluded under Rule

404(b)." Specifically, defendant contends that the trial court erred by admitting (1) Taylor's testimony regarding the assault, (2) the testimony of three law enforcement officers concerning the investigation of the Taylor incident, and (3) eight photographs of Taylor's injuries and the crime scene.

The admissibility of specific acts of misconduct by the defendant is governed by Rule 404(b), which provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1992). Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

In order for evidence of defendant's prior crimes or bad acts to be admissible under Rule 404(b) to show identity of the perpetrator in the crime charged, there must be " 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes.' " *State v. Riddick*, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986) (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)). In the present case, the evidence shows that both of the victims were taken by surprise, confined in the trunk of the car, and forced to strip. They were then robbed, and each of them was shot in the head. James Taylor was also taken by surprise, assaulted, and robbed. More importantly, Taylor was shot in the back of the head using the same gun that killed Margaret Strickland. Here, because the evidence was relevant to show identity, it was properly admitted.

The crux of defendant's argument appears to be that even if admissible under Rule 404(b), evidence of the prior assault should have been excluded under Rule 403 of the North Carolina Rules of Evidence. Rule 403 provides that "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). However, the exclusion of the evidence under Rule 403 is a matter generally left to the sound discretion of the trial court. *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Abuse will be found only where the trial court's ruling is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *Id.*

Here, the trial court did not abuse its discretion by admitting evidence of misconduct otherwise admissible under Rule 404(b). In fact, the trial court guarded against the possibility of prejudice to defendant by providing the jury with the following limiting instruction before Taylor's testimony regarding the alleged assault:

> Members of the jury, I am reminding you again, consistent with what I told you about earlier, let me instruct you that evidence of other crimes, wrongs, acts or conduct of the defendant regarding any alleged assault or robbery of James Taylor is not offered [or] admissible to prove the character of the defendant in order to show that he acted in conformity therewith with reference to these charges for which he is now being tried and must not be considered by you as such. It is offered and admitted for other purposes such as proof of motive, intent and identification of the defendant and may be considered by you for such other purposes, if you so find.

We hold that the trial court did not abuse its discretion by admitting the testimony concerning Taylor's assault and the photographs related to the assault. This assignment of error is overruled.

IV.

[5] Next, defendant contends that the trial court erred by instructing the jury on the "friend" exception to the "mere presence" rule. Defendant argues that the instruction was erroneous because there was insufficient evidence to support the conclusion that defendant's presence would have encouraged or aided the two others involved in the criminal enterprise. We disagree.

Over defendant's objection, the trial court instructed the jury on aiding and abetting, including the "friend" exception to the "mere presence" rule, as follows:

> As to each charge of murder I now charge that for you to find the defendant guilty of first degree murder because of aiding and

abetting, the State must prove three things beyond a reasonable doubt.

First, that the crime of first degree murder was committed by some other person or persons. You will recall my prior charge to you as to the elements of first degree murder as they relate to this case both on the basis of malice, premeditation and deliberation and under the first degree felony murder rule in the perpetration of robbery with a firearm.

Second, that the defendant knowingly advised, instigated, encouraged, procured, and or aided the other person or persons to commit that crime. However, a person's 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. *If the bystander is a friend of the perpetrator and knows his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement and in contemplation of the law, this would be aiding and abetting. To be guilty he must aid or actively encourage the person or persons committing the crime or in some way communicate to this person or persons his intention to assist in its commission.*

And, third, that the defendant's actions or statements caused or contributed to the commission of the crime of first degree murder by that other person.

(Emphasis added.)

In *State v. Rankin*, 284 N.C. 219, 200 S.E.2d 182 (1973), this Court discussed the "friend" exception to the "mere presence" rule and stated:

> The mere presence of the defendant at the scene of a crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense. To sustain a conviction of the defendant, . . . the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrator in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrator. Such communication of intent to aid, if needed, does not, however, have to be shown by express words of the defendant, but may be inferred from his actions and

> from his relation to the actual perpetrator. "When the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement." Wharton, Criminal Law, 12th Ed., § 246.

Rankin, 284 N.C. at 223, 200 S.E.2d at 184-85 (citations omitted).

Applying these principles to the evidence in the present case, we find no error in the trial court's decision to instruct the jury on the "friend" exception to the "mere presence" rule. Here, the evidence showed that defendant and Leggett were first cousins and that he moved in with Leggett's family upon relocating to North Carolina. Further, while living with his cousin, he met Teague. According to defendant's own testimony, on the night of the murder, he left Raynor's house in a strange car which he knew had been stolen "from some crack heads." He testified that he knew the victims were in the trunk and that Teague and Leggett were "getting ready to rob some people." After the murders, he went to his aunt's house with Leggett and Teague, where he continued to live until he was arrested. According to defendant's own testimony, Teague stayed in contact with him after the murders and informed defendant when he sold one of the weapons used in the Strickland/Stroud murders. This evidence is sufficient to support an inference that defendant, by his presence, communicated to Leggett and Teague his intent to render aid in the commission of the crime should it become necessary. *See Rankin*, 284 N.C. 219, 200 S.E.2d 182.

V.

Defendant also contends that the trial court erred by permitting the State to engage in grossly improper arguments during both the guilt phase and sentencing proceeding. Defendant argues that the improper arguments denied defendant his constitutional rights to due process and to a fair and reliable sentencing proceeding. We do not agree.

Arguments of counsel are left largely to the control and discretion of the trial judge, and counsel is allowed wide latitude in the argument of hotly contested cases. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Further, the remarks are to be viewed in the context in which they are made and the overall factual circumstances to which they refer. *State v. Womble*, 343 N.C. 667, 692-93, 473 S.E.2d 291, 306 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 719

(1997). Where, as here, defendant failed to object to the arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. To establish such an abuse, defendant must show the prosecutor's comments so infected the trial with unfairness that it rendered the conviction fundamentally unfair. *State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 229 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

[6] First, defendant contends that the prosecutor improperly argued the general deterrent effect of the death penalty to the sentencing jury. Specifically, the prosecutor's argument proceeded as follows:

> You know that crime is rampant in our society today and where in any society there is a lack of discipline and restraint in the conduct among its members there is a breakdown to due administration of law and order and the people are at risk. When members of society don't show the proper respect and restraint and discipline then they encourage crime because the attitude of the people affects the feelings of its members that say why not do a certain act. I will get away with it or if caught I can afford the consequences. The attitude of my people in my community or in my nation and my state will not make the consequences too grave. Remember the old ditty that we often jokingly say to one another. If you can't do the time, don't do the crime. As jurors you should seriously consider your obligation pursuant to your oath to do something about violent crime in your community and you do that by fairly and impartially applying the law to the facts and returning the proper verdict regardless of the consequences. It is your responsibility to fairly and objectively assess what this defendant deserves under the law for his lack of restraint.

In *State v. Barrett*, 343 N.C. 164, 469 S.E.2d 888, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 259 (1996), the prosecutor made the following argument:

> Many times you hear about events like this, shootings, murders and you say, well somebody ought to do something about that. Well, ladies and gentlemen, you are that somebody that everybody talks about. Today you speak for the people of Northampton County. You are Northampton County. Today you send a message, a thunderous message, to those who would even think of coming to this county and committing acts like the

> defendant and his friends did on August the 6th, 1989. The buck stops here, ladies and gentlemen, and you cannot pass it along. It's in your laps. The police can't do anymore, the Judge can do no more. It's up to you to decide.

Id. at 180, 469 S.E.2d at 897-98. This Court, in holding that the argument was not grossly improper, noted that the prosecutor "was commenting on the seriousness of the crime and the importance of the jury's duty. We have previously held that the prosecutor is allowed to argue the seriousness of the crime." *Id.* Similarly, in the present case, the prosecutor focused on the gravity of the jury's duty and its responsibility to follow the law. Thus, the trial court did not abuse its discretion by failing to intervene *ex mero motu.*

[7] Next, defendant contends that the prosecutor improperly repeatedly referred to defendant and a defense witness as "liars." However, the prosecutor did not refer to these witnesses as liars, but rather characterized portions of their testimony as being inaccurate and untrue. On the witness stand, defendant acknowledged telling numerous lies to mislead authorities, including lies intended to inculpate Teague and exculpate himself. Upon cross-examination by the prosecutor, defendant acknowledged lying to the police, his aunt, and his grandmother. The prosecutor's remarks were directed at the credibility of defendant in light of the evidence presented. The prosecutor's comments do not equate to the type of specific, objectionable language that would require the trial court to intervene *ex mero motu. See, e.g., State v. Locklear*, 294 N.C. 210, 214-18, 241 S.E.2d 65, 68-70 (1978) (prosecutor asserted defendant was "lying through [his] teeth" and "playing with a perjury count"); *State v. Miller*, 271 N.C. 646, 657-59, 157 S.E.2d 335, 344-45 (1967) (prosecutor stated that he knew defendant "was lying the minute he said that" and referred to defendant as "habitual storebreaker" when nothing in the record supported such reference). Rather, the prosecutor's argument was "no more than an argument that the jury should reject the defendant's testimony" because "[defendant's] version of the events [was] unbelievable." *State v. Solomon*, 340 N.C. 212, 220, 456 S.E.2d 778, 784, *cert. denied*, — U.S. —, 133 L. Ed. 2d 438 (1995). Accordingly, these remarks were not "so prejudicial and grossly improper as to require corrective action by the trial court *ex mero motu.*" *State v. James*, 322 N.C. 320, 324, 367 S.E.2d 669, 672 (1988).

[8] Likewise, the prosecutor's remarks disparaging defendant's expert witness, Dr. Brown, were neither prejudicial nor grossly

improper. In fact, defense counsel, herself, made the following statement to the jury:

> Now I have to claim responsibility for Dr. Brown. Edward Lemons [defendant] didn't hire him. . . . I apologize to this jury but you determine if at all his testimony has any weight for you. . . . The Court finds him as an expert but I submit to you please don't hold the credentials or lack thereof or the attitude or whatever you would determine Dr. Tom Brown to have against Edward Lemons.

Having reviewed the prosecutor's remarks, we conclude that they were neither prejudicial nor grossly improper. This is especially true in light of the testimony concerning the restriction or suspension of Dr. Brown's license.

[9] Defendant also contends that the prosecutor improperly argued, contrary to the evidence, that the female victim, Margaret Strickland, had been sexually assaulted. However, a review of the record fails to reveal any argument by the prosecutor that the victim was sexually assaulted. Rather, the prosecutor argued as follows:

> I would like for you to consider for yourselves what human being, male or female, would enjoy the abuse that these young men heaped upon their heads for their own, and I would submit to you in effect, sexual satisfaction before the ultimate moment of death. The climax of the escapade.

This statement merely characterizes the actions of defendant and his accomplices. It does not imply that defendant or his accomplices actually sexually assaulted the victim. The fact that Strickland was forced to strip herself, or was stripped naked, at gunpoint and then shot supports the prosecutor's characterization of the dehumanizing acts committed by defendant and his accomplices.

[10] Finally, defendant contends that the prosecutor improperly compared defendant to the Gestapo and equated his conduct with the Holocaust. During the guilt phase of the trial, the prosecutor argued that

> those who agree and unite together are responsible for whatever any one of them does. Illogical extreme and I don't want you to, I don't want, I'm using this as an illustration only and don't take it any further. The logical extreme is the Nuremberg trials. We brought Germany to task. The allies did and tried their leaders

> and one whole organization on this theory of crime against humans and adjudicated the SSI. Do you know who I am talking about? The whole group, the Gestapo, those who wore the black shirts whether they were at the camps, whether they were on the front lines in Russia, whether they opposed our men at Normandy, we adjudicated them all guilty of belonging to a criminal organization because they were an instrumentality of a Natzi [sic] state, a co-conspiracy against humans. That's that. You combine together for a criminal purpose and a criminal act, everybody who agrees is guilty of the conspiracy and if they are present and it takes place in their presence and they encourage or they give assistance or anything like that then they are responsible for the substantive crime of murder.

Later, the prosecutor once again compared defendant's conduct to the Holocaust by stating: "The attitude of the defendant toward the victims on the stand, you remember, and toward others, the choice of language, the attitude about people. We lost eight million people on the face of this earth for that same attitude."

Although the prosecutor's comparison was extreme, we do not believe that it required the trial court to intervene *ex mero motu*. The prosecutor was quick to put the comparison in perspective by stressing to the jury that it was merely "an illustration." In fact, the prosecutor himself characterized the comparison as "illogical extreme." Thus, when taken in context, the argument was not so grossly improper as to require the trial court to intervene *ex mero motu*. Accordingly, this assignment of error is without merit.

VI.

[11] In his next assignment of error, defendant contends that the instructions on aiding and abetting constitute error because they did not require the jury to find that defendant had the requisite *mens rea* to commit premeditated and deliberate first-degree murder. Defendant argues that the instructions fail to require the jury to find an essential element of first-degree murder, thereby violating his due process rights. We disagree.

Defendant concedes that he did not object to the form of the instruction at trial. Accordingly, defendant must show 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 probably would have reached a different verdict; or (ii) the error

would constitute a miscarriage of justice if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), *cert. denied*, — U.S. —, 140 L. Ed. 2d 132 (1998).

The instructions to which defendant objects are set out above in Issue IV. In support of his contention, defendant cites *State v. Allen*, 339 N.C. 545, 453 S.E.2d 150 (1995), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, — U.S. —, 139 L. Ed. 2d 177 (1997). However, *Allen* is distinguishable from the present case. In *Allen*, this Court concluded that the phrases "should have known" or had "reasonable grounds to believe" did not "convey the concept of specific intent necessary for aiding and abetting a first-degree murder committed with premeditation and deliberation." *Id.* at 558, 453 S.E.2d at 157. However, construing the instructions contextually, this Court found no plain error. Rather, the Court held that the instructions conveyed the essential principle that the defendant knowingly aided the perpetrator in committing the crime.

In the present case, the trial court adhered to the pattern jury instructions on aiding and abetting. The trial court never used the phrases "should have known" or had "reasonable grounds to believe." Accordingly, we hold that the trial court did not commit error, much less plain error, in giving the instructions of which defendant now complains. This assignment of error is without merit.

VII.

[12] Next, defendant contends that the trial court erred by permitting the State to exercise peremptory challenges in a racially discriminatory manner. Defendant argues that the trial court's ruling deprived him of his constitutional right to be tried by a jury selected without regard to race or gender. We do not agree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution prohibit a prosecutor from peremptorily excusing a prospective juror solely on the basis of his or her race. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986); *State v. Floyd*, 343 N.C. 101, 106, 468 S.E.2d 46, 50, *cert. denied*, — U.S. —, 136 L. Ed. 2d 170 (1996). A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). First, defendant must establish a *prima*

facie case that the peremptory challenge was exercised on the basis of race. *Id.* Second, if such a showing is made, the burden shifts to the prosecutor to offer a race-neutral explanation to rebut defendant's *prima facie* case. *Id.* Third, the trial court must determine whether the defendant has proven purposeful discrimination. *Id.*

In the present case, the prosecutor volunteered his explanations, and the trial court ruled that there was no purposeful discrimination. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405. Thus, the only issue for us to determine is whether the trial court correctly concluded that the prosecutor had not intentionally discriminated. *State v. Thomas*, 329 N.C. 423, 430-31, 407 S.E.2d 141, 147 (1991). Because the trial court is in the best position to assess the prosecutor's credibility, we will not overturn its determination absent clear error. *Hernandez*, 500 U.S. at 369, 114 L. Ed. 2d at 412.

Applying these principles, we now examine the prosecutor's reasons for peremptorily challenging the prospective jurors. First, defendant contends Mary Jones, a black female, was improperly struck for racial reasons. At trial, the prosecutor offered the following reasons for exercising this peremptory challenge:

> Her study of psychology and how she feels about psychology, and how she says that her experience with psychology would bear in the trial of this case with the psychiatrist. Also, her experience with HIV, talking with—in her classes and people who have [] HIV, telling them how it affects them, the symptoms that they have. And I'm sure, according to their doctor his report would indicate that one of the issues in this case is whether, as a result of HIV, this young man has dementia. They've already said that in their report. So there's a factual connection and nexus with this case. And we just feel like that we would like to challenge for that.

Second, defendant contends that the prosecutor committed purposeful discrimination when the prosecutor exercised a peremptory challenge on Reynolds Lewis, a black male prospective juror. During *voir dire*, Lewis testified that he had worked as a health-care technician at Cherry Hospital for seventeen years. When the prosecutor asked whether he would believe the testimony of a psychiatrist,

Lewis replied that he "would have no choice but to accept his testimony, because he's supposed to know what he's doing." The prosecutor pursued this line of questioning as follows:

> Q. And if he said one thing, then you would be inclined to accept that, and that would affect your verdict; is that correct?
>
> A. Yes.
>
> Q. And you would not be inclined to look at his testimony and to decide—and to say, "well, you know, I just don't believe what he's saying is right." You would not be inclined to do that?
>
> A. No, I would not.
>
> Q. Are you firm in that belief, sir?
>
> A. I am firm.

We hold that the trial court properly overruled defendant's objection to the prosecutor's use of the peremptory challenges to excuse each of these jurors. "Taken singly or in combination, the State's excusal of these jurors was based on race-neutral reasons that were clearly supported by the individual jurors' responses during *voir dire.*" *State v. Robinson*, 336 N.C. 78, 99, 443 S.E.2d 306, 315 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). Thus, the excusals of the prospective jurors, as discussed above, were not racially motivated and are not clearly erroneous. Accordingly, this assignment of error is overruled.

VIII.

[13] Next, defendant contends that the trial court erred by admitting the statements of accomplice Kwame Teague during the sentencing proceeding. Defendant argues that the confessions were inadmissible both substantively and for impeachment purposes. We disagree.

On 7 July 1995, defense counsel filed a notice of intent, "in the event that the co-defendants in this case, Kwame Teague and Larry Leggett, take the 5th Amendment," to introduce hearsay evidence through James Davis, Antoine Dixon, and Leshuan Lathan. The State responded with a notice of intent to introduce hearsay testimony in the form of statements of codefendants Larry Leggett and Kwame Teague if the trial court allowed the hearsay evidence proffered by the defense.

After extensive *voir dire*, the trial court ruled that defendant could offer the hearsay evidence of Antoine Dixon and James Davis. The trial court concluded that defendant's evidence was relevant to the issue of mitigation of defendant's punishment. The trial court also noted the State's notice of intent and indicated that it would be allowed to proceed "if the evidence so shows and so supports it."

Subsequently, defendant called both Leggett and Teague to the stand. Each, respectively, claimed his Fifth Amendment privilege against self-incrimination. Defendant then offered the testimony of both Dixon and Davis in support of the (f)(4) statutory mitigating circumstance that "[t]he defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor," N.C.G.S. § 15A-2000(f)(4) (1997), and the nonstatutory mitigating circumstance that "defendant was not the actual shooter of Margaret Strickland or Bobby Gene Stroud."

Subsequently, both Dixon and Davis were called to the stand. Dixon testified that Leggett stated that he (Leggett), Teague, and defendant were involved in the Strickland/Stroud crimes. Dixon further testified that Leggett told him that Teague shot the man and that Leggett shot the woman. Following Dixon's testimony, Davis also testified that Leggett told him that Teague shot the man and that Leggett shot the woman.

In rebuttal, the State offered two statements that Leggett made to law enforcement officers and two statements that Teague made to law enforcement officers. The confessions of both men allege that defendant personally shot the victims. While defendant concedes that Leggett's confessions to the police are admissible as prior inconsistent statements of a hearsay declarant, defendant argues that Teague's confessions were inadmissible because they are unreliable and are not inconsistent with Teague's own hearsay declaration that he planned to "put [the crimes] on Ed [defendant]."

Teague, in his first statement to police, denied any knowledge of or involvement in the crimes. However, the next morning, he implicated himself in the kidnapping and robberies, but claimed that defendant shot the man and that, at that point, Teague ran off and then he heard several more shots.

During the sentencing proceeding, the State "must be permitted to present *any* competent, relevant evidence relating to the defendant's character or record which will substantially support the imposi-

tion of the death penalty." *State v. Brown*, 315 N.C. 40, 61, 337 S.E.2d 808, 824 (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). Further, "[t]he State may offer evidence tending to rebut the truth of any mitigating circumstance upon which defendant relies and which is supported by the evidence." *State v. Heatwole*, 344 N.C. 1, 21, 473 S.E.2d 310, 320 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 339 (1997).

Here, once defendant offered evidence in support of the (f)(4) statutory mitigating circumstance and a nonstatutory mitigating circumstance that defendant was not the actual shooter, the State was entitled to present evidence rebutting this claim. Accordingly, the trial court did not abuse its discretion by admitting the statements of Teague. This assignment of error is without merit.

IX.

[14] Next, defendant contends that the trial court erred by failing to instruct the jury in accordance with the requirements of *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 95 L. Ed. 2d 127 (1987). Defendant argues that new evidence was introduced during the sentencing proceeding which corroborated defendant's contention that he was a passive participant in the murders. Because of this new evidence, defendant contends that an instruction on the *Enmund/Tison* issue was constitutionally required. We disagree.

In *Enmund*, the United States Supreme Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund*, 458 U.S. at 797, 73 L. Ed. 2d at 1151. In *Tison*, the Court expanded on the *Enmund* holding and stated that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Tison*, 481 U.S. at 158, 95 L. Ed. 2d at 145.

Defendant notes that our pattern jury instructions contain an instruction which reflects the requirements of *Enmund* and *Tison*. If there is evidence suggesting that defendant was not personally involved in the killing, the following instruction is to be given:

> First, [the jury must unanimously find beyond a reasonable doubt] that the defendant himself:
>
> (a) Killed or attempted to kill the victim; or
>
> (b) Intended to kill the victim; or
>
> (c) Intended that deadly force would be used in the course of the felony; or
>
> (d) Was a major participant in the underlying felony and exhibited reckless indifference to human life.

N.C.P.I.—Crim. 150.10 (1997). Thus, before the death penalty can be considered, the jury must make an initial determination regarding the defendant's culpability.

In his brief, defendant concedes that this instruction is not required where the defendant has been found guilty of premeditated and deliberate murder. *See State v. Robinson*, 342 N.C. 74, 88, 463 S.E.2d 218, 226 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996). Defendant notes that "[t]he rationale behind the rule in *Robinson* is that a finding of specific intent to kill at [the] guilt phase 'carries over' to sentencing." However, defendant contends that this rationale does not apply to the facts of this case because of new evidence introduced during sentencing that was relevant to the question of defendant's intent to kill. The new evidence to which defendant refers is the confessions that accomplice Larry Leggett made to two cellmates.

In *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996), this Court stated as follows:

> Once the jury determines at trial, as it did here, that defendant is guilty of murder in the first degree, the sole remaining consideration, at the "separate sentencing proceeding," N.C.G.S. § 15A-2000(a)(1), is the appropriate punishment, focusing on the defendant's character or record and any of the circumstances of the offense. As stated, we do not agree that residual doubt testimony is admissible during the sentencing proceeding of a capital case.

Walls, 342 N.C. at 52-53, 463 S.E.2d at 765-66. Thus, reconsideration of defendant's guilt is irrelevant in determining his appropriate sentence. Further, defendant could have presented the confessions of Leggett during the guilt phase if he had so chosen.

[15] Defendant also contends that because the jury was instructed on the "friend" exception to the "mere presence" rule, defendant was entitled to an *Enmund/Tison* instruction. However, as noted above, the State's evidence demonstrated that defendant had the *mens rea* required for conviction of first-degree murder based on malice, premeditation, and deliberation. Accordingly, no *Enmund/Tison* instruction was required. Based on our analysis above, we hold that the trial court did not err by refusing to instruct the jury on the *Enmund/Tison* requirements. Accordingly, this assignment of error is without merit.

X.

[16] Defendant also assigns as error the trial court's failure to submit the (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." N.C.G.S. § 15A-2000(f)(6). Defendant argues that evidence was introduced during the sentencing proceeding to support the (f)(6) mitigating circumstance and that the trial court's refusal to submit it violated his constitutional rights.

"A trial court must submit only those mitigating circumstances which are supported by substantial evidence." *State v. Strickland*, 346 N.C. 443, 463, 488 S.E.2d 194, 206 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 757 (1998). Further, "defendant bears the burden of producing 'substantial evidence' tending to show the existence of a mitigating circumstance before that circumstance will be submitted to the jury." *State v. Rouse*, 339 N.C. 59, 100, 451 S.E.2d 543, 566 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). This Court has noted that the (f)(6) statutory mitigating circumstance

> has only been found to be supported in cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, or voluntary intoxication by alcohol or narcotic drugs, to the degree that it affected the defendant's ability to understand and control his actions.

Syriani, 333 N.C. at 395, 428 S.E.2d at 142-43.

Here, the record does not support submission of the (f)(6) statutory mitigating circumstance. Defendant himself testified that he was not "doing drugs" while living with his aunt and that there was nothing wrong with his "ability to comprehend what's going on and under-

stand." He further testified that there was nothing wrong with him the night of the murders and that he knew that armed robbery, kidnapping, and murder were illegal. Additionally, Dr. Thomas Brown, an expert in the field of forensic psychiatry, testified that, in his opinion, defendant knew the difference between right and wrong on the night of the murders. He further testified that defendant had no "confusion of thinking"; had no bipolar disorder; was in touch with reality; and was oriented to time, place, and circumstances.

Further, there was no testimony or evidence suggesting that at the time of the murder, defendant's capacity to understand right from wrong or to conform his conduct to the requirements of the law was impaired as required by the (f)(6) mitigator. Thus, the trial court did not err by refusing to submit this mitigating circumstance to the jury. Accordingly, this assignment of error is without merit.

XI.

[17] Next, defendant contends that the trial court committed constitutional error by admitting evidence during the sentencing proceeding regarding several unrelated robberies. Defendant argues that the testimony that was admitted was unreliable and unrelated to any aggravating circumstance. We do not agree.

During the sentencing proceeding, defendant sought to introduce declarations made by his accomplices, Leggett and Teague, to their cellmates, James Earl Davis and Antoine Dixon. As noted above, the trial court subsequently ruled that these statements were admissible. The trial court specifically found that Leggett's statements to Dixon were "made under and with corroborating circumstances to clearly indicate the trustworthiness of the statements so as to render it admissible at this sentencing hearing" as evidence in mitigation to the issue of punishment.

Defendant also proffered a statement by Dixon to Detective George Raecher regarding what Leggett had told him. In that statement, among other things, Dixon described Leggett's statements concerning three robberies unrelated to the murders of Strickland and Stroud. However, defendant made a motion to exclude certain portions of the statement, including the statements relating to the robberies mentioned above. The State then argued that once a statement is admitted into evidence, the law requires that the entire statement be admitted. The State further argued that the evidence concerning the other robberies was relevant to prove the "course of conduct"

aggravating circumstance. Subsequently, the trial court denied defendant's motion to redact certain portions of the statements.

Defense counsel then called Dixon to the witness stand and requested that he read to the jury the statement that he gave to Detective Raecher. Contained within this statement were references to "Katlyn's" robbery; another robbery involving Leggett, Teague, and defendant; and a robbery of a man who was walking down a street. Dixon testified in part as follows:

> Larry also talked about the Katlyn's robbery. He said that himself, his brother [James Leggett], Dontai, Kwame and John Edwards were with him . . . . He said they went in the back door. Jay Leggett stayed outside. Kwame [Teague], John Edwards and Larry went into the restaurant. He said they knew there was a lot of money there.
>
> . . . .
>
> Larry told me about the other two robberies he was charged with. He said Kwame and Edward [defendant] were with him. They ran into a house and made everyone lay down [sic]. He said they got a lot of money. He said they robbed a white man walking down Center Street.

Defendant now contends that the statement contained the following inadmissible testimony: (1) the robbery of Katlyn's restaurant in which defendant was not involved, and (2) testimony involving other unrelated robberies in which defendant may have been involved.

"Although the Rules of Evidence do not apply in sentencing proceedings, they may be helpful as a guide to reliability and relevance." *State v. Bond*, 345 N.C. 1, 31, 478 S.E.2d 163, 179 (1996), *cert. denied*, —— U.S. ——, 138 L. Ed. 2d 1022 (1997). Any evidence the court "deems relevant to sentence" may be introduced at this stage. N.C.G.S. § 15A-2000(a)(3). The State "must be permitted to present *any* competent, relevant evidence relating to the defendant's character or record which will substantially support the imposition of the death penalty." *Brown*, 315 N.C. at 61, 337 S.E.2d at 824.

Here, the State contends that the evidence was relevant to support the "course of conduct" aggravating circumstance. "In determining whether the evidence tends to show that another crime and the crime for which defendant is being sentenced were part of a course

of conduct, the trial court must consider a number of factors, including the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons." *State v. Cummings*, 346 N.C. 291, 329, 488 S.E.2d 550, 572 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 873 (1998).

First, we will address the portion of the statement relating to the robbery at Katlyn's. While this evidence does not appear to be relevant to defendant's character or record, defendant can show no prejudice in its admission. In a stipulation admitted into evidence, it was made clear to the jury that defendant had no part in this robbery. Specifically, the stipulation provided that "the robbery at Katlyn's occurred June 7, 1993 which was prior to the defendant coming to the State of North Carolina." Also, while questioning Dixon regarding this robbery, the prosecutor specifically pointed out that Leggett had told Dixon that defendant was not with them at that time. Indeed, as set out above, Dixon listed five individuals who took part in the Katlyn robbery, none of whom was defendant.

As to the statements regarding the other two robberies, we hold that the trial court did not abuse its discretion in admitting them because the evidence was relevant to the "course of conduct" aggravating circumstance. While the jury did not hear evidence of the exact date of the robberies, it could logically infer that the two robberies occurred between 4 or 5 January 1994 and 31 January 1994. According to Dixon's statement, Leggett, Teague, and defendant all participated in the robberies. The record establishes that defendant did not meet Teague until 4 or 5 January 1994. The murders of Strickland and Stroud were committed on 21 January 1994. Defendant was arrested on 31 January 1994. Thus, from the evidence presented, the jury was aware the robberies occurred in a period that was no more than seventeen days before the murders and no more than ten days after the murders. Further, the *modus operandi* was sufficiently similar. The evidence presented showed that defendant, Leggett, and Teague acted together in each crime and relied on the element of surprise. The trial court did not abuse its discretion in admitting the portions of the statement involving the two robberies. Accordingly, this assignment of error is overruled.

XII.

[18] Defendant also contends that the trial court's instructions on the (e)(9) aggravating circumstance, that the murder was "especially heinous, atrocious, or cruel," N.C.G.S. § 15A-2000(e)(9), were uncon-

stitutionally vague. Defendant argues that the trial court's instructions impermissibly allowed the jury to find this circumstance based upon the actions of defendant's accomplices. Thus, defendant contends he is entitled to a new sentencing hearing. We disagree.

During the sentencing proceeding, the State sought submission in the Strickland case of the statutory aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." Defendant objected to submission of this aggravating circumstance on the grounds that the evidence did not support it. However, as defendant concedes in his brief, he did not request a limiting instruction on this circumstance. For the first time, on appeal, defendant contends that the instructions given on this circumstance are unconstitutionally vague. Accordingly, appellate review of this argument may be sought only under the plain error standard. *See State v. Frye*, 341 N.C. 470, 495-96, 461 S.E.2d 664, 676-77 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

As previously noted, "the term 'plain error' does not simply mean obvious or apparent error." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). "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 probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *Holden*, 346 N.C. at 435, 488 S.E.2d at 531. We conclude that the trial court's instructions on the (e)(9) aggravating circumstance did not constitute error, much less plain error.

In the present case, the trial court instructed the jury on the (e)(9) aggravating circumstance as follows:

> Fourth, was this murder of Margaret D. Strickland especially heinous, atrocious or cruel?
>
> In this context heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. However, it is not enough that this murder be heinous, atrocious or cruel, as those terms have just been defined, this murder must have been especially heinous, atrocious or cruel and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing

or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

In *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, this Court upheld instructions identical to those set out above. In upholding the instructions, this Court stated that "[b]ecause 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." *Id.* at 391-92, 428 S.E.2d at 141.

Nevertheless, defendant contends that these instructions impermissibly allow the jury to find this circumstance based on the intent and actions of defendant's accomplices and that the instruction is therefore unconstitutionally vague. However, this argument is meritless. As noted in *Syriani*, the instruction given passes constitutional muster. Further, the focus throughout sentencing was on the conduct of defendant, not his accomplices, and did not permit the jurors to find aggravating circumstances based on the actions of defendant's accomplices.

Here, the evidence showed that Strickland was kidnapped, confined in the trunk of a car, and driven around while defendant and his accomplices contemplated her robbery. She was then forced to strip naked in front of her kidnappers and was searched for money and drugs. Finally, after witnessing the murder of her companion, she was killed as she begged for her life. This evidence certainly supports submission of the (e)(9) aggravating circumstance. Further, the jury failed during the sentencing proceeding to find the existence of the statutory mitigating circumstance that the "murder of Margaret Strickland was actually committed by another person and the defendant was only an accomplice in/or an accessory to the murder and his participation in the murder was relatively minor." N.C.G.S. § 15A-2000(f)(4). Thus, it is apparent that the jurors believed that defendant played an active part in the murder of Strickland and was not a "passive accomplice" as defendant argues. This assignment of error is without merit.

XIII.

[19] In his next assignment of error, defendant contends that the trial court erred by submitting the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a

lawful arrest, N.C.G.S. § 15A-2000(e)(4). This circumstance was submitted to the jury only in the case of Margaret Strickland. Defendant argues that although there was evidence tending to show that his accomplices were motivated by this purpose, there was no competent evidence introduced at trial or sentencing proving that defendant was similarly motivated.

Defendant's argument, however, misconstrues the law as this Court has interpreted it. N.C.G.S. § 15A-2000(e)(4) provides, in pertinent part, that the murder was committed "for the purpose of avoiding or preventing a lawful arrest." As this Court pointed out in *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), this circumstance speaks only of "*a* lawful arrest." The Court then determined that "[i]t need not be the defendant's own arrest." *Id.* at 432, 373 S.E.2d at 416.

Having clarified this, we conclude that in the present case, there was evidence that Strickland's murder was committed for the purpose of "preventing a lawful arrest." Although defendant testified that Leggett shot Strickland, defendant conceded that she was killed to eliminate her as a witness to the crimes involved. On cross-examination, defendant testified as follows:

> Q. But you specifically remember that [Margaret Strickland] was shot and killed because she was a witness and could testify and identify about what happened?
>
> A. That she knew Kwame Teague, yes.
>
> Q. Right, but that she was a witness to the killing of Bobby Stroud; isn't that correct.
>
> A. Yes.
>
> Q. No question in your mind that's the reason she was killed that she was a witness to what happened?
>
> A. Yes.
>
> Q. And eliminated for that reason?
>
> A. Yes.

Accordingly, there was sufficient evidence to support the submission of the (e)(4) aggravating circumstance. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises eight additional issues which he concedes have been previously decided contrary to his position by this Court: (1) the trial court erred by denying defendant's motion to examine jurors concerning parole eligibility; (2) the trial court erred by placing the burden of proof on defendant with respect to mitigating circumstances and in defining the burden of proof; (3) the trial court erred by instructing that jurors were permitted to reject mitigating circumstances on the basis that they have no mitigating value; (4) the trial court erred by failing to instruct that jurors "must" rather than "may" consider mitigating circumstances at Issues Three and Four; (5) the trial court erred by instructing the jury that each juror may consider only mitigating circumstances found by that juror; (6) the trial court erred by failing to instruct the jury that unless the aggravating circumstances outweighed the mitigating circumstances, a life sentence should be imposed; (7) the trial court erred by failing to clearly instruct the jury that it should answer "no" to Issues Three and Four unless the jury unanimously answered these issues "yes"; and (8) the North Carolina death penalty statute is unconstitutional.

Defendant raises these issues for purposes of permitting this Court to reexamine its prior holdings and also for the purpose of preserving them for any possible further judicial review. We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[20] Having found no error in either the guilt or sentencing phase, we must determine whether: (1) the evidence supports the aggravating circumstances found by the jury; (2) passion, prejudice, or any other arbitrary factor influenced the imposition of the death sentence; and (3) 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).

In the present case, defendant was convicted of two counts of first-degree murder on the basis of malice, premeditation, and deliberation and also under the felony murder rule. With respect to the murder of Margaret Strickland, the jury found the aggravating circumstances that the murder was committed to prevent arrest or effect escape, N.C.G.S. § 15A-2000(e)(4); that the murder was com-

mitted while defendant was engaged in the commission of first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); that the murder was committed while defendant was engaged in the commission of robbery with a firearm, N.C.G.S. § 15A-2000(e)(5); that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and that the murder was part of a course of conduct including other violent crimes, N.C.G.S. § 15A-2000(e)(11). With respect to the murder of Bobby Stroud, the jury found the aggravating circumstances that the murder was committed while defendant was engaged in the commission of first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); that the murder was committed while defendant was engaged in the commission of robbery with a firearm, N.C.G.S. § 15A-2000(e)(5); and that the murder was part of a course of conduct including other violent crimes, N.C.G.S. § 15A-2000(e)(11).

We conclude that the evidence supports each aggravating circumstance found. We further conclude, based on a thorough review of the record, that the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor. Thus, the final statutory duty of this Court is to conduct a proportionality review.

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). 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*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

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, 161 (1993), *cert. denied*, 512 U.S. 1254, 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.* at 244, 433 S.E.2d at 164. Although we review all of

these 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 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 (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. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *and 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); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

However, we find that the present case is distinguishable from each of these seven cases. First, defendant was convicted of two counts of first-degree murder. As this Court has previously noted, we have never found the sentence of death disproportionate in a case where the defendant was found guilty of murdering more than one victim. *State v. Goode*, 341 N.C. 513, 552, 461 S.E.2d 631, 654 (1995). Further, the jury convicted defendant on the theory of malice, premeditation, and deliberation and also 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. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

Finally, this Court has never found a death sentence to be disproportionate in a witness-elimination case. " 'Murder can be motivated by emotions such as greed, jealously, hate, revenge, or passion. The motive of witness elimination lacks even the excuse of emotion.' " *State v. McCarver*, 341 N.C. 364, 407, 462 S.E.2d 25, 49 (1995) (quoting *State v. Oliver*, 309 N.C. 326, 375, 307 S.E.2d 304, 335 (1983)), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). Here, defendant conceded at trial that Strickland was shot because she was a witness to the murder of Stroud. Further, the jury found the aggravating circumstance that Strickland's murder was committed for the purpose of avoiding a lawful arrest, N.C.G.S. § 15A-2000(e)(4).

We recognize that juries may have imposed sentences of life imprisonment in cases which are similar to the present case. However, this fact "does not automatically establish that juries have 'consistently' returned life sentences in factually similar cases." *Green*, 336 N.C. at 198, 443 S.E.2d at 47. This Court has long rejected

a mechanical or empirical approach to comparing cases that are superficially similar. *Robinson*, 336 N.C. at 139, 443 S.E.2d at 337. This Court independently considers "the individual defendant and the nature of the crime or crimes which he has committed." *State v. Pinch*, 306 N.C. 1, 36, 292 S.E.2d 203, 229, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled in part on other grounds by State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543, *by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306, *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517.

Defendant contends that the sentence of death entered against him is disproportionate because his two accomplices, Teague and Leggett, both received life sentences. Defendant argues that there is no clear evidence indicating that he was more culpable than his alleged accomplices and that there is a strong possibility that he is less culpable than either of them.

In support of his position, defendant cites *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (finding death penalty disproportionate where equally or more culpable accomplice received life sentence in separate trial). However, *Stokes* is distinguishable from the present case. First, in *Stokes*, the defendant was convicted of only one count of first-degree murder under the theory of felony murder. In the present case, defendant was convicted of two counts of first-degree murder under both premeditation and deliberation and the felony murder rules. Further, in *Stokes*, Chief Justice Exum noted that

> Stokes was only seventeen years old when he murdered Kauno Lehto; Murray [his accomplice] was considerably older. There also is evidence that Stokes suffered from impaired capacity to appreciate the criminality of his conduct, and that he was under the influence of a mental or emotional disturbance at the time of the murder. Moreover, because the jury found the existence of "one or more" mitigating circumstances without specifying which ones, we must assume the existence of each mitigating factor the trial judge submitted and the evidence supported, including those involving age, mental or emotional disturbance, and impaired capacity.

Id. at 21, 352 S.E.2d at 664.

Here, defendant was twenty-six years old at the time the murders were committed. Further, there was no evidence presented that defendant suffered from impaired capacity to appreciate the criminality of his conduct or that he was under the influence of a mental

or emotional disturbance. Finally, in the present case, there were five aggravating circumstances found in the Strickland case and three found in the Stroud case, compared to the single aggravator found in *Stokes*. *Stokes* is thus clearly distinguishable from the present case and does not support defendant's contention that the sentences of death entered against him are disproportionate.

The fact that defendant was not the actual shooter of the victims does not make his participation in the crime any less culpable. Our case law supports this proposition by providing for the "friend" exception to the "mere presence" rule. Thus, a defendant may be guilty of a crime by his mere presence if the perpetrator knows the friend's presence will be regarded as encouragement and protection. *See Gaines*, 345 N.C. at 677, 483 S.E.2d at 414. As Justice Mitchell (now Chief Justice) warned in his dissent in *Stokes*, this Court should not substitute its view over that of the jury as to what the evidence actually established. *Stokes*, 319 N.C. at 33, 352 S.E.2d at 671 (Mitchell, J., dissenting). Here, the jury could reasonably find that defendant's actions warranted the death penalty. We will not overturn the jury's determination simply on the basis that defendant's two alleged accomplices received life sentences.

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 was excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. ANTHONY JEROME HIPPS

No. 272A96

(Filed 9 July 1998)

1. Jury § 227 (NCI4th)— jury selection—death penalty views—excusal for cause

The trial court did not err during jury selection in a capital first-degree murder prosecution by excusing for cause two prospective jurors where one juror's responses indicated that she could not return a verdict of death under any circumstances and

any equivocation reflected only her desire to abide by her oath and follow the law and not an actual ability to sentence defendant to death if the law required it; and the other juror's responses likewise clearly indicated that his views on the death penalty would impair his ability to act as a juror and that he could not return a verdict of death, and he also had other impediments to serving as an impartial juror. Furthermore, there was no error in not allowing the defense the opportunity to rehabilitate.

2. Evidence and Witnesses § 876 (NCI4th)— murder victim—statements that she feared defendant—admissible

There was no prejudicial error in a capital first-degree murder prosecution in the admission of statements from the victim to three witnesses that she was afraid of defendant and that he might kill her. Evidence tending to show the state of mind of a victim is admissible as long as the declarant's state of mind is a relevant issue and the potential for unfair prejudice in admitting the evidence does not substantially outweigh its value. It has consistently been held that a murder victim's statements that she fears the defendant and fears that the defendant might kill her are statements of the victim's then-existing state of mind and are highly relevant to show the status of the victim's relationship to the defendant. Whether the probative value of the victim's statements is substantially outweighed by the danger of unfair prejudice to defendant is a matter left solely in the discretion of the trial judge, and this defendant was not able to show that the trial court abused its discretion. N.C.G.S. § 8C-1, Rule 803 (3).

3. Evidence and Witnesses § 735 (NCI4th)— first-degree murder—statement by victim—defendant had beaten her—admission not prejudicial

There was no prejudicial error in a capital first-degree murder prosecution by admitting the victim's statements to a witness that defendant had beaten her and given her the bruises and knots on her head. Even assuming that the court erred in allowing the testimony, the evidence was overwhelming that defendant killed the victim.

4. Evidence and Witnesses § 1235 (NCI4th)— first-degree murder—police search for victim—defendant as bystander—questions not custodial

The trial court did not err in a capital prosecution for first-degree murder by admitting a statement made by defendant to

police when they were looking for the missing victim. While officers were searching for the victim, an officer saw defendant, approached him, and asked if had seen the victim; defendant responded that he had not seen her since the week before; the officer told defendant that the police had information that defendant had killed the victim, that they needed to know if defendant had not killed her and she was alive, and that they had enough to arrest defendant if they found the victim dead; defendant stated that he would bring the victim to the police if he saw her; and the officer left defendant standing there as the police continued their search. Although defendant contends that the statement should have been suppressed because he was not advised of his rights, the record reveals that defendant's freedom to leave was in no way hampered and that a reasonable person in defendant's position would not have thought that he was in custody. *Miranda* is not implicated by this noncustodial encounter.

5. Evidence and Witnesses § 1238 (NCI4th)— first-degree murder—officers called to disturbance—statements by defendant about prior murder—not custodial

The trial court did not err in a capital first-degree murder prosecution by admitting defendant's statements to the police where an officer responded to a call about a disturbance at a store possibly involving defendant; the officer saw defendant standing outside the store and asked what was going on; before he got the words out, defendant put his hands on the police car and said, "Go ahead and take me. I did it"; the officer backed defendant off the vehicle and asked what he was talking about; defendant said, "I did it. Me and Rock"; the officer heard defendant mumble something about Shelia; the officer had been searching for Shelia Wall all morning pursuant to a missing person report; the officer testified that at this point he thought the victim was going to walk out and that everything would be cleared up; the officer asked defendant where Shelia was; and defendant responded that they had killed her and that she was under the bridge. A reasonable person in defendant's position would not have thought he was in custody at the time he made the statement and the questions put to defendant at the store do not constitute interrogation for *Miranda* purposes. What happened after the statement was made does not affect the noncustodial and voluntary nature of the encounter prior to and while the statement was being made. Since no *Miranda* violation occurred, there was

no error on this basis in the admission of subsequent statements at the detention center.

6. Evidence and Witnesses § 1274 (NCI4th)— first-degree murder—statement by defendant—waiver of rights—low IQ and impaired reading skills

The trial court did not err in a capital first-degree murder prosecution by admitting statements given by defendant to officers where defendant contended that the statements should have been suppressed because his low IQ and impaired reading and spelling skills rendered him unable to understand and knowingly waive his rights. The court was cognizant of defendant's limited intellectual and reading abilities and conducted extensive inquiry into the procedure used in obtaining defendant's waivers and statements. The trial court's conclusions are further buttressed by evidence presented that defendant was familiar with his constitutional rights and the legal process based on his involvement with police in his earlier murder conviction.

7. Criminal Law § 103 (NCI4th Rev.)— first-degree murder—discovery—defendant's oral and written statements—oral statement provided in summary—variation in terminology

The trial court did not abuse its discretion in a capital first-degree murder prosecution by denying defendant's motion to suppress an oral statement made to officers on the ground that the State failed to provide the statement during discovery where the State provided a copy of defendant's written statement and a summary of his oral statement which indicated that it was substantially similar, but defendant in his written statement described the wooden object used to strike the victim as a "stick" and counsel first heard testimony on voir dire which described the object as a "board." There was no discovery violation; whatever term defendant used in his oral statement to describe the implement is immaterial in light of the fact that the object was identified at the scene of the crime, collected by investigators, studied by crime-scene specialists, introduced into evidence, and placed before the jury. Whether defendant called it a "stick," "board," or another of the terms used at various points prior to the *voir dire* is of little consequence. Even if there had been a discovery violation, the trial court provided the defense with a recess to examine the object, but defendant specifically declined the full use of the recess and asked merely to look at the notes from which the officer testified.

8. Evidence and Witnesses §§ 327, 337 (NCI4th)— first-degree murder—prior murder—admissible to show knowledge and intent

The trial court did not err in a capital first-degree murder prosecution by admitting evidence of defendant's 1978 conviction for second-degree murder where the evidence of the prior crime is highly probative of defendant's knowledge that his actions would likely kill this victim and that he intended to kill this victim. The time lapse between the crimes goes to the weight of the evidence, not to its admissibility, and the trial court was aware of the danger of unfair prejudice and gave a proper limiting instruction.

9. Criminal Law § 1336 (NCI4th Rev.)— capital sentencing—impaired capacity—objection to defendant's question sustained—no offer of proof and no prejudice

The trial court did not err in a capital sentencing proceeding by sustaining the prosecution's objection to a question to defendant's expert in forensic psychology where the expert opined that defendant's limited intellectual functioning and any substance abuse constituted diagnosable mental disturbances, defense counsel attempted to ask whether defendant would have the capacity to appreciate the criminality of his conduct and conform to the requirements of the law as with most of the population, the prosecutor's objection was sustained, and defense counsel did not rephrase the question or make an offer of proof. A defendant must make an offer of proof in order to preserve the exclusion of evidence for appellate review; moreover, the jury had before it evidence from which it could have concluded that defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired.

10. Evidence and Witnesses § 2787 (NCI4th)— capital sentencing—cross-examination of defense expert—prosecutor's opinion

The trial court did not err in a capital sentencing proceeding by overruling defendant's objections to the manner in which the prosecutor cross-examined defendant's expert witness. Although defendant contends that the prosecutor was allowed to place before the jury the opinion that defendant was only acting "crazy" and was lying on personality tests, the questions were well within the bounds of proper cross-examination of an expert witness.

11. Criminal Law § 1371 (NCI4th Rev.)— capital sentencing—aggravating circumstance—especially heinous, atrocious, or cruel—properly submitted

The trial court did not err in a capital sentencing proceeding by submitting to the jury the especially heinous, atrocious or cruel aggravating circumstance where defendant stabbed the victim at least thirty-four times, primarily on her back, but also on the front of her body and her head, the wounds to the head penetrated the skull, two wounds pierced the left lung, three pierced the right lung, one penetrated the aorta and caused extensive bleeding, indicating that the victim's heart was still beating while she was being stabbed, she also suffered a fracture at the base of her skull from a blow or blows to the head with a piece of wood, the evidence suggested that at least some of the stab wounds were inflicted prior to the blow to the head, a defensive wound suggests that the victim was conscious and aware of what was happening, and death was caused by the stab wounds. This evidence supports the conclusion that the victim's death was physically agonizing, conscienceless, pitiless, and unnecessarily torturous and that the victim was aware of but helpless to prevent her impending death. N.C.G.S. § 15A-2000(e)(9).

12. Criminal Law § 461 (NCI4th Rev.)— capital sentencing—prosecutor's argument—death penalty as deterrent for this defendant

There was no plain error in a capital sentencing proceeding where the trial court did not intervene *ex mero motu* when the prosecutor argued that prison had been tried and didn't work. Although defendant argued that this was analogous to the argument that the jury should impose a standard of conduct and send a general message of deterrence to others who may commit crimes, the prosecutor properly and permissibly argued that the jury should impose the death penalty to foreclose further crimes by defendant specifically.

13. Criminal Law § 460 (NCI4th Rev.)— capital sentencing—prosecutor's argument—death warranted by facts of case

There was no plain error in a capital sentencing proceeding where the trial court failed to intervene *ex mero motu* when the prosecutor argued that "the law requires that you return a jury recommendation of death in this case." In context, the prosecutor was properly arguing that the recommendation of death was warranted by the facts and circumstances of the case.

14. Criminal Law § 1402 (NCI4th Rev.)— death penalty—not disproportionate

A sentence of death was not disproportionate where the aggravating circumstances were supported by the evidence, nothing in the record suggests that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and this case is more similar to cases in which the death sentence was found proportionate than to those in which it was found disproportionate or those in which juries consistently returned recommendations of life imprisonment.

Justice WEBB concurring in the result.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Helms (William H.), J., at the 13 May 1996 Criminal Session of Superior Court, Rowan County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 9 March 1998.

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

Lisa S. Costner for defendant-appellant.

PARKER, Justice.

Defendant was indicted 4 December 1995 for the first-degree murder of Shelia Dianne Wall[1] on 3 November 1995. In May 1996 he was tried capitally and found guilty of first-degree murder. Following a capital sentencing proceeding, the jury recommended a sentence of death; and the trial court entered judgment accordingly. For the reasons discussed herein, we conclude that the jury selection, the guilt-innocence phase, and the capital sentencing proceeding of defendant's trial were free from prejudicial error and that the death sentence is not disproportionate.

The State's evidence at trial tended to show that the victim, Shelia Dianne Wall, met defendant, Anthony Jerome Hipps, in December of 1994 after which the two began seeing each other and spending time together. The victim would frequently spend the night with defendant in the front room of the apartment he shared with his

1. Throughout the transcript and the briefs, the victim's name is also spelled "Sheila." Having no way to know which spelling is correct, we have elected to use "Shelia," which is the spelling in the indictment.

nephew, Rock Sturdivant. Various witnesses testified that they began to notice bruises on the victim and knots and bumps on her head beginning in the summer of 1995 and continuing from that time until the time of her death. Defendant drank frequently and physically abused the victim. The victim confided to a friend in August that she was afraid of defendant, that things were getting worse, and that she was afraid defendant might kill her.

On Thursday, 2 November 1995, at around 9:00 p.m., defendant and the victim were seen arguing loudly outside the Spencer Country Cupboard. The last time the victim was seen alive by her family she and defendant were walking down the road with defendant walking behind the victim.

The next day, Friday, 3 November 1995, defendant's nephew, Sturdivant, ran into defendant in East Spencer. Defendant was acting wildly and grabbed Sturdivant and told him that he had killed his girlfriend, offering to show Sturdivant the body as proof that he was not lying to him. They were near the railroad tracks by Burdette Bridge, and defendant told Sturdivant that the body was nearby. Sturdivant got upset and frightened and left after telling defendant he did not want to see the body.

On Saturday, 4 November 1995, Sturdivant went to see the victim's family to tell them that someone told him that defendant had killed the victim. The family did not know whether to believe him. They filed a missing-person report, and the police began a search for the victim.

The next day, Sunday, 5 November 1995, fearful that his relationship with defendant would cause him to be linked to the killing, Sturdivant, on his sister's advice, went to the Spencer Police Department. Sturdivant told the police what defendant had told him about killing the victim. The police then began looking for defendant and put the word out to his friends that they wanted to talk to him.

On Wednesday, 8 November 1995, defendant went to the Spencer Police Department to be interviewed. Defendant was not under arrest at this time, but he was read his rights and signed a waiver. He gave a statement to the officers that he did not know where the victim was and that he had last seen her on Friday, 3 November 1995. Defendant was then released.

The police continued searching for the victim in the woods north of Burdette Bridge. While searching on Friday, 10 November 1995,

Officer G.S. Henline saw defendant standing beside the railroad tracks near the bridge. Defendant was drinking beer and looking at Henline and laughing. Henline approached defendant to find out what was funny. Henline explained to defendant that they were searching for Shelia Wall and that if he knew something, he should let them know, but that if he did not, he should not get in the way. Defendant responded, "Yes, sir"; and after some more words were exchanged, Sergeant Henline walked away. Later, Officer George Wilhelm saw defendant by the tracks and spoke with him, telling him they were searching for Shelia Wall and asking defendant if he had seen her. Defendant responded that he had not seen her since Friday the week before, just as he had stated in his earlier statement to police on 8 November. Wilhelm told defendant that they had information that Ms. Wall had been killed and that defendant was the one who killed her. Wilhelm further told defendant that if the police found her body, they had enough evidence to arrest him for her murder; so if she was alive, defendant needed to let them know. Defendant responded that if he saw her, he would bring her to the police. Wilhelm then left defendant and continued searching.

Later that same day while on a break from the search, the officers received a call about a disturbance nearby at Real's Variety store. When Sergeant Henline arrived at the store, he saw defendant standing outside and asked him what was going on. Defendant immediately said, "Go ahead and take me. I did it," and came up and put both hands on the hood of the police car. Henline asked defendant what he was talking about; and defendant said, "I did it. Me and Rock." Henline again asked what he was talking about, and defendant responded that he and Sturdivant had killed Shelia Wall and that her body was under the bridge.

Henline was not sure whether to believe defendant but radioed Sergeant Wilhelm to meet them at Burdette Bridge. Henline and defendant then got in the front seat of the police car and drove to the bridge. Defendant had not been placed under arrest and was not handcuffed. Defendant told Henline the victim was not under the bridge itself, but under some trees. They got out of the car and were joined by Sergeant Wilhelm. Defendant met Wilhelm in front of the car and said, "I wanted to tell you [a] while ago, but I couldn't. I want to take you where Shelia is." Wilhelm put his hand up and reminded defendant of the rights he had read him on the previous Wednesday, 8 November, and told him he did not have to tell them anything. Defendant replied that he knew his rights and wanted to show them

where the victim's body was. Defendant then took Wilhelm by the hand and walked him over to a brush pile and pointed and said, "There she is, there's Shelia." The victim's body was hidden with leaves and branches broken from nearby trees. Wilhelm then told defendant not to tell him anything until he could inform him of his rights again; he took defendant back to his patrol car where he kept a rights card and read defendant his rights. Defendant said he understood and waived his rights. Defendant then gave a statement in which he said that Sturdivant attacked the victim with a knife while the three of them were walking on the path and that when the victim ran to defendant for help, defendant saw the blood and panicked and started hitting her in the head with a stick. Defendant then took the officers back and showed them the location on the path where the incident took place, about two hundred yards from where he had dragged the body to hide it. He pointed out the piece of lumber with which he had struck the victim.

Defendant was then taken to the Spencer Police Department, where he was advised of his rights again and given a written waiver to sign. He repeated his statement confessing to the murder and implicating Sturdivant. Sergeant Wilhelm wrote the statement down line by line, reading it back to defendant after each line; and defendant signed it. Defendant and Sturdivant were then arrested for murder.

Sturdivant allowed the police to search his apartment and told the police that all he knew about the killing was what defendant had told him when he ran into defendant on 3 November, namely, that defendant had killed the victim and that her body was somewhere around the bridge.

On Sunday, 12 November 1995, Sergeant Wilhelm was puzzled by the details of defendant's 10 November statements about how the crime occurred. He reinterviewed defendant, again advising him of his rights. Defendant acknowledged he understood his rights and signed a waiver. Wilhelm again wrote out defendant's statement line by line, and defendant signed it. In this statement defendant confessed that he alone killed the victim after they had gotten into an argument behind the Country Cupboard on Thursday, 2 November 1995. Defendant stated that he and the victim were on the path and began to argue and fight and that he hit her and began to stab her. He covered up her body and then went to the nearby Food Lion where he bought a jug of Clorox which he poured on the body to

cover up the odor and keep it from being discovered. Defendant said he previously included Sturdivant as a participant in the crime to get back at Sturdivant for telling the police that defendant had killed the victim.

Charges against Sturdivant were dropped the next day, and he was released.

Dr. John D. Butts, the chief medical examiner for the State of North Carolina, performed the autopsy on the body of Shelia Wall on 11 November 1995. He testified that the victim received thirty-four stab wounds to the body, five to the front and twenty-nine to the back, upper shoulder, and neck. Two injuries to the left lung and one to the aorta were inflicted from the back. The body cavity had filled with blood, indicating that the victim had been alive and her heart beating for some time after the infliction of the stab wounds. Additional stab wounds to the head penetrated the skull and may or may not have penetrated the brain. The victim also suffered an extensive fracture at the base of the right side of the skull consistent with a blunt-force injury from a heavy object. Dr. Butts concluded that the piece of wood found at the crime scene, or one like it, could have caused the fracture. Dr. Butts was unable to determine the order of the stab wounds in relation to the fracture of the skull but testified that if the stab wounds occurred before the fracture of the skull, the victim would have been conscious during some portion of the time during which the stab wounds were being inflicted. A cut on the victim's right thumb was consistent with a defensive wound.

The State also presented evidence concerning the murder of Wade Long committed by defendant in 1978 and brought forth details about the similarities between the 1978 and 1995 murders. The crimes, though separated by seventeen years, were committed within eight-tenths of a mile from one another in the Spencer area. Both victims had been stabbed multiple times in the back and neck with a knife. Defendant had in each instance used a piece of lumber or wood to inflict blunt-force injuries to the head, after which he had thrown the wood in the bushes. In each case defendant was later seen by police near the crime scene; and when questioned, he confessed to having killed the victims. In each case he pointed out the piece of wood he had used.

Defendant did not testify or offer any evidence during the guilt-innocence phase of the trial.

During the sentencing proceeding the State introduced copies of documents from defendant's prior convictions: assault with a deadly weapon with intent to kill in 1975 and the second-degree murder of Wade Long in 1978.

Defendant offered the testimony of several witnesses at his sentencing, including family members and friends. They testified that when defendant was released in 1991 from serving time in prison for the 1978 murder, he lived with his sister and her family for six or seven months, and then moved out when he could afford a place to stay. During this time defendant began to drink heavily. Prior to the killing of Shelia Wall, defendant was frequently depressed about their relationship and about his housing and job situations—at some point in 1995 he lost his job, and his landlord was angry because his mobile home had bats. Several witnesses testified that although he often drank, defendant was never angry or violent. Defendant's niece testified that defendant could not read but had not seemed embarrassed about taking someone with him to fill out job applications.

Dr. John Warren, an expert in forensic psychology, examined defendant and diagnosed alcohol abuse, cannabis abuse, cocaine abuse, low intellectual functioning, specific reading disability, and specific spelling disability. Warren also noted symptoms of depression and adjustment disorder. He testified that defendant showed remorse for killing Shelia Wall and that defendant was tearful when they discussed it.

JURY SELECTION

[1] Defendant contends that the trial court erred in allowing the State's motions to excuse for cause two prospective jurors, Ms. Waller and Mr. Harris, and in not allowing the defense an opportunity to rehabilitate these prospective jurors.

Defendant argues that prospective juror Waller exhibited some equivocation about her ability to return a death verdict and that she did not have enough certitude on the subject to justify a challenge for cause. The transcript reveals that during *voir dire* by the prosecutor, Waller indicated three times that she had doubts about her ability to individually return a death verdict and that she did not think that she could do it. Upon questioning by the trial judge, she then stated unequivocally that she could not individually return a verdict of death. Defense counsel then questioned Waller and asked Waller whether she could follow the law and set aside her personal feelings

to impose the death penalty. She responded, "I would have to because I am under oath." The trial court then resumed questioning and received several unequivocal answers from Waller that she could not individually stand and render a verdict of death.

As for prospective juror Harris, defendant argues that Harris indicated only that he did not want to serve in general, rather than that he felt his beliefs made him unable under any circumstances to return a verdict of death. The transcript shows that Harris' daughter worked for the defense attorneys and that this fact caused him to have reservations about his ability to serve as an impartial juror: "All I know is my daughter has worked for Marshall [Bickett, lead defense counsel] and the other [defense] lawyer [Bays Shoaf] for the last year and two or three months . . . . She is their secretary or paralegal, whatever it is for some time." More importantly, however, Harris also indicated to the prosecutor that his beliefs about the death penalty were such that he "probably couldn't" return a verdict of death even if the law required it. When the trial judge questioned Harris, the following colloquy took place:

> THE COURT: Is what you're saying is that there aren't any facts or any law that in any case would allow you to return a verdict of guilt or death?
>
> MR. HARRIS: I don't think so. I don't—
>
> THE COURT: Your opinion is that your view in this particular case would impair your ability to perform your duties as a juror?
>
> MR. HARRIS: I would rather not be involved in this case. . . .
>
> THE COURT: The question is do you think it would impair your ability as a juror in this particular case?
>
> MR. HARRIS: To a certain degree it may.
>
> THE COURT: Question is—will it or won't it?
>
> MR. HARRIS: It probably would.

The trial court then granted the State's motion to excuse Harris for cause.

The standard for determining when a prospective juror may be excluded for cause on account of his or her 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.' " *State v. Conaway*, 339 N.C. 487, 511, 453 S.E.2d 824, 839 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985)), *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). Whether to allow a challenge for cause in jury selection is a decision ordinarily left to the sound discretion of the trial court, and that decision will not usually be reversed on appeal except for abuse of discretion. *Id.*

In the instant case Ms. Waller's responses indicated that she could not return a verdict of death under any set of circumstances. Any equivocation she may have exhibited reflected not an actual ability to sentence defendant to death if the law required it, but only her desire to abide by her oath and follow the law. *See State v. Daughtry*, 340 N.C. 488, 508-09, 459 S.E.2d 747, 757 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996); *State v. Yelverton*, 334 N.C. 532, 544, 434 S.E.2d 183, 190 (1993). Mr. Harris' responses likewise clearly indicated that his views on the death penalty would impair his ability to act as a juror in this case and that he could not return a verdict of death. Mr. Harris also had other additional impediments to his serving as an impartial juror. The trial court thus did not abuse its discretion in allowing the State's motion to excuse for cause either of these prospective jurors.

Defendant also argues that the trial court abused its discretion in not allowing the defense an opportunity to rehabilitate prospective jurors Waller and Harris. In Ms. Waller's case, the transcript reveals that the defense did attempt to rehabilitate the witness, albeit unsuccessfully. In Mr. Harris' case, the defense did not request to rehabilitate the witness. Where defendant fails to make any request to rehabilitate a prospective juror, he has failed to preserve for appellate review his contention that the trial court erred in failing to allow rehabilitation. *Conaway*, 339 N.C. at 512, 453 S.E.2d at 840. This assignment of error is overruled.

GUILT-INNOCENCE

[2] Defendant next contends that the trial court committed prejudicial error in admitting testimony from witnesses Gwendolyn Fisher, Nicole Pittman, and Barbara Jennifer Gray that the victim had told them that she was afraid of defendant, that she was afraid he might kill her, and that the bruises and knots on her head during the summer and autumn of 1995 were caused by physical abuse from defendant.

Defendant first argues that the victim's statements that she was afraid of defendant and that she was afraid that he might kill her were hearsay statements and that they were not admissible under the state of mind exception to the hearsay rule, N.C.G.S. § 8C-1, Rule 803(3) (1992). At trial Gwendolyn Fisher testified as follows on direct examination:

> Q. Okay, over the period of time from when you first saw the bruises that you have described, up until the time—up until November 2nd, did you see bruises on her at other times?
>
> A. Yes.
>
> Q. How often did you see bruises on her?
>
> A. It was getting to be almost a weekly thing I have seen them [sic.]
>
> Q. Did she ever say to you whether or not she was afraid of the defendant in this case?
>
> A. Yes.
>
> Q. What did she say to you?
>
> A. She said that things were getting worse and that she was getting—she was afraid of him, that something was missing in him. He didn't know how to love, things to that effect.
>
> Q. Did she say what she was afraid what might happen to her?
>
> A. She was afraid she was going to get killed.

Nicole Pittman testified as follows:

> Q. Did Sheila [sic] Wall ever say anything to you about being afraid of [defendant]?
>
> A. Yes.
>
> Q. What did she tell you?
>
> A. Well, when I asked her, you know, how she got [the lumps and bruises on her scalp] —
>
> [DEFENSE COUNSEL]: Objection.
>
> [PROSECUTOR]: I don't want you to say what she said about that, all right?
>
> A. She said she was scared of him and that he might kill her.

Q. Did you ever—did she, after she told you that, did she say anything to you about telling other people about that?

A. Yes, she told me not to tell because if he found out that she told—

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Q. What did she say?

A. She said that for—not to tell anybody because she was scared that if anybody found out that she told that he would kill her.

Barbara Jennifer Gray testified as follows:

Q. Ms. Gray, let me back up and ask you a question. Did—at any time when you saw a bruise or abrasion on her, did Sheila [sic] Wall ever tell you whether or not she was afraid of [defendant]?

A. Yes.

Q. What did she say to you?

A. She just told me that—she had told me about whenever, all right, not like the first bruise that happened, not then, but afterwards after it started happening, she had told me that she was afraid that [defendant] was going to kill her and I had, you know, told her also she needed to get away way from him.

Evidence tending to show the state of mind of a victim is admissible as long as the declarant's state of mind is a relevant issue and the potential for unfair prejudice in admitting the evidence does not substantially outweigh its probative value. *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990). This Court has consistently held that a murder victim's statements that she fears the defendant and fears that the defendant might kill her are statements of the victim's then-existing state of mind and are " 'highly relevant to show the status of the victim's relationship to the defendant.' " *State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996) (quoting *State v. Alston*, 341 N.C. 198, 230, 461 S.E.2d 687, 704 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996)); *see also State v. McHone*, 334 N.C. 627, 636-38, 435 S.E.2d 296, 301-02 (1993), *cert. denied*, 511 U.S. 1046, 128 L. Ed. 2d 220 (1994); *State v. Lynch*, 327 N.C. 210, 220-24, 393 S.E.2d 811, 818-19 (1990); *State v. Cummings*, 326 N.C. at 312-13, 389 S.E.2d at 74. Defendant relies on *State v. Hardy*, 339 N.C. 207, 451

S.E.2d 600 (1994), for the proposition that this Court has "receded" from these well-established principles regarding the state of mind exception. In *Hardy* the victim had made diary entries which detailed assaults and threats against her by the defendant but which did not reveal the victim's state of mind or contain statements of fear by the victim. On this basis *Hardy* is distinguishable from the present case. Moreover, in *Hardy* the Court stated that "[s]tatements of a declarant's state of mind" such as " 'I'm frightened,' or, 'I'm angry,' " are excepted from the hearsay rule and admissible. *Id.* at 229, 451 S.E.2d at 612.

Whether the probative value of the victim's statements in this case is substantially outweighed by the danger of unfair prejudice to defendant is a matter left solely in the discretion of the trial court, and the trial court's decision will not be disturbed on appeal absent a showing of abuse of discretion. *Alston*, 341 N.C. at 231, 461 S.E.2d at 704. Here, defendant is not able to show that the trial court abused its discretion. We conclude that the trial court committed no error in admitting into evidence the statements of the victim that she was afraid of defendant and was afraid that he might kill her.

[3] Defendant next argues that the victim's statements that defendant beat her and gave her the bruises and knots on her head were not admissible under the state of mind exception and should have been excluded since they were more prejudicial to defendant than probative of any relevant fact. The record reflects that the prosecutor attempted to elicit testimony from witness Fisher that the victim had told Fisher that she received bruises from being struck by defendant. The trial court sustained defendant's objection and, outside the presence of the jury, heard arguments from both the prosecutor and defense counsel. The prosecutor argued that the victim's statements that her bruises came from being beaten by defendant are relevant to the issues of defendant's premeditation and deliberation and intent to kill and that the statements were admissible since they showed the victim's state of mind. Defendant argued that the statements did not show the state of mind of the victim. The trial court ruled that the testimony that the victim said her bruises were caused by blows from defendant was not admissible since it was hearsay and did not show the victim's state of mind and that the State must, therefore, limit the testimony of the witnesses to the state of mind evidence that the victim feared defendant. The prosecutor complied with this ruling while examining witness Fisher, carefully eliciting testimony only that the victim had bruises and knots on her head, that "things were getting

worse," that she was afraid of defendant, and that she was afraid she was going to get killed. The testimony from witness Pittman was likewise in compliance.

However, when examining witness Gray, the following colloquy took place:

Q. Ms. Gray, when did you first notice a bruise on her?

A. I can't tell you exactly what month it was, but I could tell you exactly what, you know, I know where it was located at and how she told me it got there and the reason why she got it.

Q. All right, then do that.

A. Okay. One day, Shelia had came home, which is at my mother's house, she had came home, and, you know, she had fat cheeks and so she had a bruise. I don't know which side of the cheek it was and I had asked her, I asked her myself. I said, "Shelia," I said, ["]what's wrong with you?" I said, "[W]hat's wrong with your face?" like that. At first, she didn't want to tell me and I keep on and on to her about, you know. I was really concerned, you know, about her and so she had told me that [defendant] had took his fist and hit her in the face.

[DEFENSE COUNSEL]: Objection.

THE COURT: Approach the bench.

(Conference held at the bench.)

THE COURT: Sustained. Don't consider the testimony as to him striking her at this point.

Q. Ms. Gray, let me back up and ask you a question. Did—at any time when you saw a bruise or abrasion on her, did Sheila [sic] Wall ever tell you whether or not she was afraid of [defendant]?

A. Yes.

Q. What did she say to you?

A. She just told me that—she had told me about whenever, all right, not like the first bruise that happened, not then, but afterwards after it started happening, she had told me that she was afraid that [defendant] was going to kill her and I had, you know, told her also she needed to get away way from him.

Q. All right. And in those times, in at least one of those times when she told you that she was afraid that he was going to kill her, did she also tell you where those bruises came from?

A. Yes, sir.

Q. What did she tell you?

A. She told me it came from [defendant].

Defendant lodged neither an objection to these last two questions by the prosecutor nor a motion to strike the answers of the witness.

Even assuming *arguendo* that defendant's earlier objection sufficed as an objection to these later questions and that the trial court erred in allowing the testimony, defendant has failed to show that the error was prejudicial. The evidence was overwhelming that defendant killed the victim. Several witnesses testified as eyewitnesses to an argument that defendant and the victim were having outside the Country Cupboard on the evening of 2 November 1995. At least one witness testified that the two were then seen walking down the road, the defendant walking directly behind the victim. Defendant confessed to having killed the victim, led police to the body, and pointed out to police one of the weapons he used to kill the victim. The autopsy corroborated defendant's statements. In light of this evidence, defendant cannot show that there is a reasonable possibility that the outcome of the trial would have been different if the trial court had excluded the statement of witness Gray that the victim's bruises were caused by defendant. *See* N.C.G.S. § 15A-1443(a) (1988).

Defendant next contends that various statements he made to police officers on 10 and 12 November 1995 were improperly admitted into evidence by the trial court since the statements were involuntarily given and obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and the federal and state Constitutions. The trial court conducted *voir dire* on the admissibility of defendant's statements and concluded in each instance that the statements were admissible. On appeal a trial court's findings of fact are binding if supported by competent evidence, but the question of voluntariness is a conclusion of law which is fully reviewable. *State v. Leary*, 344 N.C. 109, 117, 472 S.E.2d 753, 757 (1996). In this case we conclude that the trial court correctly admitted each of defendant's statements. We address each statement in turn.

[4] Defendant first argues that the trial court should have suppressed the statement he made to police at the railroad tracks on the morning of 10 November 1995 on the ground that defendant had not been advised of his constitutional rights pursuant to *Miranda* prior to being subjected to questioning by the police. Defendant does not argue precisely that he was in custody at this time, but merely that the words of the police officers were equivalent to an interrogation in that they were designed to elicit incriminating information and that the comments were "coercive" and "set the stage for defendant's later involuntary confession." On the morning of 10 November, while the officers were conducting their search for the victim in the woods near Burdette Bridge, Sergeant Wilhelm saw defendant, approached him, told him that they were searching for Shelia Wall, and asked defendant if he had seen her. Defendant responded that he had not seen her since Friday, 3 November, the week before. Wilhelm told defendant that the police had information that Ms. Wall had been killed and that he was the one who killed her and that if defendant did not kill her and she was alive, the officers needed to know. Wilhelm further told defendant that if the police found Ms. Wall dead, the police had enough evidence to arrest defendant for the murder. Defendant stated that if he saw her, he would bring Ms. Wall to the police. Sergeant Wilhelm then left defendant standing there while police continued to search in the woods.

The rule in *Miranda* applies only when a defendant is subjected to custodial interrogation. *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (1997). The term "custodial interrogation" is defined in *Miranda* as "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." *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706. To determine whether an encounter is custodial or noncustodial, we apply the objective test of whether a reasonable person in the defendant's position would have felt free to leave. *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405.

The trial court held *voir dire* as to this particular statement by defendant and, based on the uncontradicted testimony, found that Sergeant Wilhelm received "no information from defendant as to where Shelia Wall was." The trial court did not address whether defendant was in custody at the time. The rule is "[i]f there is no material conflict in the evidence on *voir dire*, it is not error to admit the challenged evidence without making specific findings of

fact . . . . In that event the necessary findings are implied from the admission of the challenged evidence." *State v. Vick*, 341 N.C. 569, 580, 461 S.E.2d 655, 661 (1995). The record reveals that defendant's freedom to leave was in no way hampered when he was encountered by police at the railroad tracks and that a reasonable person in defendant's position would not have thought that he was in custody. We conclude that *Miranda* is not implicated by this noncustodial encounter and that the trial court did not err in admitting defendant's 10 November statement made to police by the railroad tracks.

[5] Defendant next argues that his statements to police later in the day on 10 November in the parking lot of Real's Variety store should have been suppressed since defendant was in custody and had not been given the *Miranda* warnings.

At *voir dire* on the admissibility of these statements, the evidence was not in conflict on the material facts. Accordingly, the trial court was not required to make findings of fact. *Id.* The undisputed evidence concerning defendant's statements was as follows: Sergeant Henline responded to a call on his radio about a disturbance at Real's Variety, possibly involving Rock Sturdivant or defendant or both. When Henline arrived at the store, he saw defendant standing outside. Henline asked defendant what was going on; and before he even got the words out, defendant came up and put his hands on the police car, saying, "Go ahead and take me. I did it." Henline backed defendant up off the vehicle and asked him, "What's going on? What are you talking about?" Defendant then said, "I did it. Me and Rock." Henline thought he was talking about the disturbance and asked, "What are you talking about?" Henline then heard defendant mumble something about "Shelia." Henline had been searching for Shelia Wall all morning pursuant to the missing-person report; and he testified that at this point in the conversation with defendant, he thought she was "going to walk out here on me in a minute and we're going to get everything cleared up." So Henline asked defendant, "[W]hat about Shelia, where's she at?" Defendant then responded, "[W]e killed her. She's under the bridge."

The trial court concluded as a matter of law that since defendant was not in custody when he made these statements and since they were voluntarily made, he did not have to be given his *Miranda* warnings. As stated above, *Miranda* warnings must be given only during custodial interrogation, and an encounter is custodial only if a reasonable person in the suspect's position would not feel free to leave. *Gaines*, 345 N.C. at 661-62, 483 S.E.2d at 404-05.

Given the facts of this encounter at Real's Variety, a reasonable person in defendant's position would not have thought he was in custody at the time he made the statement. Sergeant Henline, responding to a call of a disturbance, clearly did not know what defendant was talking about when he first encountered him in front of the store and tried to ascertain what was going on. Only after defendant said, "[W]e killed her. She's under the bridge," did the officer realize that defendant was talking about the Wall murder. Defendant was not in custody nor was he being interrogated by police when he made this statement. The facts here are analogous to those in *State v. Meadows*, 272 N.C. 327, 158 S.E.2d 638 (1968), where the officers were informed of a shooting and went to the scene to investigate. Upon arrival they saw the victim lying in a yard, bleeding from a gunshot wound to the neck. Several people were standing around; and when an officer asked the defendant what had happened, the defendant replied that he had shot the victim. When the officer asked why, the defendant explained; and when asked about the weapon, he led police to the shotgun he had used. *Id.* at 335, 158 S.E.2d at 643. The officer in that case testified concerning the encounter, "I didn't know what happened. When I got there—I asked him what happened and that's when he told me." *Id.* This Court held that the evidence had been properly admitted into evidence, inasmuch as no "in-custody interrogation" of the defendant had occurred since the defendant was not under arrest or in custody when he made the statement. *Id.* at 337, 158 S.E.2d at 645. Additionally, the Court in *Meadows* concluded that the police, who had arrived at the scene and were only trying to determine what was going on, were not interrogating, but were merely conducting an investigation to determine whether a crime had been committed. This Court stated:

> A general investigation by police officers, when called to the scene of a shooting, automobile collision, or other occurrence calling for police investigation, including the questioning of those present, is a far cry from the "in-custody interrogation" condemned in *Miranda*. Here, nothing occurred that could be considered an "incommunicado interrogation of individuals in a police-dominated atmosphere."

Id. at 337-38, 158 S.E.2d at 645 (quoting *Miranda*, 384 U.S. at 445, 16 L. Ed. 2d at 707). We find the reasoning in *Meadows* sound and applicable to the present case. Moreover, in this case, as in *Meadows*, when the officer arrived at the scene and asked questions to determine what was happening and whether a crime had been committed,

he did not know, nor should he have known, that his questions were likely to elicit an incriminating response. *See Vick*, 341 N.C. at 581, 461 S.E.2d at 662; *State v. McQueen*, 324 N.C. 118, 129, 377 S.E.2d 38, 44-45 (1989). Thus, the questions Sergeant Henline put to defendant at Real's Variety do not constitute interrogation for *Miranda* purposes.

Defendant attempts to broaden the factual scope of the encounter to include what happened after defendant made his statement in order to argue that the entire encounter was custodial. Defendant notes that directly after defendant made his statement, "[W]e killed her. She's under the bridge," defendant and Sergeant Henline got into the patrol car and went to the bridge. Defendant argues, based on this fact, that he was custodially detained while he made his statement.

What happened after the statement was made, however, does not affect the noncustodial and voluntary nature of the encounter prior to and while the statement was being made. *See State v. Hicks*, 333 N.C. 467, 479, 428 S.E.2d 167, 174 (1993) (encounter was noncustodial until the suspect gave a statement that he would "take responsibility" for a killing). Moreover, the facts show that defendant got into the car on his own, sat beside the officer in the front seat, was not handcuffed, and was not told he was under arrest or that he could not leave. We conclude that the trial court did not err in admitting into evidence the statement defendant gave to the police at Real's Variety.

Defendant next argues that his custodial statement to police at the station later that same day, 10 November 1995, and his statement made on 12 November at the detention center were inadmissible even though defendant had been given proper *Miranda* warnings in each instance and had waived his rights since the earlier unwarned statements were obtained in violation of his rights. Defendant urges the application of *State v. Hicks*, in which this Court set out the test for determining whether subsequent confessions should be suppressed when the initial confession is obtained in violation of a defendant's rights. *Id.* at 482, 428 S.E.2d at 175-76. We have concluded, however, that no *Miranda* violation occurred as to defendant's earlier statements; therefore, this argument necessarily fails.

[6] Defendant argues finally that the statements he gave and the written statements he signed after being properly advised of and waiving his rights should have been suppressed because his low IQ and impaired reading and spelling skills rendered him unable to under-

stand and knowingly waive his rights. Defendant contends that the trial court did not determine whether defendant actually understood his rights and what it meant to waive them and that the trial court thus failed to make an assessment of the voluntariness of the waivers and statements based on the totality of the circumstances. *State v. Massey*, 316 N.C. 558, 574, 342 S.E.2d 811, 821 (1986).

We do not find defendant's argument persuasive. The trial court was cognizant of defendant's limited intellectual and reading abilities and conducted extensive inquiry into the procedure used in obtaining defendant's waivers and statements. Defendant was reminded of his rights when he and Sergeant Henline reached the Burdette Bridge area on 10 November. After defendant showed the officers where the body was located, he was taken back to the police car, where Sergeant Wilhelm read defendant his rights from a rights card the officer kept in his car. Defendant orally indicated he understood his rights and then waived them before giving the officers more information about the crime. Later, when defendant was taken to the police station and given an opportunity to write his statement, defendant indicated that he did not write well and that he would like Sergeant Wilhelm to write it. Wilhelm wrote down each sentence as defendant spoke it and then read it back to defendant line by line, making corrections. Defendant initialed each correction and signed the statement. The trial court entered its findings of fact accordingly and concluded that defendant's rights were not violated; that he was not induced to waive his rights or make a statement; and that he freely, knowingly, intelligently, and voluntarily waived his rights and made his statements. We agree with the trial court's conclusions and note that these conclusions are further buttressed by the evidence presented by the State that defendant was familiar with his constitutional rights and the legal process based on his involvement with police in connection with his earlier murder conviction; in that case defendant had been advised of and waived his rights before giving a voluntary statement. Defendant's assignment of error is overruled.

[7] Defendant next assigns error to the trial court's denial of defendant's motion to suppress the oral statement he made on 10 November on the ground that the State failed to provide the statement to defense counsel during discovery in violation of N.C.G.S. § 15A-903(a)(1). Specifically, defendant notes that in response to his request for discovery documents from the State concerning both the oral and written statements made by defendant on 10 November, the prosecution provided a copy of the written statement and a summary

of the oral statement which indicated that the oral statement was substantially similar to the written one. Defendant complains that in the written statement, defendant stated to the police that he had used a "stick" to deliver the blows to the victim's head; but the testimony on *voir dire* concerning the oral statement was that defendant had used a "board." The defense argues that this *voir dire* was the first time defense counsel had heard anything about a "board" and that this undisclosed evidence resulted in unfair surprise and prejudice to defendant. Defendant maintains that the trial court abused its discretion in failing to sanction the prosecution and in failing to prohibit the introduction of the oral statement into evidence. We find defendant's contention to be without merit.

First, there was no discovery violation by the prosecution. Whatever term defendant used in his oral statement to describe the implement he used to deliver the blunt-force injury to the victim's head is immaterial in light of the fact that the object was identified at the scene of the crime, collected by investigators, studied by crime-scene specialists, introduced into evidence, and placed before the jury as State's exhibit number 13. Whether defendant called it a "stick" or "board," or, as it is also referred to at various points prior to the *voir dire* in question, a "railroad tie," a "piece of timber," a "piece of board," a "board," a "piece of wood," a "piece of railroad tie," a "log," a "timber," or a wooden object the dimensions of which are "twenty-nine and a half inches by three and a half inches by three inches," is of little consequence. Any variation in the terminology attributed to defendant's first statement was obviously caused by a natural confusion over what to call the object. The 10 November written statement states that defendant "got a stick and started hitting her in the head." As for the oral statement given earlier in the day on 10 November, however, Sergeant Wilhelm first testified that defendant picked up a "piece of wood" and started beating the victim in the head with it. Wilhelm then testified about the question he asked defendant and defendant's answer: " '[Y]ou picked up a stick and started beating her in the head with it?' He said, 'Yeah, I don't know why I did it, I just did it.' " Later on *voir dire* the following exchange occurred between the prosecutor and Sergeant Wilhelm:

> Q. Did he also tell you what he did with the wood board or piece of wood?
>
> A. Yes, sir, when he was standing there he told us. I said, "Well, where's the piece of wood?" and he pointed over to a large multi-

flora rose bush, which y'all call them briar bushes, flora rose bush, and in the very top of it, you couldn't see it to start with[,] this board.

Q. Is that State's Exhibit 13 that was later collected by Agent Bonds?

A. Yes, sir, it is.

On cross-examination by defense counsel, the following exchange took place:

Q. Did he say it was a stick that he hit her with and not a piece of wood or board?

A. I don't remember his exact—I can look it up in the statement, but I don't remember exactly.

Q. In the written statement, he says a stick and you're testifying now he said a board?

A. Well, he said a stick, but then he pointed [it out] to us and showed us where it was. In fact, he walked up to the bush and said, "That's it."

From these exchanges we conclude that Wilhelm referred to the object as a board because what he found on top of the bush where defendant indicated looked to him more like a board than a stick. The prosecution did not violate the discovery statute by representing to defense counsel that the 10 November oral statement was substantially similar to the 10 November written statement.

Even if there had been a discovery violation, the trial court did not abuse its discretion since it provided the defense with a recess to examine the evidence. Our General Statutes provide:

> If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article [Article 48, Discovery in Superior Court] or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

N.C.G.S. § 15A-910 (1997). Defendant concedes that the decision as to which sanctions to apply or whether to apply any sanction at all rests in the discretion of the trial court. Defendant also concedes that the trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Quarg*, 334 N.C. 92, 103, 431 S.E.2d 1, 6 (1993). In this case the trial court did not abuse its discretion. The court denied the motion to suppress, finding that a violation had not occurred, but also granted the defense a recess to examine the evidence. The granting of a recess is one of the enumerated remedies a trial court is statutorily authorized to employ under N.C.G.S. § 15A-910. We note in addition that while defendant contends that he was denied sufficient time to prepare for the surprise evidence concerning the "board," defendant specifically declined the full use of the recess offered by the trial court and asked merely to look at the notes from which Sergeant Wilhelm testified. Defendant's assignment of error is overruled.

[8] Defendant next argues that the trial court committed error by admitting evidence of defendant's prior conviction for second-degree murder in violation of Rule 404(b) of the North Carolina Rules of Evidence. Defendant contends specifically that the evidence was not relevant to any permissible 404(b) purpose and that, instead, it tended to prove only that defendant possessed the character and disposition to commit the murder. Defendant also argues that the prior crime which occurred in 1978 was too remote in time to be relevant to any aspect of the present crime. Defendant maintains further that the error was prejudicial since the jury likely used the evidence for improper purposes. Rule 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1997).

In interpreting this rule, this Court has said:

> This rule is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. [268,] 278-79, 389 S.E.2d [48,] 54 [(1990)]. The list of permissible purposes for admission of "other crimes" evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime. *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

State v. White, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

The trial court in this case after *voir dire* made the following findings of fact: (i) that in each case the victim suffered knife wounds to the back and stomach and suffered blunt-force injury to the head; (ii) that each assault occurred in an area where defendant was not likely to be seen by others; (iii) that each victim's clothing was left containing money; (iv) that following the death of each victim, officers observed defendant in the area where the body was found; (v) that in each case defendant gave a statement to the investigating officers indicating that he had killed the victim; (vi) that in each case defendant took the officers to the crime scene and pointed out the pieces of wood which he said were used in the commission of the murders. The trial court then concluded:

> [B]ased on the foregoing findings of fact, the Court finds that these cases are sufficiently similar to be admissible under our Rules of Evidence, that they are of the type made admissible by Rules of Evidence and they are relevant to some purpose other than showing the defendant's propensity for the type of conduct at issue; that the evidence is relevant and is to be received and considered only for the purpose of showing that the defendant had the intent required for first degree murder; that he knew that the stabbing and beating of Sheila Diane [sic] Wall would cause her death, and that he himself was capable of inflicting the wounds on Sheila [sic] Wall without the aid of anyone else. And further, that the probative value of this evidence . . . outweighs any prejudicial effect it may [have.] It is therefore, ordered that

the objection is overruled and [the evidence is] ruled to be admissible for these limited purposes.

We conclude that the evidence of the prior murder committed by defendant was properly admitted. The similarity of the two crimes is relevant to the present crime for reasons other than to show defendant's propensity to commit the crime. The manner in which the previous crime was committed tended to show that defendant had both knowledge and intent when he committed the crime for which he was being tried. The fact that defendant had previously killed a person in the same way demonstrated, as the prosecutor argued, that defendant knew what he was doing, knew that his actions would result in the victim's death, intended to kill the victim, and did not simply lose control.

Defendant argues nevertheless that since the prior crime occurred seventeen years before the present crime, it is too remote to be admissible under Rule 404(b). Remoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered. For some 404(b) purposes, remoteness in time is critical to the relevance of the evidence for those purposes; but for other purposes, remoteness may not be as important. For example, as this Court noted in *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), remoteness in time may be significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan; but remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident. *Id.* at 307, 406 S.E.2d at 893; *see also State v. Carter*, 338 N.C. 569, 588-89, 451 S.E.2d 157, 167-68 (1994) (remoteness not as critical when prior-acts evidence is admitted for purpose of proving identity), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995); *State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986) (remoteness more important when prior acts evidence is admitted to prove common plan or scheme rather than to prove *modus operandi*). In this case we conclude that the time lapse between the crimes goes to the weight of evidence, not to its admissibility. *See Carter*, 338 N.C. at 589, 451 S.E.2d at 168.

Defendant contends finally that the admission of the evidence of the prior murder was most likely used by the jury for improper purposes and that the danger of unfair prejudice far outweighed its probative value. We disagree. The determination of whether relevant evidence should be excluded under Rule 403 is a matter that is left in the

sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion. *State v. Pierce*, 346 N.C. 471, 490, 488 S.E.2d 576, 587 (1997). In this case defendant has not demonstrated any abuse of discretion by the trial court. On the contrary, a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper limiting instruction to the jury. Moreover, the evidence of the prior crime is highly probative of defendant's knowledge that his actions on 2 November 1995 would likely kill the victim and that he intended to kill the victim. We conclude, therefore, that defendant's assignments of error concerning the admission of this evidence are without merit.

SENTENCING PROCEEDING

[9] Defendant next contends that the trial court erred in sustaining the prosecution's objection to a question posed to defendant's expert witness in forensic psychology. Defendant asserts that critical testimony was thus precluded; and as a direct result, the jury failed to find the (f)(6) statutory mitigating circumstance that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. N.C.G.S. § 15A-2000(f)(6) (1997).

During the sentencing proceeding, defendant's counsel elicited from Dr. John Warren information concerning defendant's ability to make decisions and the effect of alcohol on defendant's ability to think. Dr. Warren opined that defendant's limited intellectual functioning and any substance abuse constituted diagnosable mental disturbances. Defendant's counsel then attempted to ask Dr. Warren the following question with respect to the (f)(6) mitigator, "Would he have the capacity to appreciate the criminality of his conduct and conform to the requirements of law as with most of your population in a given situation?" The trial court sustained the prosecutor's objection. After the objection was sustained, defendant's counsel did not rephrase the question or make an offer of proof as to how Dr. Warren would have answered; rather, he moved on to other areas of inquiry.

Defendant argues based on *State v. Beach*, 333 N.C. 733, 430 S.E.2d 248 (1993), that the trial court erred in sustaining the State's objection. The question posed to the expert witness in *Beach* tracked the language of the (f)(6) statutory mitigator. In this case the question contained the additional phrase, "as with most of your population in a given situation." Hence, defendant's reliance on *Beach* is misplaced.

In order for a defendant to preserve for appellate review the exclusion of evidence, "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. Geddie*, 345 N.C. 73, 95-96, 478 S.E.2d 146, 157 (1996), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 43 (1997). " 'It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify.' " *State v. Johnson*, 340 N.C. 32, 49, 455 S.E.2d 644, 653 (1995) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)).

Moreover, as the State notes, Dr. Warren also testified that "[w]hat I found was that his understanding of his world is limited because of his limited IQ, that any substance abuse is going to curtail that and decrease his understanding of those concepts and decrease his ability to control himself emotionally," and, "Yes, he does [know right from wrong], but it's a very elementary simple right from wrong. It's how what I do affects me rather than the bigger picture, community right or wrong." Hence, the jury had evidence before it from which it could have concluded that defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was impaired. Defendant's assignment of error is overruled.

[10] Defendant's next contention is that the trial court erred in overruling defendant's objection to the manner in which the prosecutor cross-examined defendant's expert witness. Defendant asserts that the prosecutor's questioning included improper statements of the prosecutor's own opinion of the witness' diagnosis of defendant and that these statements were prejudicial to defendant and deprived him of a fair trial.

During the sentencing proceeding, the following exchange occurred between the prosecutor and Dr. Warren:

> Q. Okay. And what you were saying to this jury is that his answers [on three personality tests] showed so many symptoms of profound mental illness for which you found no other indications that none of the personality tests were valid; isn't that right?
>
> A. No, not the way you word it. His answers showed so many symptoms and complaints that the test interpretation would not be valid because, as I said on direct, except for the most pro-

foundly mentally ill psychotic, crazy—to use a regular term—person, they wouldn't have that many symptoms, and I did not in my examination or that of my staff members, see that level of mental illness in him, so the tests scores being off the charts, not seeing that extent in the examination with him, the standard interpretation for those tests would not be valid. In other words, the tests would not be valid.

Q. So, to simplify this for us, he is not crazy, in your words?

A. I found no indication of psychosis or craziness. What I found was mental illness and substance abuse.

Q. He is not crazy, but he answered like he was crazy?

A. He answered saying that he had a large number of physical and mental symptoms.

Q. Okay. Now, crazy is the word. Could you answer that question yes or no?

A. No, I really can't. I answer—trying to explain to you and the jury so that you have a clear understanding of what I'm saying as opposed to putting it in a way that is not clear.

Q. Okay. Well, it seems abundantly clear to me if he is not crazy, he answered like he is crazy, he wasn't telling you the truth, but you say that's a cry for help?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. I did not say he answered like he was crazy, and see, that's, I think, the way our misunderstanding is coming in as you interpret things and I'm trying to help you clarify. He answered endorsing a large number of symptoms on all three tests. This is very unusual, and in the literature is most often called a cry for help response pattern seen in very childlike and dependent people, which is consistent with this man's intelligence and background.

Defendant asserts that the trial court's failure to sustain defendant's objection to the prosecutor's question allowed the prosecutor to place before the jury his opinion that defendant was only acting "crazy" and was lying on the personality tests.

Concerning the cross-examination of expert witnesses, this Court has said:

"[The] North Carolina Rules of Evidence permit broad cross-examination of expert witnesses. N.C.G.S. § 8C-1, Rule 611(b) (1992). The State is permitted to question an expert to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole. " 'The largest possible scope should be given," and "almost any question" may be put "to test the value of his testimony." ' 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 42 (3d ed. 1988) (footnotes omitted) (citations omitted)."

State v. Gregory, 340 N.C. 365, 410, 459 S.E.2d 638, 663-64 (1995) (quoting *State v. Bacon*, 337 N.C. 66, 88, 446 S.E.2d 542, 553 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995)) (alteration in original), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

Applying this standard, we conclude that the prosecutor's questions were well within the bounds of proper cross-examination of an expert witness. The witness had stated that defendant gave the types of answers only a profoundly mentally ill, psychotic, or crazy person would have given, but that all other indications of defendant's mental status were that defendant was not profoundly mentally ill. The witness drew a conclusion from this disparity that defendant's responses constituted a cry for help. This conclusion was proper for the prosecutor to attack in order to impeach the credibility of the witness and his expert opinion. The prosecutor's questions were designed to elicit that another conclusion could be drawn from the facts, namely, that defendant was merely lying. The trial court did not err in overruling defendant's objection to the prosecutor's question; this assignment of error is overruled.

[11] Defendant next assigns error to the submission of the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9), asserting that the evidence does not support the submission of this aggravator. In *State v. Sexton* this Court identified several types of murders which warrant submission of the especially heinous, atrocious, or cruel circumstance. We said:

"One type includes killings physically agonizing or otherwise dehumanizing to the victim. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328[, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18] (1988). A second type includes killings less violent but 'conscienceless, pitiless, or unnecessarily torturous to the victim,' *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808,

> 826-27 (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),] including those which leave the victim in her 'last moments aware of but helpless to prevent impending death,' *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). A third type exists where 'the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder.' *Brown*, 315 N.C. at 65, 337 S.E.2d at 827."

State v. Sexton, 336 N.C. 321, 373, 444 S.E.2d 879, 908-09 (quoting *State v. Gibbs*, 335 N.C. 1, 61-62, 436 S.E.2d 321, 356 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994)), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). For purposes of determining the sufficiency of the evidence to support the submission of this aggravating circumstance to the jury, 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 from the facts. *State v. Elliott*, 344 N.C. 242, 279, 475 S.E.2d 202, 219 (1996), *cert. denied*, — U.S. —, 137 L. Ed. 2d 312 (1997).

The evidence in this case, viewed in the light most favorable to the State, supported the submission of the especially heinous, atrocious, or cruel circumstance. Defendant stabbed the victim at least thirty-four times, primarily on her back, but also on the front of her body and her head. The knife wounds to the head penetrated the skull. Two stab wounds pierced the left lung, and three pierced the right lung. One wound penetrated the aorta and caused extensive bleeding into the chest cavity, indicating that the victim's heart was beating while she was being stabbed. The victim also suffered a fracture at the base of her skull from a blow or blows to the head with a piece of wood. Even if the trauma to the head rendered the victim unconscious, the evidence suggested that at least some of the stab wounds were inflicted prior to the blow to the head. The existence of a defensive wound on the victim's hand also suggests that the victim was conscious and aware of what was happening. Death was caused by the stab wounds. This evidence supports the conclusion that the victim's death was physically agonizing, conscienceless, pitiless, and unnecessarily torturous and that the victim was aware of, but helpless to prevent, her impending death. The trial court did not err by submitting this aggravating circumstance to the jury; defendant's assignment of error is overruled.

[12] Defendant next contends that the trial court erred by failing to intervene during two portions of the prosecutor's argument to the jury and by failing to instruct the jury to disregard those portions of the prosecutor's argument. Defendant concedes that he did not object at trial but contends that the argument was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu*. In determining whether the prosecutor's argument was so grossly improper, this Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers. *State v. Tyler*, 346 N.C. 187, 205, 485 S.E.2d 599, 609, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 411 (1997). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

Defendant first culls from the prosecutor's argument the exhortation that "[p]rison's been tried, it didn't work, and you've got a responsibility as a juror to go back and consider this." Defendant contends that this is analogous to an argument that the jury should impose the death penalty in order to set a standard of conduct and send a general message of deterrence to others who may commit crimes. Defendant maintains that this Court held such an argument to be grossly improper in *State v. Kirkley*, 308 N.C. 196, 215, 302 S.E.2d 144, 155 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). Initially, we note that defendant errs in his interpretation of the prosecutor's argument. A review of the transcript reveals that the prosecutor properly and permissibly argued that the jury should impose the death penalty to foreclose further crimes by defendant specifically. *See State v. Alston*, 341 N.C. at 251-52, 461 S.E.2d at 717; *State v. Zuniga*, 320 N.C. 233, 269, 357 S.E.2d 898, 920, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). Moreover, defendant's reliance on *Kirkley* is misplaced. In *Kirkley* the prosecutor argued, "I'm asking you to impose the death penalty as a deterrent, to set a standard of conduct." We said that the prosecutor's argument was improper but held, since the defendant there had lodged no objection to the argument at trial, that the argument was not so grossly improper as to require *ex mero motu* intervention by the trial court. *Kirkley*, 308 N.C. at 215, 302 S.E.2d at 155.

[13] Defendant also takes exception to the prosecutor's statement to the jury that "the law requires that you return a jury recommendation

of death in this case," asserting that this statement constitutes a false proposition of law. Defendant, however, fails again to understand the prosecutor's argument in its proper context. The prosecutor was properly arguing that the recommendation of a death sentence was warranted by the facts and circumstances of this case; he did not make a "false proposition of law" by so arguing.

As defendant has failed to show any gross impropriety in the prosecutor's arguments to the jury, we overrule this assignment of error.

PROPORTIONALITY

[14] In defendant's final assignment of error, he argues that the sentence of death in this case was imposed under the influence of passion, prejudice, or other arbitrary considerations, and that based on the totality of the circumstances, the death penalty is disproportionate. We are required by N.C.G.S. § 15A-2000(d)(2) to review the record and determine (i) whether the record supports the jury's findings of the aggravating circumstances upon which the court based its death sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

After a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we are convinced that the jury's findings of the two aggravating circumstances submitted were supported by the evidence. We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we must consider whether the imposition of the death penalty in defendant's case is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and the defendant. *State v. Robinson*, 336 N.C. 78, 133, 443 S.E.2d 306, 334 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random impo-

sition 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). Our consideration is limited to those cases within the pool which are roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Defendant was convicted of first-degree murder based on premeditation and deliberation. The jury found both the submitted aggravating circumstances: (i) that defendant had previously been convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); and (ii) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

Three statutory mitigating circumstances were submitted for the jury's consideration: (i) the murder was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (ii) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); and (iii) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence which the jury deemed to have mitigating value, N.C.G.S. § 15A-2000(f)(9). The jury found that the murder was committed while defendant was under the influence of mental or emotional disturbance but declined to find either of the other two mitigators. Of the fifteen nonstatutory mitigating circumstances submitted, three were found by the jury.

We begin our analysis by comparing this case to those cases in which this Court has determined the sentence of death to be disproportionate. This Court has determined the death sentence to be disproportionate on seven occasions. *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. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

In five of the seven cases in which this Court has concluded that the death penalty was disproportionate, the jury did not find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *Benson*, 323 N.C. 318, 372 S.E.2d 517; *Rogers*, 316 N.C. 203, 341 S.E.2d 713; *Young*, 312 N.C. 669, 325 S.E.2d 181; *Hill*, 311 N.C. 465, 319 S.E.2d 163; *Jackson*, 309 N.C. 26, 305 S.E.2d 703. Since the jury in the present case found this statutory aggravating circumstance to exist, this case is easily distinguishable from those cases. As we have previously stated, "[w]hile this fact is certainly not dispositive, it does serve as an indication that the sentence of death . . . is not disproportionate." *State v. Walls*, 342 N.C. 1, 72, 463 S.E.2d 738, 777 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). The crime of defendant in this case, which included thirty-four stab wounds to the victim's body, additional stab wounds to the head, and a blunt-force trauma to the head, is equally as brutal as other murders where a death sentence was imposed. Additionally, there is evidence that the victim suffered before she died and that she was aware of but helpless to prevent her impending death. Dr. John D. Butts testified that the bleeding into the chest cavity indicated that the victim was alive and that her heart was still beating while she was being stabbed. The evidence further supports the inference that the blow to the head, which may or may not have produced unconsciousness, was delivered after the stab wounds. A cut to the victim's thumb was also indicative of a wound received while the victim was attempting to protect herself. That defendant was convicted of premeditated and deliberate murder is also significant. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

In the other two cases in which we have concluded that the death penalty was disproportionate, the jury did find that the murders were especially heinous, atrocious, or cruel. *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. However, both cases are distinguishable from the present case on other grounds.

In *Stokes* the Court emphasized that the defendant was found guilty of first-degree murder based upon the felony murder rule; that there was little, if any, evidence of premeditation and deliberation; and that the defendant was seventeen years old at the time of the murder and acted in concert with a considerably older co-felon. 319 N.C. at 21, 24, 352 S.E.2d at 664, 666. In the instant case, on the other

hand, defendant was forty-six years old at the time of the murder, acted alone, and was found guilty of first-degree murder on the basis of premeditation and deliberation.

In *Bondurant* the defendant shot the victim but then immediately directed the driver of the car in which they had been riding to proceed to the emergency room of a hospital. In concluding that the death penalty was disproportionate, we focused on the defendant's immediate attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. In contrast, the evidence in the present case tended to show that defendant covered the victim's body with tree limbs, poured bleach on the body to retard the smell and prevent discovery, and then laughed at the police as he watched them searching for days for the woman reported missing by her family.

Another distinguishing characteristic of this case is that two aggravating circumstances were found by the jury. Of the seven cases in which this Court has found a sentence of death disproportionate, in only two, *Bondurant*, 309 N.C. 674, 309 S.E.2d 170, and *Young*, 312 N.C. 669, 325 S.E.2d 181, did the jury find the existence of multiple aggravating circumstances. *Bondurant*, as discussed above, is clearly distinguishable. In *Young* this Court focused on the failure of the jury to find the existence of the "especially heinous, atrocious, or cruel" aggravating circumstance, which the jury found in the present case. Moreover, the jury in the present case found as an aggravating circumstance that defendant had been previously convicted of a violent felony. This finding is significant and reflects upon defendant's character as a recidivist. *See State v. Warren*, 347 N.C. 309, 328, 492 S.E.2d 609, 619 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 818 (1998). There are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to sustain death sentences; the (e)(3) and (e)(9) aggravators, both of which were found in this case, are among them. *Bacon*, 337 N.C. at 110 n.8, 446 S.E.2d at 566 n.8.

Although we review all of the cases in the pool when engaging in this statutory duty, as we have repeatedly stated, it is worth noting again that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. We conclude 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 dispro-

portionate or those in which juries have consistently returned recommendations of life imprisonment.

Accordingly, we conclude that defendant received a fair trial, free from prejudicial error, and that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

NO ERROR.

Justice WEBB concurring in the result.

I concur in the result reached by the majority but I believe evidence that the defendant had committed a murder seventeen years previously should have been excluded pursuant to N.C.G.S. § 8C-1, Rule 404(b).

The majority says this evidence was admissible to prove intent and was thus not barred as evidence showing the defendant's propensity to commit the crime with which he is charged in this case. The majority says this is so because, "The fact that defendant had previously killed a person in the same way demonstrated . . . that defendant knew what he was doing, knew that his actions would result in the victim's death, intended to kill the victim, and did not simply lose control."

The evidence showed the victim had thirty-four stab wounds to the body, stab wounds to the head that penetrated the skull, and an extensive fracture at the base of the skull. It is inconceivable to me that on this evidence it was necessary to show the defendant had previously committed murder in order to prove he knew his action would cause the death of the victim. The defendant is bound to have known that his action would cause the victim's death.

The evidence of the previous murder was of no probative value in proving the defendant's intent. It was probative of the defendant's propensity to commit murder. It should have been excluded.

Because of the strong evidence against the defendant, I am satisfied there is not a reasonable possibility that there would have been a different result had this error not occurred. I would hold it is harmless error.

STATE OF NORTH CAROLINA v. SHAWN DERRICK BONNETT A/K/A TYRONE WILLIAMS

No. 471A96

(Filed 9 July 1998)

1. Criminal Law § 78 (NCI4th Rev.)— pretrial publicity— denial of change of venue

The trial court did not err in the denial of defendant's motion for a change of venue or a special venire in this first-degree murder and robbery trial based on pretrial publicity where (1) several jurors who indicated that they had read or heard about the case stated that they had not formed an opinion about the case, could set aside any information, and could be fair and impartial, and one juror who had formed an opinion and knew the victim stated unequivocally that he could set aside his opinion and base his decision on the evidence, and (2) viewing the totality of the circumstances, there was no reasonable likelihood that the county's population was so infected with prejudice against defendant that he could not receive a fair trial in the county. N.C.G.S. § 15A-957.

2. Jury § 111 (NCI4th)— pretrial publicity—denial of individual voir dire

The trial court did not abuse its discretion in the denial of defendant's motion for individual voir dire of prospective jurors in a capital trial based upon pretrial publicity. N.C.G.S. § 15A-1214(j).

3. Criminal Law § 1324 (NCI4th Rev.)— death penalty— denial of motion to preclude

The trial court did not err in denying defendant's motion to preclude the State from seeking the death penalty in this first-degree murder trial on the ground that the death penalty would be disparate, disproportionate, excessive, and cruel and unusual punishment under the United States and North Carolina Constitutions.

4. Jury § 237 (NCI4th)— capital trial—bifurcation or continuance properly denied

The trial court did not err in denying defendant's motion to bifurcate his capital trial and his alternative motion to continue so that he would not be tried or sentenced until after two codefendants were tried.

5. Criminal Law § 121 (NCI4th Rev.)— capital charge—arraignment in chambers

Defendant was not prejudiced by being arraigned on a capital charge in chambers rather than in open court.

6. Constitutional Law § 343 (NCI4th)— unrecorded conferences—absence of defendant—prior to capital trial—no error

An unrecorded conference in the judge's chambers that occurred prior to the start of defendant's capital trial without defendant being present did not amount to constitutional or other error.

7. Constitutional Law § 344.1 (NCI4th)— bench conferences—capital trial—absence of defendant—counsel present—no constitutional violation

The trial court did not violate defendant's constitutional right to be present at every stage of his capital trial by conducting ten bench conferences outside his presence where defendant was present in the courtroom and was represented by counsel at each conference; nine of the conferences were recorded and eight concerned questions of law; in the remaining recorded conference, the trial court inquired of counsel how best to handle an incident where a reporter had talked to a juror; the only unrecorded conference occurred during voir dire of a prospective juror who was excused for cause because her views would prevent or substantially impair the performance of her duties as a juror; and defendant failed to show how his presence would have served any useful purpose.

8. Jury § 260 (NCI4th)— peremptory challenges of black prospective jurors—race-neutral reasons

The trial court's findings that the prosecutor's exercise of peremptory challenges to strike four black prospective jurors in this capital trial was not racially motivated and that the prosecutor had not engaged in purposeful discrimination were not clearly erroneous where (1) the prosecutor excused the first juror because he was equivocal about the effect on his decision of a codefendant testifying pursuant to a plea agreement, the prosecutor was unable to make eye contact with him, and the prosecutor detected a smile or smirk when talking to him; (2) the second juror was excused because he was equivocal about the

death penalty, he was not paying attention when the prosecutor was going through the death penalty issues, the prosecutor was unable to make eye contact with him, and an investigator who would be a witness in the case informed the prosecutor that he had questioned the juror in a felonious larceny case under investigation; (3) the third juror was excused because he was equivocal about the death penalty, the prosecutor had been informed by a law officer who had known the juror for a number of years that one could not depend on what he said, and the juror had been investigated as a suspect in a larceny case several years earlier; and (4) the fourth juror was excused because the prosecutor perceived, from her tone of voice, facial expression and body language, that she had a belligerent attitude or air of defiance which suggested that she would be antagonistic to the prosecution, and that she had emphasized in her questionnaire that she had temporary custody of her grandchildren.

9. Jury § 203 (NCI4th)— challenge for cause—preconceived opinion—knowledge of victim—ability to set aside opinion

The trial court did not err in denying defendant's challenge for cause of a prospective juror on the basis that the juror had formed an opinion and knew the victim where the juror stated unequivocally that he could set aside his opinion and base his decision on the evidence, and the juror's responses did not suggest that he would not be a fair and impartial juror or that he could not return a verdict according to N.C.G.S. § 15A-1212(6) and (9).

10. Jury § 210 (NCI4th)— alternate juror related to victim—denial of challenge for cause—harmless error

Even if the trial court erred in denying defendant's challenge for cause of an alternate juror who was related within the sixth degree to the victim in this case, this error was harmless where the alternate juror did not serve as one of the twelve jurors who decided defendant's case. N.C.G.S. § 15A-1212(5).

11. Evidence and Witnesses § 263 (NCI4th)— capital trial—use of defendant's nickname—absence of prejudice

Assuming that the trial court erred in permitting a witness in this capital murder trial to refer to defendant as "Homicide" when it ruled that the witness did not come within a pretrial order prohibiting the use of the alias "Homicide" by court personnel and law enforcement officers, defendant cannot show any prejudice

in that he lost the benefit of any objection when he failed to object to the prosecutor's reference to defendant as "Homicide," defense counsel used the term "Homicide" on cross-examination, and defendant referred to himself as "Homicide" during the sentencing proceeding. Moreover, it is not error to refer to defendant by a nickname by which he is generally known even if the nickname is demeaning.

12. Evidence and Witnesses § 1145 (NCI4th)— statements made by codefendant—sufficient evidence of conspiracy—hearsay exception

The evidence in a first-degree murder and robbery trial was sufficient to meet the State's burden of showing that a conspiracy existed so as to render admissible hearsay statements of a coconspirator during the course and in furtherance of the conspiracy where it tended to show that defendant and his three codefendants went to the victim's store three times to buy beer; the next time they went there, one codefendant stayed in the car while defendant and the other two went inside, shot the victim, took his gun, and stole the money box; and they then drove to a motel, divided up the money, and attempted to take refuge in someone else's house when pursued by the police. Further, the statements of a codefendant in which the codefendants agreed to "hit this store," "stick together whatever happen[s]," and to "smoke the old m-----f-----," along with statements made during the robbery and murder, fall within the hearsay exception for statements made during the course and in furtherance of a conspiracy. N.C.G.S. § 8C-1, Rule 801(d)(E).

13. Homicide § 552 (NCI4th)— first-degree murder trial—instruction on second-degree murder not required

Evidence in a first-degree murder trial that defendant and his codefendants had been drinking, that defendant did not plan the murder and robbery of the victim, and that one codefendant did not think the other two codefendants would kill the victim did not require the trial court to instruct the jury on the lesser included offense of second-degree murder since defendant failed to show that his voluntary intoxication rendered him incapable of forming the requisite specific intent, the codefendant's belief was not pertinent to defendant's guilt or innocence, and the State presented evidence of each element of first-degree murder that was positive and uncontroverted.

14. Criminal Law § 804 (NCI4th Rev.); Homicide § 583 (NCI4th)— acting in concert—specific intent—instructions

The rule for acting in concert for specific intent crimes stated in *State v. Blankenship*, 337 N.C. 543 (1994), applies to defendant's first-degree murder trial since the crime and judgment occurred subsequent to the decision in *Blankenship* and prior to the decision in *State v. Barnes*, 345 N.C. 184 (1997). The trial court properly instructed the jury on the law of acting in concert in accordance with *Blankenship* where the court emphasized to the jury that in order to find defendant guilty of premeditated and deliberate murder, the jury must find that defendant specifically intended to kill the victim.

15. Criminal Law § 807 (NCI4th Rev.)— closing argument—aiding and abetting—absence of instruction

Defendant was not prejudiced by the trial court's allowing the prosecutor to argue "aiding and abetting" to the jury in this capital murder trial when the court was not going to instruct on that theory of guilt since the court instructed on acting in concert and the distinction between a defendant being found guilty of aiding and abetting and acting in concert is of little significance, and the record shows that the evidence supported jury instructions on both aiding and abetting and acting in concert.

16. Criminal Law § 807 (NCI4th Rev.)— aiding and abetting—mere presence—instruction not required

The trial court did not err by failing to instruct the jury in a capital murder trial that defendant's mere presence at the scene of the crime is insufficient to support a finding that he was an aider and abettor where the evidence overwhelmingly showed that defendant was not "merely present" at the murder scene but showed that defendant agreed to the robbery and murder of the victim and that he supplied the murder weapon and actively participated by stealing the victim's money box.

17. Criminal Law § 1367 (NCI4th Rev.)— capital sentencing—aggravating circumstance—murder during armed robbery—conviction based on premeditation and felony murder

The trial court did not err by submitting to the jury in a capital sentencing proceeding the (e)(5) aggravating circumstance that the murder was committed during the course of an armed

robbery, although the armed robbery served as the underlying felony for defendant's felony-murder conviction, where defendant was also convicted of first-degree murder on the basis of premeditation and deliberation. N.C.G.S. § 15A-2000(e)(5).

18. Criminal Law § 1364 (NCI4th Rev.)— capital sentencing—prior violent felony aggravating circumstance—accessory after fact to murder and assault

The trial court did not err in submitting the (e)(3) prior violent felony aggravating circumstance in a capital sentencing proceeding where defendant had been convicted of one count of accessory after the fact to murder and two counts of accessory after the fact to assault with a deadly weapon with intent to kill inflicting serious injury, and two witnesses testified that defendant's convictions for accessary after the fact involved defendant and others shooting guns into a nightclub in 1991.

19. Criminal Law § 1365 (NCI4th Rev.)— capital sentencing—aggravating circumstance—avoiding arrest

The trial court did not err in submitting in a capital sentencing proceeding the (e)(4) aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest in that the jury could find that defendant participated in the killing to eliminate a potential witness against him where there was plenary evidence tending to show that, earlier on the day of the murder, defendant and his codefendants had each been inside the victim's store to purchase beer; after defendant and his codefendants agreed to "hit the store," they also agreed to "smoke the old m-----f-----" because the victim would recognize two of the codefendants; and defendant then handed a gun to one codefendant, and defendant and two codefendants went inside the store, killed the victim, and robbed his store. N.C.G.S. § 15A-2000(e)(4).

20. Criminal Law § 1382 (NCI4th Rev.)— capital sentencing—mitigating circumstance—no significant criminal history—submission not required

The trial court did not err in failing to submit in this capital sentencing proceeding the (f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity because no reasonable juror could have concluded that defendant's criminal history was insignificant where evidence of defendant's criminal history included a conviction for one count of

accessory after the fact of murder; conviction for two counts of accessory after the fact of assault with a deadly weapon with intent to kill inflicting serious injury; conviction for felony possession with intent to sell and deliver cocaine, felony conspiracy to sell and deliver cocaine, and illegal use of marijuana; conviction for drug possession and possession of drug paraphernalia in New York; and conviction of larceny of an automobile in New York. N.C.G.S. § 15A-2000(f)(1).

21. Criminal Law § 1384 (NCI4th Rev.)— capital sentencing—mitigating circumstance—mental or emotional disturbance—submission not required

The trial court did not err in failing to submit to the jury in a capital sentencing proceeding the statutory mitigating circumstance that defendant was under the influence of a mental or emotional disturbance at the time of the offense where one of defendant's experts testified that testing showed defendant to be disturbed psychologically and to be socially alienated with a poor self-image, insecurity, and feelings of inadequacy, but neither of defendant's experts suggested any nexus between defendant's personality characteristics and the crimes he committed or any mental or emotional disturbance at the time of the killing.

22. Criminal Law § 1390 (NCI4th Rev.)— capital sentencing—age as mitigating circumstance—submission not required

The trial court did not err by failing to submit the (f)(7) mitigating circumstance of age to the jury in this capital sentencing proceeding where defendant relied upon evidence that he was twenty-six years old at the time of the murder, was abandoned at birth by his mother, grew up in a dysfunctional family, and had an IQ of 86, a learning disability, a lack of reading skills, and a lack of stability and guidance, but defendant introduced no substantial evidence of his immaturity, youthfulness, or lack of emotional or intellectual development at the time of the crime.

23. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—requested nonstatutory mitigating circumstance—subsumption by submitted circumstance

The trial court did not err by refusing to submit defendant's requested mitigating circumstance that "Defendant has not been antagonistic with the therapists" because this circumstance was subsumed by the submitted mitigating circumstance that "Defendant has been cooperative with the therapists."

24. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—requested nonstatutory mitigating circumstance—refusal to submit—harmless error

Any error in the trial court's refusal to submit to the jury in a capital sentencing proceeding the mitigating circumstance that "Defendant was not heavily armed" was harmless error where the court submitted the circumstance that "Defendant was not the shooter" and the circumstance that "Defendant did not encourage [a codefendant] to shoot the victim"; all jurors rejected the circumstance that defendant did not encourage the shooting, but at least one juror found that the circumstance "Defendant was not the shooter" existed and had mitigating value; the evidence showed that defendant supplied the gun used to commit the murder; and all the evidence tending to support the requested mitigating circumstance was considered by the jury under the submitted mitigating circumstances as well as under the catchall mitigating circumstance.

25. Criminal Law § 1392 (NCI4th Rev.)— capital sentencing—requested nonstatutory mitigating circumstance—refusal to submit—subsumption by submitted circumstances

The trial court did not err by refusing to submit the proposed mitigating circumstance that "Defendant will benefit from a structured environment in prison" because it was subsumed by the submitted circumstance that "Defendant will benefit from a structured environment." Nor did the court err by refusing to submit the proposed circumstance that "Defendant is an accomplice like [a codefendant] who sat in the back seat with the [codefendant] whenever they were in the car" because this circumstance was subsumed by the submitted statutory mitigating circumstance that "This murder was actually committed by another person and the defendant was only an accomplice and his participation in the murder was relatively minor." N.C.G.S. § 15A-2000(f)(4).

26. Criminal Law § 690 (NCI4th Rev.)— capital sentencing—statutory mitigating circumstance—peremptory instruction not warranted

The evidence regarding the (f)(4) mitigating circumstance that "[t]his murder was actually committed by another person and the defendant was only an accomplice in the murder and his participation in the murder was relatively minor" was not uncon-

troverted and did not warrant a peremptory instruction in this capital sentencing proceeding where there was evidence tending to show that defendant left his house carrying the gun used to kill the victim and handed it to the triggerman just before they entered the victim's store, and that defendant took the victim's money box.

27. Criminal Law § 1355 (NCI4th Rev.)— capital sentencing—Issues One, Three, Four—unanimity

The trial court did not err by instructing the jury in a capital sentencing proceeding that it must be unanimous in order to answer "no" to Issues One, Three, and Four.

28. Criminal Law § 1348 (NCI4th Rev.)— capital sentencing—life sentence as life without parole—instruction

Where the trial judge complied with the mandate of N.C.G.S. § 15A-2002 by instructing the jury at the beginning of the sentencing charge in this capital sentencing proceeding that "[i]f you unanimously recommend a sentence of life imprisonment, the court will impose a sentence of life imprisonment without parole," the trial judge did not commit error, much less plain error, by not informing the jury that a life sentence means life without parole every time he mentioned a life sentence in the charge.

29. 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 under theories of both premeditation and deliberation and felony murder; the jury found the three submitted aggravating circumstances that defendant had previously been convicted of a felony involving the use or threat of violence to the person, that the murder was committed to avoid or prevent a lawful arrest, and that the murder was committed while defendant was engaged in the commission of an armed robbery; defendant was twenty-six years old at the time of the murder; and the evidence tended to show that defendant supplied the murder weapon and actually took the money box from the victim's store. Defendant's sentence of death was not rendered disproportionate by the fact that two codefendants who were convicted of this murder in a separate trial each received a sentence of life imprisonment where defendant was the same age as one codefendant

and only six years younger than the second codefendant; the jury in defendant's trial found three aggravating circumstances to exist, but the jury found only one aggravating circumstance in the codefendants' trial; and, unlike the two codefendants, defendant had previously been convicted of violent felonies.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Everett, J., on 26 September 1996 in Superior Court, Martin County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment for robbery with a dangerous weapon was allowed by the Supreme Court on 17 October 1997. Heard in the Supreme Court 26 May 1998.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

Rudolph A. Ashton, III, for defendant-appellant.

PARKER, Justice.

Defendant Shawn Derrick Bonnett was indicted on 22 January 1996 for the first-degree murder of Robert Stancil Hardison ("victim") and for robbery with a dangerous weapon. Three codefendants, Christopher Moore, Richard Smith, and Jimmy Smith, were also indicted but were not tried together. The jury found defendant guilty of first-degree murder on the bases of premeditation and deliberation and the felony-murder rule. Following a capital sentencing proceeding, the jury recommended a sentence of death; and the trial court entered judgment in accordance with that recommendation. The jury also found defendant guilty of robbery with a dangerous weapon, and the trial court sentenced defendant to a consecutive sentence of 129 to 164 months' imprisonment.

The State's evidence tended to show the following. Between 4:30 and 5:30 p.m. on 4 January 1996, defendant and his codefendants drove to Hardison's General Merchandise, which was owned and operated by the victim and his wife and located in the Farm Life community of rural Martin County outside Williamston, North Carolina. Richard Smith (a/k/a "Joe Raggs") drove a yellow GEO Storm, Jimmy Smith (a/k/a "Little Jimmy") was in the passenger seat, and defendant

and Christopher Moore sat in the rear seats. Moore and Little Jimmy went inside the victim's store to buy some beer. They got back into the car and drove around for five or ten minutes. At approximately 6:30 p.m. they stopped at the store again, and defendant and Moore went inside to buy beer. Another five to ten minutes later, they returned a third time; and Joe Raggs bought some beer. While riding around some more, Little Jimmy said to the others, "we all have to stick together whatever happen[s], because we're, we're about to go ahead and hit this store." After they agreed to "stick together," Joe Raggs said, "We're going to have to smoke the old m-----f-----."

They continued to drive past the store until there were no customers inside. At about 7:30 p.m. they pulled into the store's parking lot, and defendant handed a gun to Little Jimmy. Joe Raggs stayed in the car. Moore and Little Jimmy went to the beer cooler, while defendant stood next to the counter. Little Jimmy placed a beer on the counter; and when the victim approached in order to ring up the sale, Little Jimmy pulled out the gun and shot the victim three or four times. Then Moore took the victim's gun from the victim's back pocket, and defendant took the money box.

They drove to a motel in Greenville and divided up the money. They decided to return to Williamston, and on the way a highway patrolman, who had been given a description and license plate number of the yellow GEO Storm, pursued them. Joe Raggs pulled into the yard of a house, and they all entered the house. Joe Raggs and Little Jimmy decided to go out the front door and were arrested. Moore stayed inside, but he left the house when the police instructed him to do so and was arrested. Defendant escaped through the back door. On 8 January 1996 the police discovered the whereabouts of defendant, and he was arrested without incident.

Defendant presented no evidence at the guilt phase.

Additional facts will be presented as needed to discuss specific issues.

PRETRIAL ISSUES

[1] By his first assignment of error, defendant contends that pretrial publicity surrounding the murder 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 Martin County jury.

N.C.G.S. § 15A-957 provides that if there exists so great a prejudice against the defendant in the county in which he is charged that he cannot obtain a fair and impartial trial, the court must either transfer the case to another county or order a special venire from another county. *State v. Perkins*, 345 N.C. 254, 275, 481 S.E.2d 25, 33, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 64 (1997). The burden is on a defendant to establish 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. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347 (1983). A defendant must "establish specific and identifiable prejudice against him as a result of pretrial publicity . . . [by showing] *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." *State v. Billings*, 348 N.C. 169, 177, 500 S.E.2d 423, 428 (1998) (emphasis omitted). The determination of whether defendant has carried his burden lies within the sound discretion of the trial court. *State v. Barnes*, 345 N.C. 184, 204, 481, S.E.2d 44, 54 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 134, *and cert. denied*, —— U.S. ——, 140 L. Ed. 2d 473 (1998).

Our review of the record in this case reveals that the trial court did not err in denying defendant's motion for a change of venue or special venire. While several jurors selected indicated that they had read or heard about the case, all but one stated that they had not formed an opinion about the case, could set aside any information, and could be fair and impartial. Juror Bullock, who had formed an opinion and knew the victim, stated unequivocally that he could set his opinion aside and base his decision in this case on the evidence.

However, our examination does not end here. This Court recognized in *Jerrett* that where the totality of the circumstances reveals that a county's population is so "infected" with prejudice against a defendant that he cannot receive a fair trial, the defendant has met his burden. *State v. Jerrett*, 309 N.C. at 258, 307 S.E.2d at 349. In *Jerrett* we noted that "the crime occurred in a small, rural and closely-knit county where the entire county was, in effect, a neighborhood." *Id.* at 256, 307 S.E.2d at 348. The population of Alleghany County was 9,587 people, *id.* at 252 n.1, 307 S.E.2d at 346 n.1; the *voir dire* revealed that one-third of the prospective jurors knew the victim or some member of the victim's family, and many jurors knew poten-

tial State's witnesses, *id.* at 257, 307 S.E.2d at 348-49. Furthermore, the jury was examined collectively on *voir dire,* thus allowing prospective jurors to hear that other prospective jurors knew the victim and the victim's family, that some had already formed opinions, and that some would not be able to give the defendant a fair trial, *id.* at 257-58, 307 S.E.2d at 349.

This case is distinguishable from *Jerrett.* Martin County's population at the time of the crime was over 25,000. *North Carolina Manual 1995-1996,* at 970 (Lisa A. Marcus ed.). Further, the level of familiarity that the *Jerrett* jurors had with the victim, the victim's family, and witnesses is not present in this case. While a number of prospective jurors had heard or read about the case, in viewing the totality of the circumstances, we conclude that there is no reasonable likelihood that pretrial publicity prevented defendant from receiving a fair trial in Martin County and that the trial court did not err by refusing to grant defendant's motion for change of venue or a special venire.

Defendant further contends that included within the totality of circumstances should be the fact that his codefendants' trial was transferred on account of pervasive prejudice. However, codefendants' trial was subsequent to defendant's trial; and publicity from defendant's trial most likely created much of the prejudice against codefendants such that *they* could not obtain a fair and impartial trial in Martin County.

[2] Defendant next contends that the trial court erred in denying his motion for individual *voir dire* of prospective jurors. Defendant argues that the pretrial publicity was so great that it was reasonably likely that prospective jurors would make a decision upon pretrial information instead of the evidence presented at trial.

N.C.G.S. § 15A-1214 provides in pertinent part that "[i]n 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) (1997). The decision to deny individual *voir dire* of prospective jurors rests in the trial court's sound discretion, and this ruling will not be disturbed absent a showing of abuse of discretion. *State v. Barnard,* 346 N.C. 95, 101, 484 S.E.2d 382, 385 (1997).

Defendant has offered no convincing argument that the trial judge abused his discretion in not allowing individual *voir dire.* "A

defendant does not have a right to examine jurors individually merely because there has been pretrial publicity." *State v. Burke*, 342 N.C. 113, 122, 463 S.E.2d 212, 218 (1995). A careful examination of jury selection reveals no harm to defendant resulting from the denial of his motion. We hold that the trial court did not err in denying defendant's motion.

[3] By his next assignment of error, defendant argues that the trial court erred in denying defendant's motion to preclude the State from seeking the death penalty in that, *inter alia*, the death penalty would be disparate, disproportionate, excessive, and cruel and unusual punishment under the United States and North Carolina Constitutions. Defendant acknowledges that this issue has already been decided adversely to him, and we need not consider it further. *See State v. Robinson*, 342 N.C. 74, 88, 463 S.E.2d 218, 226 (1995) (holding that no *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982), issue arises when defendant was convicted of first-degree murder upon the theory of premeditation and deliberation in addition to the felony-murder theory), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996).

[4] Next, defendant contends that the trial court erred in denying his motion to bifurcate and his alternate motion to continue so that defendant would not be tried or sentenced until after Richard Smith and Jimmy Smith were tried. The crux of defendant's concern is that if defendant was tried and sentenced prior to the Smiths' case he might receive a death sentence if convicted; and Richard Smith and Jimmy Smith might receive life sentences at a later trial, which is in fact what occurred. Defendant contends that he was less culpable than the Smiths and that, if sentenced after them, he should be able to argue to his sentencing jury the fact that the Smiths received life sentences.

Defendant concedes that this Court has previously held that a defendant is not entitled to separate jury trials, one to determine guilt or innocence and another to determine punishment, *State v. Holden*, 321 N.C. 125, 133, 362 S.E.2d 513, 520 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988); however, he claims that the facts of this case are distinguishable and warrant the particular relief he seeks. We disagree.

In *State v. Bond* we held that, for purposes of sentencing, the fact that a codefendant received a lesser sentence "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.' " *State v. Bond*, 345 N.C. 1, 34, 478 S.E.2d 163, 180 (1996) (*quoting State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 447 (1981)), *cert. denied*, — U.S. —, 138 L. Ed. 2d 1022 (1997). Thus, this assignment of error is overruled.

[5] By his next assignment of error, defendant argues that by arraigning him in chambers and not in open court, the trial court violated his constitutional right to an open and public trial under Article I, Section 18 of the North Carolina Constitution. Defendant acknowledges that this Court has rejected the *per se* rule that failure to conduct a formal arraignment on a capital charge constitutes reversible error. *State v. Brown*, 315 N.C. 40, 50, 337 S.E.2d 808, 817 (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). Further, we hold that defendant has not been prejudiced by being arraigned in chambers, and thus we find no merit to this assignment of error.

[6] Next, defendant contends that the trial judge erred in holding an unrecorded conference without defendant's being present, in violation of his state and federal constitutional rights. Following defendant's arraignment in the judge's chambers, the trial judge stated, "All right. Take the defendant back out there[;] let me see counsel here just a minute." No recording was made of the subsequent conference outside the presence of defendant.

Under the North Carolina Constitution, a defendant in a capital case has an unwaiveable right to be present at every stage of his trial. *State v. Buckner*, 342 N.C. 198, 227, 464 S.E.2d 414, 430 (1995), *cert. denied*, — U.S. —, 136 L. Ed. 2d 47 (1996). Further, under the United States Constitution, a defendant has a right to be present under the Confrontation Clause as well as a due process right to be present. *Id.*

However, "[n]ot every error caused by a defendant's absence requires reversal as these errors are subject to a harmless-error analysis." *Id.* at 227-28, 464 S.E.2d at 431. In *Buckner* we held that no error, constitutional or otherwise, existed when a conference took place prior to the commencement of defendant's trial. *Id.* at 228, 464 S.E.2d at 431. Since the record clearly indicates that the conference about which defendant complains took place prior to the start of his trial, we likewise find no merit to this assignment of error.

JURY SELECTION ISSUES

[7] Defendant next argues that the trial court violated his constitutional rights by conducting ten bench conferences outside his presence. Defendant was present in the courtroom and represented by counsel at these conferences but, nevertheless, contends that his absence from the bench conference violated his constitutional rights to be present at every stage of the proceedings.

In *State v. Speller*, 345 N.C. 600, 481 S.E.2d 284 (1997), the trial court conducted ten unrecorded bench conferences with defense counsel and counsel for the State. Defendant was present in the courtroom but was not included in the conferences. This Court concluded that since (i) "defendant 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 [and] . . . had a firsthand source as to what transpired," (ii) "defense counsel had the opportunity and obligation to raise for the record any matter to which defendant took exception," and (iii) defendant "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 "did not err in conducting the bench conferences with the attorneys out of the hearing of defendant." *Id.* at 605, 481 S.E.2d at 286-87; *see also State v. Lee*, 335 N.C. 244, 265, 439 S.E.2d 547, 557 (holding that defendant failed to meet his burden of showing how his absence from the conferences caused him prejudice), *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994).

In this case we note that of the ten bench conferences about which defendant complains, nine were recorded; and the transcript shows that eight of the recorded bench conferences concerned questions of law. In the remaining recorded conference, the trial court inquired of counsel how best to handle an incident where a reporter had talked to a juror. The only unrecorded conference occurred during *voir dire* of a prospective juror who was excused for cause because her views would prevent or substantially impair the performance of her duties as a juror. Defendant was present in the courtroom and was represented by counsel at each conference. Further, defendant gives no indication, and we cannot discern, how his presence would have served any useful purposes. For these reasons we hold that defendant has failed to meet his burden of showing how he was prejudiced by his absence from these conferences; therefore, this assignment of error is overruled.

By his next 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 use of peremptory challenges. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991).

Article I, Section 26 of the Constitution of North Carolina forbids the use of peremptory challenges for a racially discriminating purpose, *State v. Williams*, 339 N.C. 1, 15, 452 S.E.2d 245, 254 (1994), *cert. denied*, 516 U.S. 833, 133 L. Ed. 2d 61 (1995), as does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79, 86, 90 L. Ed. 2d 69, 80 (1986).

In *Batson* the United States Supreme Court set out a three-pronged test to determine whether a prosecutor impermissibly excluded prospective jurors on the basis of their race. *Hernandez*, 500 U.S. at 358-59, 114 L. Ed. 2d at 405. First, a criminal defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. *Id.* at 358, 114 L. Ed. 2d at 405. Second, once the *prima facie* case has been established by the defendant, the burden shifts to the State to articulate a race-neutral explanation for striking the juror in question. *Id.* at 358-59, 114 L. Ed. 2d at 405. The explanation must be clear and reasonably specific, but " 'need not rise to the level justifying exercise of a challenge for cause.' " *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990) (quoting *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88). 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. Elam*, 514 U.S. 765, 768-69, 131 L. Ed. 2d 834, 839-40 (1995); *State v. Barnes*, 345 N.C. at 209-10, 481 S.E.2d at 57. This Court also permits the defendant at this point 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).

Third, the trial court must determine whether the defendant has satisfied his burden of proving purposeful discrimination. *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405. The trial court's findings as to race neutrality and purposeful discrimination depend in large measure on the trial judge's evaluation of credibility; hence, these findings should be given great deference. *Batson*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21. The trial court's determination will be upheld unless the appellate court is convinced that the trial court's decision is clearly erroneous. *State v. Kandies*, 342 N.C. 419,

434-35, 467 S.E.2d 67, 75, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996).

In this case the prosecutor gave reasons for the excusal of each juror defendant now challenges. Therefore, "we need not address the question of whether defendant met his initial burden of showing discrimination and may proceed as if a *prima facie* case had been established." *State v. Harden*, 344 N.C. 542, 557, 476 S.E.2d 658, 665 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 483 (1997).

[8] The prosecutor used seven of his peremptory challenges to remove black venire members. Defendant contends that the reasons given by the prosecutor were a pretext and that the trial court erred in finding no purposeful discrimination for the dismissal of four black, prospective jurors—Mr. Carmon, Mr. Morning, Mr. Williams, and Ms. Ossie Brown. We disagree.

The prosecutor indicated that he excused Mr. Carmon for the reasons that Mr. Carmon was equivocal about the effect on his decision of a codefendant testifying pursuant to a plea agreement, the prosecutor was unable to make eye contact with him, and the prosecutor detected a smile or smirk when talking to him.

Regarding Mr. Morning, the prosecutor gave as reasons for his removal that Mr. Morning was equivocal about the death penalty, that he was not paying attention when the prosecutor was going through the issues related to the death penalty, that the prosecutor was not able to make eye contact with him, and that a lead investigator who would be a witness in the case had informed the prosecutor that he had questioned Mr. Morning in a felonious larceny case under investigation.

As to Mr. Williams, the prosecutor stated that his answers concerning the death penalty were equivocal, that the prosecutor had been informed by a law enforcement officer who had known Mr. Williams for a number of years that one could not depend on what he said, and that Mr. Williams had been investigated as a suspect in a larceny case several years earlier. *See State v. Glenn*, 333 N.C. 296, 303, 425 S.E.2d 688, 693 (1993) (holding that equivocation toward the death penalty is a valid basis for using a peremptory challenge).

Finally, with respect to Ms. Ossie Brown, the prosecutor indicated that from her tone of voice, facial expression, and body language, the prosecutor perceived that Ms. Brown had a belligerent

attitude or air of defiance about her which suggested to him that she would be antagonistic to the prosecution; further, in answering the questionnaire, Ms. Brown had emphasized that she had temporary custody of her grandchildren, and this fact gave the prosecutor some concern.

After carefully reviewing the transcript and applying the previously stated principles of law, we conclude that the trial court's findings that the prosecutor's exercise of peremptory strikes was not racially motivated and that the prosecutor had not engaged in purposeful discrimination are not clearly erroneous. Defendant's assignment of error is overruled.

[9] Defendant next contends that the trial court erred in denying defendant's challenge for cause of prospective juror Bullock on the basis that juror Bullock had formed an opinion and knew the victim. We disagree.

N.C.G.S. § 15A-1212 provides, in pertinent part, that a challenge for cause may be made on the ground that the juror "[h]as formed or expressed an opinion as to guilt or innocence of the defendant." N.C.G.S. § 15A-1212(6) (1997). Further, N.C.G.S. § 15A-1212(9) allows a for-cause challenge if the juror, for any other cause, is unable to render a fair and impartial verdict.

N.C.G.S. § 15A-1214(h) provides:

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

N.C.G.S. § 15A-1214(h) (1997).

N.C.G.S. § 15A-1214(i) provides:

> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

(1) Had peremptorily challenged the juror; or

(2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C.G.S. § 15A-1214(i).

We agree with defendant that he has complied with the requirements of N.C.G.S. § 15A-1214 and thus has properly preserved this assignment of error for appellate review. However, the decision to deny a challenge for cause rests in the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion. *State v. Hartman*, 344 N.C. 445, 458, 476 S.E.2d 328, 335 (1996), *cert. denied*, —— U.S. ——, 137 L. Ed. 2d 708 (1997). In this case Bullock stated unequivocally that he could set aside his opinion and base his decision in this case on the evidence. Bullock's responses do not suggest that he would not be a fair and impartial juror or that he could not return a verdict according to N.C.G.S. § 15A-1212(6) and (9). *See State v. Perkins*, 345 N.C. at 275, 481 S.E.2d at 33 (concluding that the trial court did not err in denying the challenge for cause when prospective juror unequivocally stated he would follow the law). We hold that the trial court did not err in denying defendant's for-cause challenge.

[10] Defendant next argues that the trial court erred in denying his challenge for cause to alternate juror Wynn, who was related within the sixth degree to the victim in this case. *See* N.C.G.S. § 15A-1212(5). Alternate juror Wynn did not serve as one of the twelve jurors who decided defendant's case. Thus, even if the trial court's denial of defendant's challenge for cause was error, it was harmless. *State v. Carter*, 335 N.C. 422, 428, 440 S.E.2d 268, 271 (1994).

GUILT/INNOCENCE PHASE

[11] Defendant contends that the trial court erred in permitting the prosecutor and State's witnesses to refer to defendant as "Homicide" during the guilt-innocence and sentencing stages of the trial. Judge William C. Griffin, Jr. signed a pretrial order which allowed "defendant's Motion in Limine to strike the alias 'Homicide' from the Court's records and to prohibit the use of said alias by Court officers and law-enforcement personnel." Defendant argues, *inter alia*, that the repeated use of the nickname "Homicide" violated the order granting his motion *in limine* and resulted in the jury's recommendation of a death sentence.

In *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995), we held that "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." We held further that "[a] criminal defendant is required to interpose at least a general objection to the evidence at the time it is offered." *Id.* at 521, 453 S.E.2d at 846. *See also State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (holding that a party objecting to an order granting a motion *in limine* must attempt to introduce the evidence at the trial), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 1099 (1998).

At trial on direct examination by the prosecutor of codefendant Christopher Moore, defense counsel objected when the witness stated that defendant told him his name was "Homicide"; however, the trial court expressly found that this witness was not a court officer or law enforcement personnel and thus that his testimony did not violate the order. Subsequently, the prosecutor referred to defendant as "Homicide"; but defense counsel failed to object to this violation of the order granting the motion *in limine*.

A thorough reading of the transcript reveals that the prosecutor referred to defendant as "Homicide" three times on direct examination of codefendant Moore: once during redirect examination, once during his closing argument at the guilt-innocence phase in reference to Moore's testimony, once during direct examination of a sentencing proceeding witness for clarification, and once during his closing argument at the sentencing proceeding. Defendant did not object to the prosecutor's use of the term "Homicide."

The transcript further reveals that during cross-examination of Moore and cross-examination of two sentencing proceeding witnesses, counsel for the defense referred to defendant as "Homicide" other than to impeach the witness' testimony on this point. Additionally, when defendant took the stand during the sentencing proceeding, he himself referred to his name as "Homicide."

On this record, even assuming *arguendo* that the trial court erred in permitting the witness to refer to defendant as "Homicide," defendant cannot show prejudice in that he lost the benefit of any objection by failing to object when the prosecutor referred to defendant as "Homicide," by his counsel using the term on cross-examination, and by referring to himself as "Homicide" during the sentencing proceeding. *State v. Swift*, 290 N.C. 383, 390, 226 S.E.2d 652, 659 (1976).

Moreover, this Court has stated that "it would [not be] error to refer to defendant by the name which he was generally known. The fact that his nickname may have been demeaning does not create error per se." *Id.* This assignment of error is overruled.

[12] Next, defendant contends that the trial court erred in allowing codefendant Moore to testify to certain statements made by codefendants Richard and Jimmy Smith. Defendant argues that these statements constituted inadmissible hearsay. We disagree.

"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." *State v. Williams*, 345 N.C. 137, 141, 478 S.E.2d 782, 784 (1996). For the statements to be admissible, there must be a showing that a conspiracy existed and that the statements were made by a party to the conspiracy, after it was formed and before it ended, and in pursuance of its objectives. *Id.* Further, the State must establish a *prima facie* case of conspiracy. *Id.* In so doing the State is afforded wide latitude, and the evidence is considered in the light most favorable to the State. *Id.* at 142, 478 S.E.2d at 784.

In this case the evidence shows that defendant and his three codefendants went to the victim's store three times to buy beer. The next time they went there, Richard Smith stayed in the car while defendant and the other two went inside, shot the victim, took his gun, and stole the money box. Then they drove to a motel, divided up the money, and attempted to take refuge in someone's house when pursued by the police. This evidence, when viewed in the light most favorable to the State, is sufficient to meet the State's burden of showing that a conspiracy existed. Further, we find that the statements of codefendant Moore in which the codefendants agreed to "hit this store," "stick together whatever happen[s]," and to "smoke the old m-----f-----," along with statements made during the robbery and murder, fall well within the hearsay exception for statements made during the course and in furtherance of a conspiracy. Thus, the trial court properly admitted these statements.

[13] Defendant next argues that the trial court erred by denying his request to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder.

> A defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support that lesser-

> included offense. . . . If the State's evidence establishes each and every element of first-degree murder and there is no evidence to negate these elements, it is proper for the trial court to exclude second-degree murder from the jury's consideration.

State v. Flowers, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997) (citations omitted), *cert. denied*, — U.S. —, 140 L. Ed. 2d 150 (1998).

In this case evidence of the lesser-included offense of second-degree murder is totally lacking. Defendant argues that the evidence that he and the codefendants had been drinking, that he did not plan the murder and robbery, and that Christopher Moore did not think the Smiths would kill the victim is sufficient to support submission of second-degree murder. To satisfy his burden in establishing voluntary intoxication as a defense to negate premeditation, defendant must show that the intoxication rendered him incapable of forming the requisite specific intent. *State v. Brown*, 335 N.C. 477, 492, 439 S.E.2d 589, 598 (1994). Furthermore, Christopher Moore's belief is not pertinent to defendant's guilt or innocence. Defendant presented no evidence. The State presented evidence of each element of first-degree murder that was positive and uncontroverted; hence, the trial court did not err in declining defendant's request to submit the lesser-included offense of second-degree murder.

[14] By his next assignment of error, defendant contends that the trial court erred in its instruction on acting in concert. Specifically, defendant argues that the jury instructions regarding acting in concert permitted the jury to convict defendant of first-degree murder on the theory of premeditation and deliberation without finding that defendant had specific intent to commit the crime.

In *State v. Blankenship* this Court held that for each charge of acting in concert related to a specific intent crime, the State must prove each defendant's intent to commit the specified crime. *State v. Blankenship*, 337 N.C. 543, 558, 447 S.E.2d 727, 736 (1994). We subsequently overruled *Blankenship*, *see State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44; however, we explicitly stated that there would be no retroactive application of the overruling of *Blankenship*, *id.* at 234, 481 S.E.2d at 72. Since the crime and judgment in this case occurred subsequent to our decision in *Blankenship* and prior to our decision in *Barnes*, the rule as stated in *Blankenship* applies to defendant's case.

An examination of the instructions reveals that the trial court properly instructed the jury regarding the law of acting in concert. On

more than one occasion, the trial court emphasized to the jury that in order to find defendant guilty of premeditated and deliberate murder, the jury must find that defendant specifically intended to kill the victim. The trial court stated, "First degree . . . murder is one of those crimes requiring proof of specific intent. . . . [O]ne may not be criminally responsible as an accomplice under the theory of acting in concert for a crime which requires a specific intent, unless he himself is shown to have the requisite specific intent." This assignment of error is overruled.

[15] Next, defendant argues that the trial court erred in allowing the prosecutor to argue "aiding and abetting" to the jury when the trial court was not going to instruct on that theory of guilt. In *State v. Williams*, 299 N.C. 652, 656, 263 S.E.2d 774, 777 (1980), we held that "[t]he distinction between [a defendant being found guilty of] aiding and abetting and acting in concert . . . is of little significance. Both are equally guilty." Further, the record shows that the evidence overwhelmingly supported jury instructions on both "aiding and abetting" and "acting in concert"; therefore, defendant was not prejudiced by the trial court's allowing the prosecutor to so argue. We find no merit to this assignment of error.

[16] Defendant next contends that the trial court exacerbated the error in allowing the prosecutor to argue "aiding and abetting" and committed plain error by failing to instruct the jury on "mere presence." Defendant correctly notes that his mere presence at the scene of the crime is insufficient to support a finding that he is an aider and abettor. *See State v. Penland*, 343 N.C. 634, 650, 472 S.E.2d 734, 743 (1996), *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 725 (1997). However, the evidence overwhelmingly shows that defendant was not "merely present" at the murder scene. The evidence shows that defendant agreed to the robbery and murder, and further that he supplied the murder weapon and actively participated by stealing the money box. Therefore, the trial court correctly did not instruct the jury on mere presence. Accordingly, this assignment of error is overruled.

Defendant next contends that the trial court erred in denying his motion for directed verdict at the close of the State's evidence and again at the close of all the evidence. A motion for a directed verdict should be denied if there is substantial evidence of each essential element of the crime. *State v. Rose*, 335 N.C. 301, 326, 439 S.E.2d 518, 532, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994). "[T]he trial judge must consider the evidence in the light most favorable to the

State and the State is entitled to every reasonable inference to be drawn from the evidence." *Id.*

The evidence, when viewed in the light most favorable to the State, was clearly sufficient to withstand a motion for directed verdict. Without repeating all the evidence presented, the transcript shows ample evidence that defendant committed first-degree murder, under theories of both premeditation and deliberation and felony murder, and robbery with a dangerous weapon.

SENTENCING PROCEEDING

[17] Defendant next asserts that it was error for the trial court to submit the aggravating circumstance that the murder was committed during the course of a robbery. N.C.G.S. § 15A-2000(e)(5) (1997). The jury convicted defendant of first-degree murder on the theories of premeditation and deliberation and felony murder, with robbery with a dangerous weapon serving as the underlying felony for the felony-murder conviction. Defendant argues that submission of the (e)(5) aggravating circumstance during the capital sentencing proceeding resulted in improper duplication of that circumstance.

Defendant concedes that the felony underlying a conviction for felony murder may be submitted as an aggravating circumstance under N.C.G.S. § 15A-2000(e) if the defendant is also convicted of first-degree murder on the basis of premeditation and deliberation. *State v. McNeill*, 346 N.C. 233, 241, 485 S.E.2d 284, 289 (1997), *cert. denied*, — U.S. —, 139 L. Ed. 2d 647 (1998). Since the jury found defendant guilty of first-degree murder under both theories, the trial court did not err in submitting the (e)(5) aggravating circumstance. This assignment of error is meritless.

[18] In his next assignment of error, defendant contends that the trial court erred in submitting the (e)(3) aggravating circumstance in that he had not been previously convicted of a felony involving the use or threat of violence to the person. N.C.G.S. § 15A-2000(e)(3) allows a jury to consider as an aggravating circumstance whether "defendant had been previously convicted of a felony involving the use or threat of violence to the person." Defendant argues that this aggravating circumstance cannot be introduced because his convictions for accessory after the fact do not meet the statutory requirements of the (e)(3) aggravating circumstance.

Defendant acknowledges that this Court has repeatedly held that "[t]he (e)(3) prior violent felony aggravating circumstance requires

proof that the defendant was convicted of either a felony in which the use or threat of violence to the person is an element of the crime or a felony which actually involved the use or threat of violence." *State v. Flowers*, 347 N.C. at 34, 489 S.E.2d at 410. In support of the (e)(3) prior violent felony aggravating circumstance, the State offered into evidence certified copies of defendant's 1991 judgments for one count of accessory after the fact to murder and two counts of accessory after the fact to assault with a deadly weapon with intent to kill inflicting serious injury. Two witnesses testified that defendant's convictions for accessary after the fact involved defendant and others shooting guns into a nightclub in 1991; one person was murdered. This evidence supports the (e)(3) aggravating circumstance. Accordingly, the trial court did not err in submitting the (e)(3) aggravating circumstance. This assignment of error is, therefore, overruled.

[19] Defendant further assigns error to the trial court's submission of the (e)(4) aggravating circumstance that the murder was committed "for the purpose of avoiding or preventing a lawful arrest." N.C.G.S. § 15A-2000(e)(4). Defendant contends that this aggravating circumstance was not supported by the evidence. We disagree.

Before the trial court may instruct the jury on the (e)(4) aggravating circumstance, there must be substantial, competent evidence from which the jury can infer that at least one of defendant's purposes for the killing was the desire to avoid subsequent detection and apprehension for his crime. *State v. Wilkinson*, 344 N.C. 198, 224, 474 S.E.2d 375, 389 (1996).

In this case there is plenary evidence tending to show that defendant's motivation was based upon his desire to avoid subsequent detection and apprehension. Earlier on the day of the murder, defendant and his codefendants had each been inside the victim's store to purchase beer. After defendant and his codefendants agreed to "hit the store," they also agreed to "smoke the old m-----f-----" because, as Richard Smith said to Jimmy Smith, "you know that he know me and your face [sic]." Defendant then handed a gun to Jimmy Smith; and defendant, Jimmy Smith, and Moore went inside the store, killed the victim and robbed his store. This evidence of defendant's actions following Richard Smith's statement was substantial, competent evidence from which the jury could find that defendant participated in the killing to eliminate a potential witness against him. We find no merit to this assignment of error.

[20] Next, defendant contends that the trial court should have submitted the (f)(1) mitigating circumstance that "defendant had no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1). Defendant contends that his history of criminal activity is not significant and that, based on *State v. Jones*, 346 N.C. 704, 487 S.E.2d 714 (1997), he is entitled to a new sentencing hearing.

The trial court is required to submit to the jury any statutory mitigating circumstance supported by the evidence regardless of whether the defendant objects to it or requests it. *State v. Quick*, 337 N.C. 359, 361, 446 S.E.2d 535, 537 (1994). Before submitting the (f)(1) mitigating circumstance, the trial court must determine whether a rational jury could conclude that no significant history of prior criminal activity existed. *State v. Jones*, 346 N.C. at 715, 487 S.E.2d at 721. A significant history for purposes of N.C.G.S. § 15A-2000(f)(1) is one likely to influence the jury's sentence recommendation. *Id.*

The evidence of defendant's prior criminal history in the instant case includes: conviction for one count of accessary after the fact of murder; conviction for two counts of accessory after the fact of assault with a deadly weapon with intent to kill inflicting serious injury; conviction for felony possession with intent to sell and deliver cocaine, felony conspiracy to sell and deliver cocaine, and illegal usage of marijuana; conviction for drug possession and possession of drug paraphernalia in New York; and conviction of larceny of an automobile in New York. Based on this evidence, we hold that the trial court properly determined that no reasonable juror could have concluded that defendant's criminal history was insignificant.

In *Jones*, upon which defendant relies, the defendant received a new sentencing proceeding for the trial court's failure to submit the (f)(1) mitigating circumstance. *Id.* at 718, 487 S.E.2d at 723. However, we noted that "[n]o evidence presented at trial suggested that defendant had committed any violent crimes prior to the killing of the victim." *Id.* at 716, 487 S.E.2d at 722. By contrast, in this case, defendant had been convicted of violent crimes prior to the victim's murder. Accordingly, this assignment of error is overruled.

[21] 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).

The central question presented by the (f)(2) circumstance is defendant's mental and emotional state at the time of the crime. *State v. Geddie*, 345 N.C. 73, 102, 478 S.E.2d 146, 161 (1996), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 43 (1997). Although one of defendant's experts testified that testing showed defendant to be disturbed psychologically and to be socially alienated with a poor self-image, insecurity, and feelings of inadequacy, neither of defendant's experts' testimony suggested any nexus between defendant's personality characteristics and the crimes he committed or any mental or emotional disturbance at the time of the killing. *See State v. Hill*, 347 N.C. at 301-02, 493 S.E.2d at 279. Accordingly, we find no merit to this assignment of error.

[22] Defendant also assigns error to the trial court's failure to submit the (f)(7) mitigator, "The age of the defendant at the time of the crime." N.C.G.S. § 15A-2000(f)(7). In support of his argument, defendant relies upon the fact that he was twenty-six years old at the time of the crime; the fact that he was abandoned at birth by his mother and grew up in a dysfunctional family; and the fact that he had an intelligence quotient of 86, a learning disability, a lack of reading skills, and a significant lack of stability and guidance.

Chronological age is not determinative of this mitigating circumstance. *State v. Daughtry*, 340 N.C. 488, 522, 459 S.E.2d 747, 765 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996). Defendant introduced no substantial evidence of his immaturity, youthfulness, or lack of emotional or intellectual development at the time of these crimes. *See State v. Bowie*, 340 N.C. 199, 203, 456 S.E.2d 771, 773 (1995). In fact, the evidence here showed that defendant has only slightly below-normal intelligence, with no major disturbance of mood or thinking. Considering this evidence, we conclude that the trial court properly declined to submit the (f)(7) circumstance. These assignments of error are overruled.

By his next assignment of error, defendant contends that the trial court erred in refusing to submit four requested nonstatutory mitigating circumstances to the jury.

In order for defendant to succeed on his claim that the trial court erred by refusing to submit particular nonstatutory mitigating circumstances, he must establish that the jury could reasonably find that the nonstatutory mitigating circumstances had mitigating value and that there was sufficient evidence of the existence of the circumstances requiring them to be submitted. *State v. Richmond*, 347

N.C. 412, 438, 495 S.E.2d 677, 691 (1998). This Court has held that it is not error for the trial court to refuse to submit a nonstatutory mitigating circumstance if it is subsumed by other statutory or nonstatutory mitigating circumstances. *Id.*

Defendant requested in writing that the trial court submit sixty-eight mitigating circumstances, sixty-seven of which were nonstatutory. The judge instructed the jury on sixty-one of them, and defendant contends that the judge erred by refusing to submit the following four nonstatutory mitigating circumstances for consideration by the jury:

> 24. The Defendant has not been antagonistic with the therapists.
>
> . . . .
>
> 59. The Defendant was not heavily armed.
>
> 60. The Defendant will benefit from the structured environment in prison.
>
> 61. The Defendant is an accomplice like Christopher Moore who sat in the back seat with Christopher Moore whenever they were in the car.

[23] Defendant first argues that the trial court erred in refusing to submit the mitigating circumstance that "Defendant has not been antagonistic with the therapists." The trial court submitted the mitigating circumstance that "Defendant has been cooperative with the therapists." At least one juror found this circumstance to exist and deemed it to have mitigating value. The trial court found, and we agree, that the proposed mitigating circumstance was subsumed by the mitigating circumstance that "Defendant has been cooperative with the therapists."

[24] Next, defendant argues that the trial court erred in refusing to submit the mitigating circumstance that "Defendant was not heavily armed." Assuming *arguendo* that the evidence in this case was sufficient to support the submission of this circumstance, that a reasonable juror could have found it to have mitigating value, and that the trial court thus erred by refusing to submit this nonstatutory mitigating circumstance to the jury, we conclude that the error was harmless beyond a reasonable doubt. *See State v. Green*, 336 N.C. 142, 183, 443 S.E.2d 14, 38, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

The trial court submitted the circumstance that "Defendant was not the shooter" and the circumstance that "Defendant did not encourage Little Jimmy to shoot the victim." All of the jurors rejected the circumstance that "Defendant did not encourage Little Jimmy to shoot the victim" as a circumstance in mitigation of the crime, but at least one juror found that the circumstance "Defendant was not the shooter" existed and deemed it to have mitigating value. Further, the evidence showed that defendant supplied the gun used to commit the murder. All the evidence tending to support the requested nonstatutory mitigating circumstance which was not submitted was considered by the jury under these submitted mitigating circumstances as well as under the catchall mitigating circumstance. Hence, the trial court's error, if any, in failing to submit defendant's requested nonstatutory mitigating circumstance was harmless beyond a reasonable doubt since it is clear that the jury was not prevented from considering any potential mitigating evidence.

[25] The proposed mitigating circumstance that "Defendant will benefit from the structured environment in prison" was subsumed by the submitted mitigating circumstance that "Defendant will benefit from a structured environment."

Finally, the proposed mitigating circumstance that "Defendant is an accomplice like Christopher Moore who sat in the back seat with Christopher Moore whenever they were in the car" was subsumed by the submitted statutory mitigating circumstance that "[t]his murder was actually committed by another person and the defendant was only an accomplice in the murder and his participation in the murder was relatively minor." N.C.G.S. § 15A-2000(f)(4). This circumstance, combined with the catchall mitigating circumstance, provided an adequate vehicle for the jury to consider the mitigating value of this evidence. This assignment of error is overruled.

Defendant next asserts that the trial court erred in not giving peremptory instructions on certain of the mitigating circumstances. More specifically, defendant argues that the judge agreed to give peremptory instructions on the one submitted statutory mitigating circumstance and fifty-eight of the sixty nonstatutory mitigating circumstances, but failed to do so, thus entitling him to a new sentencing hearing.

Defendant is entitled to a peremptory instruction when a mitigating circumstance is supported by uncontroverted evidence. *State v. Womble*, 343 N.C. 667, 683, 473 S.E.2d 291, 300 (1996), *cert. denied*,

—— U.S. ——, 136 L. Ed. 2d 719 (1997). "Conversely, a defendant is not entitled to a peremptory instruction when the evidence supporting a mitigating circumstance is controverted." *Id.*

[26] Defendant contends that the evidence concerning the (f)(4) statutory mitigating circumstance that "[t]his murder was actually committed by another person and the defendant was only an accomplice in the murder and his participation in the murder was relatively minor" was uncontroverted. N.C.G.S. § 15A-2000(f)(4). He argues that all the evidence indicates that two of his codefendants were the ringleader and triggerman. Further, he argues that the fact that the jury did not find the existence of the (f)(4) mitigating circumstance shows that the trial court committed error in failing to give the jury a peremptory instruction. We disagree.

Our review of the record shows that the evidence was not uncontroverted as to each aspect of the (f)(4) mitigating circumstance. As the prosecutor argued, defendant was not a minor participant in this crime. In fact, the evidence tends to show that defendant supplied the murder weapon and took the money box. Defendant left his house carrying the gun used to kill the victim and handed it to the triggerman just before they entered the victim's store. Although defendant testified that he did not take the money box, codefendant Moore testified that he saw defendant hand it to Jimmy Smith. Therefore, although the trial judge initially did agree to peremptorily instruct the jury on this circumstance, we conclude that given the nature of defendant's participation in the crime, the evidence regarding the (f)(4) mitigating circumstance was not uncontroverted and did not warrant a peremptory instruction. *See State v. Bond*, 345 N.C. at 39, 478 S.E.2d at 184 (holding that the trial court properly denied defendant's request for a peremptory instruction where the evidence on the (f)(4) mitigating circumstance was hotly contested).

Further, defendant asserts that the trial judge also failed to peremptorily instruct the jury on various nonstatutory mitigating circumstances. However, upon a careful reading of the transcript, we find that the trial judge did in fact give a peremptory instruction on the nonstatutory mitigating circumstances. With regard to fifty-eight of the sixty nonstatutory mitigating circumstances, the trial judge instructed the jury as follows:

> [I]f one or more of you find the facts to be, as all the evidence tends to show, as to each of these mitigating circumstances[,] you would find that each circumstance exists, and further if one or

> more of you deems or considers a circumstance to have mitigating value, you would so indicate by having your foreman write "Yes" in the space provided by the mitigating circumstance.

Therefore, this assignment of error is overruled.

[27] Next, defendant contends that the trial court committed reversible error by instructing the jury that it needed to be unanimous in order to answer "no" as to Issues One, Three, and Four. Defendant objected to none of these instructions at trial; our review, therefore, is limited to review for plain error. N.C. R. App. P. 10(c)(4).

During defendant's sentencing proceeding, the judge instructed the jury as follows:

> On the other hand, if you unanimously find from the evidence that none of the aggravating circumstances existed, and if you have so indicated by writing "No" in the space after every one of them on that form, you would answer Issue One "No."

Defendant argues that this impermissibly shifts the burden of proof to defendant. We previously addressed this issue in *State v. McCarver*. In *McCarver* we held that "any issue which is *outcome determinative* as to the sentence a defendant in a capital trial will receive—whether death or life imprisonment—must be answered unanimously by the jury." *State v. McCarver*, 341 N.C. 364, 390, 462 S.E.2d 25, 39 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). We further stated that "the jury should answer Issues One, Three, and Four on the standard form used in capital cases either unanimously 'yes' or unanimously 'no.' " *Id.* This assignment of error is overruled.

[28] Defendant also asserts that the trial court erred in not instructing the jury that a sentence of life imprisonment means a sentence of life imprisonment without parole. Defendant concedes that the trial court initially instructed the jury that "[i]f you unanimously recommend a sentence of life imprisonment, the Court will impose a sentence of life imprisonment without parole." However, he contends that since the judge later used the term "life imprisonment" four times instead of "life imprisonment without parole," he is entitled to a new sentencing hearing. Defendant failed to object at trial; therefore, the standard of review is plain error. N.C. R. App. P. 10(c)(4).

Effective 1 October 1994, N.C.G.S. § 15A-2002 mandates that the trial court "instruct the jury, in words substantially equivalent to

those of this section, that a sentence of life imprisonment means a sentence of life without parole." The required instruction was given at the beginning of the judge's sentencing charge. Further, defendant was not prevented from informing the jury that life imprisonment means life without parole; and his counsel so informed the jury during the trial. We hold that the trial judge, having complied with the statutory mandate, did not commit error, much less plain error, by not informing the jury that a life sentence means life without parole every time he mentioned a life sentence. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises four additional issues which he concedes have been decided contrary to his position previously by this Court: (i) the trial court erred in denying defendant's motion to strike the death penalty on the ground that it is unconstitutional, (ii) the trial court erred in denying defendant's motion to require the State to reveal all evidence regarding proportionality, (iii) the trial court erred in requiring defendant's expert to prepare a written report and disclose that report to the State, and (iv) the trial court erred in allowing the State's challenges for cause of jurors opposed to the death penalty.

Defendant raises these issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving them for any possible further judicial review. We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY

[29] Having found no prejudicial error in either the guilt-innocence stage or the sentencing proceeding, it is now our duty to determine (i) whether the record supports the jury's findings of the aggravating circumstances upon which the court based its death sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

Defendant was found guilty of first-degree murder under theories of both premeditation and deliberation and felony murder. Following a capital sentencing proceeding, the jury found the three submitted

aggravating circumstances: (i) that 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) that this murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); and (iii) that this murder was committed while the defendant was engaged in the commission of a robbery with a firearm, N.C.G.S. § 15A-2000(e)(5). Two statutory mitigating circumstances were submitted to the jury—that this murder was actually committed by another person, and defendant was only an accomplice in the murder, and his participation in the murder was relatively minor, N.C.G.S. § 15A-2000(f)(4); and the catchall, N.C.G.S. § 15A-2000(f)(9)—but neither was found. Of the sixty nonstatutory mitigating circumstances submitted, the jury found eight to exist and have mitigating value.

After careful review we conclude that the record fully supports the jury's finding of the aggravating circumstances submitted. Further, we find no indication that the sentence of death was 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.

We begin our proportionality review by comparing this case to those cases in which this Court has determined that the death penalty was disproportionate. This Court has concluded that the death sentence was 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. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 177 (1997), *and 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). However, we find that the instant case is distinguishable from each of these seven cases.

First, we note that in none of the cases were three aggravating circumstances found. Moreover, in none of the seven cases in which the sentence was found to be disproportionate was the (e)(3) aggravating circumstance included. *State v. Lyons*, 343 N.C. 1, 27-28, 468 S.E.2d 204, 217, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996). "The jury's finding of the prior conviction of a violent felony aggravating circumstance is significant in finding a death sentence propor-

tionate." *Id.* at 27, 468 S.E.2d at 217. Further, we reiterate the fact that the jury found defendant guilty of first-degree murder under theories of both premeditation and deliberation and felony murder.

However, defendant argues that his case is as compelling, if not more, than the defendant's case in *Stokes* in which this Court reversed a sentence of death. We disagree. In *Stokes* this Court held that defendant Stokes did not appear more deserving of death than his codefendant Murray, who received a life sentence. *State v. Stokes*, 319 N.C. at 21, 352 S.E.2d at 664. In support of this conclusion, we noted that Stokes was only seventeen years old, and Murray was considerably older; Stokes suffered from impaired capacity to appreciate the criminality of his conduct; and at the time of the murder, Stokes was under the influence of a mental or emotional disturbance. *Id.*

In the case *sub judice*, two codefendants (Richard Smith and Jimmy Smith) were convicted of first-degree murder and each received a sentence of life imprisonment, the other codefendant (Christopher Moore) pleaded guilty to second-degree murder pursuant to a plea agreement. Here, defendant was twenty-six years old at the time of the murder and was the same age as Jimmy Smith and was only six years younger than Richard Smith. Defendant was convicted of first-degree murder on the theories of premeditation and deliberation and felony murder; but Stokes was convicted solely on a felony-murder theory, and there was little evidence of premeditation, *id.* at 24, 352 S.E.2d at 666. Further, the evidence tended to show that defendant here supplied the murder weapon and actually took the money box from the victim's store. The jury in defendant's trial found three aggravating circumstances to exist; whereas, in the Smiths' trial the jury found only one aggravating circumstance to exist. Unlike Richard and Jimmy Smith, defendant had previously been convicted of violent felonies. On these facts we cannot say as a matter of law that the sentence of death is disproportionate when compared with other cases roughly similar with respect to the crime and the defendant.

For the foregoing reasons we conclude that defendant received a fair trial free from prejudicial error and that the sentence of death imposed by the trial court is not excessive or disproportionate.

NO ERROR.

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

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PENNSYLVANIA & SOUTHERN GAS COMPANY, A DIVISION OF NUI CORPORATION; AND PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC.

No. 22A96

(Filed 9 July 1998)

1. Utilities § 185 (NCI4th)— just and reasonable rate of return—factors

What is a "just and reasonable" rate of return depends upon a determination and examination of several variables, including: (1) the rate base which earns the return; (2) the gross income received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined rate base.

2. Utilities § 181 (NCI4th)— fair rate of return—conclusion of law—factual findings

What constitutes a fair rate of return on common equity is a conclusion of law that must be predicated on adequate factual findings.

3. Utilities § 232 (NCI4th)— nonunanimous stipulation—consideration by Utilities Commission

A stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under Chapter 62 should be accorded full consideration and weighed by the Utilities Commission with all other evidence presented by any of the parties in the proceeding. The Commission may adopt the recommendations or provisions of the nonunanimous stipulation as long as the Commission sets forth its reasoning and makes its own independent conclusion supported by substantial evidence on the record that the proposal is just and reasonable to all parties in light of all the evidence presented.

4. Utilities § 232 (NCI4th)— unanimous stipulation—informal disposition of rate case

Only those stipulations that are entered into by all of the parties before the Utilities Commission may form the basis of

informal disposition of a contested proceeding under N.C.G.S. § 62-69(a).

5. Utilities § 232 (NCI4th)— return on equity—adoption of rate in nonunanimous stipulation—failure to make independent determination

The Utilities Commission erred in finding the 11.4% rate of return on common equity specified in a nonunanimous stipulation by a gas company and the public staff in a natural gas rate case where it is clear that the Commission merely adopted, without analysis or deduction, the 11.4% rate set forth in the stipulation rather than considering the stipulation as one piece of evidence to be weighed in making an otherwise independent determination as to the appropriate rate of return.

6. Utilities § 196 (NCI4th)— rate case—cost of service to customer classes—material fact

Cost of service to the various customer classes is a material fact in a natural gas general rate case because (1) the utility's cost of providing service to each of its customer classes is an integral part of the formula for determining the appropriate rates of return for each customer class as it pertains to the ordered rate design, and (2) cost of service must be examined in reviewing whether there is unjust discrimination in rate design among classes of customers under N.C.G.S. § 62-140.

7. Utilities § 196 (NCI4th)— natural gas rate case—cost of service for various classes—insufficient findings

Findings by the Utilities Commission in a natural gas rate case with regard to cost of service for the various classes of customers lacked analysis and were insufficient to enable the appellate court to properly review the ordered rate design where the only determination regarding the cost of service calculation was a finding that the cost of service studies presented in this proceeding show that somewhat higher rates of return exist under the filed and stipulated proposed rates for Large General and Interruptible customers than for Residential customers and that the rate of return for Residential customers is below the total company returns; the findings do not establish the magnitude of the differences among the rates of return provided by the various customer classes; the findings do not set forth the existing rate differences with respect to the cost of serving the several customer classes; and the Commission's characterization of indus-

trial class rates as "somewhat higher" under the stipulated rates is not only vague but is arguably contrary to the evidence.

8. Utilities § 198 (NCI4th)— rate case—full margin transportation rates

A gas company's use of full margin transportation rates was proper as a matter of law where those rates were supported by competent, material and substantial evidence in view of the entire record.

Appeal as of right by intervenor-appellant Carolina Utility Customers Association pursuant to N.C.G.S. § 7A-29(b) from a final order of the Utilities Commission in a general rate case granting applicant-appellee Pennsylvania & Southern Gas Company a partial rate increase. Heard in the Supreme Court 10 September 1996.

Amos & Jeffries, L.L.P., by James H. Jeffries IV, for applicant-appellee Pennsylvania & Southern Gas Company.

Robert P. Gruber, Executive Director, by James D. Little, Staff Attorney, for intervenor-appellee Public Staff.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Sam J. Ervin, IV, for intervenor-appellant Carolina Utility Customers Association, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James Y. Kerr, II, on behalf of BellSouth Telecommunications, Inc.; and Dwight W. Allen, Vice President and General Counsel, on behalf of Carolina Telephone & Telegraph Company, amici curiae.

Hunton & Williams, by Edward S. Finley, Jr., on behalf of North Carolina Natural Gas Corporation; and Les S. Anthony, Associate General Counsel, on behalf of Carolina Power & Light Company, amici curiae.

Michael F. Easley, Attorney General, by Alan S. Hirsch, Special Deputy Attorney General, and Karen E. Long, Assistant Attorney General, on behalf of the Attorney General, amicus curiae.

LAKE, Justice.

On 17 February 1995, applicant-appellee Pennsylvania & Southern Gas Company, a division of NUI Corporation and doing

business as North Carolina Gas Service ("the Company"), filed an application with the North Carolina Utilities Commission seeking a $773,503 increase in annual gross revenues and approval of a mechanism for the future recovery of manufactured gas plant costs. On 14 March 1995, the Commission entered an order setting the Company's application for investigation and hearing and declared this case a general rate case pursuant to N.C.G.S. § 62-137. Subsequently, the Commission by order allowed the formal intervention of Carolina Utility Customers Association, Inc. ("CUCA"). The intervention and participation of the Public Staff-North Carolina Utilities Commission ("Public Staff") was recognized pursuant to statute.

On 14 June 1995, the Company and the Public Staff filed a stipulation resolving all revenue requirements and rate design issues raised by the Company's application. The parties to the stipulation agreed that the Company should be granted an annual rate increase of $384,771, that the Company should be allowed to earn an 11.4% return on common equity, and that certain "proposed rates [were] just and reasonable to all customer classes." CUCA did not join in this stipulation and opposed certain provisions contained therein. This matter came on for hearing before the Commission on 27 June 1995.

At that hearing, the Company offered the direct, supplemental and rebuttal testimonies of James W. Carl, its vice president; Robert F. Lurie, the treasurer of NUI Corporation; and Bernard L. Smith, the vice president of accounting for the Company. On direct, Mr. Carl testified regarding the Company's cost of service and several studies allocating costs to the Company's various customer classes and determining the rate of return on those classes. On the basis of these studies, Mr. Carl made recommendations for the design of rates. In his supplemental testimony, Mr. Carl explained the negotiation procedures with the Public Staff and identified the various changes to the Company's filed case that were incorporated into the stipulation as a result of negotiations with the Public Staff. Mr. Lurie, on direct examination, testified that he had performed a discounted cash flow analysis of the projected costs of capital for the Company. Based on this study, Mr. Lurie's initial recommendation for a return on equity for the Company was 13.34%.

CUCA offered the testimony of Kevin W. O'Donnell, a consultant in the field of utility regulation. Mr. O'Donnell testified that with respect to the Company's cost of equity capital, he had performed

both a discounted cash flow analysis and a comparable earnings analysis, and based on these studies, the Company's cost of equity capital was 10.4%. Mr. O'Donnell further testified regarding cost of service and rate design. He criticized Mr. Carl's cost-of-service studies and stated that, in his opinion, rates should be based strictly on cost, that the rate design put forth by the Company did not reflect this approach, and that rates of return for the various customer classes essentially should be equalized over time. Finally, Mr. O'Donnell criticized the Company's continued use of "full margin" transportation rates. In his supplemental testimony, Mr. O'Donnell testified that a 0.15% flotation factor should be added to his original return on equity recommendation so as to allow the Company to earn 10.55% on equity.

On rebuttal, Mr. Carl testified regarding problems with the cost-of-service analysis performed by Mr. O'Donnell and the practical difficulties associated with Mr. O'Donnell's recommendation for levelized rates of return for each customer class. Mr. Carl further testified that the Company should be allowed to continue using "full margin" transportation rates. Mr. Lurie testified on rebuttal that the stipulated rate of return on equity of 11.4% was just and reasonable.

On 20 September 1995, the Commission approved the stipulated revenue requirement and rate design and entered an order granting a partial rate increase. In reaching its decision, the Commission concluded: (1) that the cost of the Company's equity capital was 11.4%; (2) that "[i]t is not appropriate to set rates in this proceeding based solely on any one or more of the estimated cost-of-service studies presented by CUCA and Pennsylvania & Southern"; (3) that the stipulated rate design was "just and reasonable for purposes of this proceeding and [did] not subject any customer or class of customers to rate shock or unjust or discriminatory rates"; and (4) that the Company's transportation rates should continue to be established on a "full margin" basis.

CUCA appeals to this Court contending the Commission committed reversible error by (1) adopting a return on equity of 11.4%, the return specified in said stipulation; (2) failing to adopt a single cost-of-service study for use in designing rates; and (3) approving the continued use of "full margin" transportation rates by the Company. For the reasons stated herein, we reverse the decision of the North Carolina Utilities Commission and remand this case for further proceedings not inconsistent with this decision.

The goals, policies and principles underlying the Commission's regulation of public utilities, and its concomitant duties pursuant thereto, are well established in the statutory and case law of this state. This Court emphasized and summarized these fundamental principles of public utility law in *State ex rel. Util. Comm'n v. General Tel. Co. of Southeast*, 281 N.C. 318, 189 S.E.2d 705 (1972), wherein the Court stated:

> [T]he Legislature has conferred upon the Utilities Commission the power to police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable. G.S. 62-31; G.S. 62-32; G.S. 62-130; and G.S. 62-131. These statutes confer upon the Commission, not upon this Court or the Court of Appeals, the authority to determine the adequacy of the utility's service and the rates to be charged therefor.
>
> . . . In fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of the government. . . . The Commission, however, does not have the full power of the Legislature but only that portion conferred upon it in G.S. Chapter 62. In fixing the rates to be charged by a public utility for its service, the Commission must, therefore, comply with the requirements of that chapter, *more specifically, G.S. 62-133.*

General Tel., 281 N.C. at 335-36, 189 S.E.2d at 717 (emphasis added). In this regard, N.C.G.S. § 62-81(a) provides in relevant part:

> All cases or proceedings, declared to be or properly classified as general rate cases under G.S. 62-137, or any proceedings which will substantially affect any utility's overall level of earnings or rate of return, shall be set for trial or hearing by the Commission . . . . *All such cases or proceedings shall be tried or heard and decided in accordance with the rate-making procedure set forth in G.S. 62-133* . . . .

N.C.G.S. § 62-81(a) (1989) (emphasis added). Thus, the Commission must comply with the overall requirements of regulation established and specified in considerable detail by the Legislature in chapter 62 of the General Statutes. *General Tel.*, 281 N.C. at 336, 189 S.E.2d at 717. While public utilities are subject to such regulation, in all other respects they are private, investor-owned companies, and they must be allowed to attract from volunteer investors, within our free enterprise system, such additional capital as is periodically required for

the expansion or improvement of services. *Id.* at 337, 189 S.E.2d at 718. Utilities accomplish this by offering their shareholders and other potential investors the opportunity to earn a return on investment that, in light of the potential risk, outweighs or is at least comparable to returns available in other investment options. *Id.*

In order to meet the twin goals of assuring sufficient shareholder investment in utilities while simultaneously maintaining the lowest possible cost to the using public for quality service, the Legislature set forth in section 62-133 the precise steps the Commission must follow in fixing rates in a general rate case such as the one at bar. *General Tel.*, 281 N.C. at 335-37, 189 S.E.2d at 717-18. This statute provides in part:

§ 62-133. How rates fixed.

(a) In fixing the rates for any public utility . . . , the Commission shall fix such rates as shall be fair both to the public utilities and to the consumer.

(b) In fixing such rates, the Commission shall:

(1) Ascertain the reasonable original cost of the public utility's property used . . . in providing the service rendered to the public . . . .

. . . .

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses . . . .

(4) Fix such rate of return on the cost of the property ascertained . . . as will enable the public utility by sound management to produce a fair return for its shareholders, . . . to maintain its facilities and services . . . , and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

. . . .

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascer-

> tained . . . the rate of return fixed . . . on the cost of the public utility's property . . . .
>
> . . . .
>
> (d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

N.C.G.S. § 62-133 (Supp. 1997). The Commission's ultimate goal in setting rates is to determine what constitutes a reasonable charge for services proposed to be rendered in the immediate future. *State ex rel. Util. Comm'n v. Morgan*, 277 N.C. 255, 267, 177 S.E.2d 405, 413 (1970). The determination of this question is for the Commission, in accordance with the direction of this section. *Id.*

The rates fixed by the Commission are deemed *prima facie* just and reasonable. N.C.G.S. §§ 62-94(e), -132 (1989). The decision of the Commission will be upheld on appeal unless it is assailable on one of the statutory grounds enumerated in section 62-94(b). *State ex rel. Util. Comm'n v. Mebane Home Tel. Co.*, 35 N.C. App. 588, 591, 242 S.E.2d 165, 166 (1978), *aff'd*, 298 N.C. 162, 257 S.E.2d 623 (1979). Section 62-94 provides in relevant part:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

> (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

N.C.G.S. § 62-94(b), (c).

This Court's role under section 62-94(b) is not to determine whether there is evidence to support a position the Commission did not adopt. *State ex rel. Util. Comm'n v. Eddleman*, 320 N.C. 344, 355, 358 S.E.2d 339, 347 (1987). Instead, the test upon appeal is whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record. *State ex rel. Util. Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 745, 332 S.E.2d 397, 474 (1985), *rev'd on other grounds*, 476 U.S. 953, 90 L. Ed. 2d 943 (1986). "Substantial evidence [is] defined as 'more than a scintilla or a permissible inference.' " *State ex rel. Util. Comm'n v. Southern Coach Co.*, 19 N.C. App. 597, 601, 199 S.E.2d 731, 733 (1973) (quoting *Util. Comm'n v. Great Southern Trucking Co.*, 223 N.C. 687, 690, 28 S.E.2d 201, 203 (1943)), *cert. denied*, 284 N.C. 623, 201 S.E.2d 693 (1974). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 83 L. Ed. 126, 140 (1938). The Commission's knowledge, however expert, cannot be considered by this Court unless the facts and findings thereof embraced within that knowledge are in the record. *State ex rel. Util. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 390-91, 134 S.E.2d 689, 695 (1964). Failure to include all necessary findings of fact is an error of law and a basis for remand under section 62-94(b)(4) because it frustrates appellate review. *State ex rel. Util. Comm'n v. Public Staff*, 317 N.C. 26, 34, 343 S.E.2d 898, 904 (1986).

I. Return on Equity and Cost of Service

Having reiterated these foundational principles, we now turn our analysis to the Commission's order in the case *sub judice*. CUCA maintains that the Commission's order was deficient in two respects: first, the Commission's conclusion of an 11.4% rate of return on equity is unsupported by competent, material and substantial evidence; and second, the Commission failed to make sufficient findings of fact regarding the cost of service to the various classes of customers in adopting the stipulated rate design. We agree.

N.C.G.S. § 62-79(a) sets forth the standard for Commission orders against which they will be analyzed upon appeal. The statute provides:

> (a) *All final orders and decisions* of the Commission *shall be sufficient in detail* to enable the court on appeal to determine the controverted questions presented in the proceedings *and shall include*:
>
> (1) Findings and conclusions and the reasons or bases therefor upon *all the material issues of fact, law, or discretion* presented in the record, and
>
> (2) The appropriate rule, order, sanction, relief or statement of denial thereof.

N.C.G.S. § 62-79(a) (1989) (emphasis added). The purpose of the required detail as to findings, conclusions and reasons as mandated by this subsection is to provide the appellate court with sufficient information with which to determine under the scope of review the questions at issue in the proceedings. *State ex rel. Util. Comm'n v. Conservation Council of N.C.*, 312 N.C. 59, 62, 320 S.E.2d 679, 682 (1984). Since the Commission is required to render its decisions upon questions of law and of fact in the same manner as a court of record, its findings must be supported by competent evidence as a matter of law. *State ex rel. Util. Comm'n v. Rail Common Carriers*, 42 N.C. App. 314, 317-18, 256 S.E.2d 508, 511 (1979). Failure to include all necessary findings of fact is an error of law and a basis for remand under section 62-94(b)(4).

A. Rate of Return on Equity

[1] A thorough review of the record, including particularly the Commission's order, reveals that the Commission's 11.4% rate of return on equity conclusion comes directly, without any deduction, from the stipulation between the Company and the Public Staff, and thus does not meet the standards established by sections 62-79(a), -94(b) and -133. The "rate of return" on equity, the Company's outstanding common stock, is a percentage that the Commission concludes should be earned on the value of the utility's investment, commonly referred to as the "rate base." *State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n*, 323 N.C. 238, 244, 372 S.E.2d 692, 696 (1988). What is a "just and reasonable" rate of return depends upon a determination and examination of several variables, including: (1) the rate base which earns the return; (2) the gross income

received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined rate base. *State ex rel. Util. Comm'n v. State*, 239 N.C. 333, 344-45, 80 S.E.2d 133, 141 (1954).

[2] What constitutes a fair rate of return on common equity is a conclusion of law that must be predicated on adequate factual findings. *State ex rel. Util. Comm'n v. Public Staff*, 322 N.C. 689, 693, 370 S.E.2d 567, 570 (1988). In finding essential, ultimate facts, the Commission must consider and make its determination based upon all factors particularized in section 62-133, including "all other material facts of record" that will enable the Commission to determine what are reasonable and just rates. N.C.G.S. § 62-133; *State ex rel. Util. Comm'n v. State*, 239 N.C. 333, 344, 80 S.E.2d 133, 141; *accord State ex rel. Util. Comm'n v. Westco Tel. Co.*, 266 N.C. 450, 456, 146 S.E.2d 487, 491 (1966). The Commission must then arrive at its "*own independent conclusion*" as to the fair value of the applicant's investment, the rate base, and what rate of return on the rate base will constitute a rate that is just and reasonable both to the utility company and to the public. *State ex rel Util. Comm'n v. State*, 239 N.C. at 344, 80 S.E.2d at 141.

The Company and the Public Staff contend that, notwithstanding the dictates of chapter 62 and our case law, a relaxed standard of review should be applied on appeal where determinations contained in a Commission order are embodied in a stipulation between less than all of the parties to the dispute. These parties argue that, where a stipulation entered into by less than all of the parties is embodied in a Commission order, the order should be reviewed for reasonableness as a whole since a stipulation between adversarial parties such as the Company and the Public Staff fulfills the requirement of "substantial evidence" in N.C.G.S. § 62-94(b)(5). We hold such an interpretation and contention to be contrary to the requirements of chapter 62 and our jurisprudence in general.

N.C.G.S. § 62-69(a) empowers the Commission to resolve even general rate cases by stipulation of the parties. Section 69(a) provides in part:

> The Commission may make informal disposition of *any contested proceeding* by stipulation, agreed settlement, consent order or default.

N.C.G.S. § 62-69(a) (1989) (emphasis added). While this statute does not address directly either the question of whether all of the parties must participate in the stipulation to qualify a case for complete informal disposition, or the evidentiary weight, if any, to be given a stipulation entered into by less than all of the parties, the use of the terms "stipulation," "agreed settlement," and "consent order" clearly imply an agreement reached between *all* the contestants in the case.

To address these interrelated questions specifically, we turn to chapter 62 and persuasive case authority. In its delegation of rate-making authority to the Commission, the legislature has established an elaborate procedural, hearing, and appeals process that contemplates the full consideration of all evidence put forth by each of the parties certified via the statute to have an interest in the outcome of contested proceedings. *See, e.g.*, N.C.G.S. § 62-65(a) (1989) ("*Every party* to a proceeding shall have the right to call and examine witnesses, to introduce exhibits . . . .") (emphasis added); N.C.G.S. § 62-78(a) (1989) ("Prior to each decision . . ., *the parties* shall be afforded an opportunity to submit . . . proposed findings of fact and conclusions of law and briefs . . . .") (emphasis added); N.C.G.S. § 62-90(a) (1989) ("*Any party* to a proceeding before the Commission may appeal from any final order or decision . . . .") (emphasis added). This is particularly true of general rate cases where the whole rate structure of the applicant company is involved. In such cases, the Commission is required to apply "the rules of evidence applicable in civil actions in the superior court." N.C.G.S. § 62-65(a). Any person having a direct interest in the subject matter shall be allowed "to intervene in any pending proceeding." N.C.G.S. § 62-73 (1989). Once such considerations are afforded to all parties in a contested case, the Commission is required to embody its findings in an order sufficiently detailing the reasons for its determinations on all material and controverted issues of fact, law or discretion presented in the record. N.C.G.S. § 62-79(a). Those findings and conclusions must be supported by substantial evidence on the record as a whole. N.C.G.S. § 62-94(b).

The fact that the Commission is empowered by section 62-69(a) to resolve cases by informal disposition does not absolve it of all other provisions of chapter 62 and its formal rate-making duties therein mandated, absent full agreement of all parties to a contested case. This Court has long recognized the value of stipulations to the efficient administration of justice.

> Parties undoubtedly have the right to make agreements and admissions in the course of judicial proceedings, especially when they are solemnly made and entered into and are committed to writing, and when, too, they bear directly upon the matters involved in the suit. Such agreements and admissions are of frequent occurrence and of great value, as they dispense with proof and save time in the trial of causes.

J.L. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N.C. 431, 438, 49 S.E. 946, 948-49 (1905). However, this Court also recognizes that, "[w]hile this is so, *the court will not extend the operation of the agreement beyond the limits set by the parties or by the law.*" *Id.* at 439, 49 S.E. at 949 (emphasis added). In *Ingold v. City of Hickory*, 178 N.C. 614, 101 S.E. 525 (1919), this Court recognized, " 'A person may lawfully waive by agreement the benefit of a statutory provision. But there is an imputed exception to this general rule in the case of a statutory provision[] whose waiver would violate public policy expressed therein, or where rights of third parties[] which the statute was intended to protect[] are involved.' " *Id.* at 617, 101 S.E. at 527 (quoting 9 Cyc. 480 (1903)).

Chapter 62 contemplates a full and fair examination of evidence put forth by *all* of the parties. To allow the Commission to dispose of a contested rate case by stipulation of less than all certified parties would effectively absolve the Commission of its statutory and due process obligations to afford all parties a fair hearing. As perceptively enunciated by the Texas Court of Appeals:

> The adoption of a non-unanimous stipulation raises several due-process concerns. The most obvious is the possibility that opposing parties may be denied an opportunity to present evidence against acceptance of the stipulation. A more subtle problem is the possibility of an unintentional shift of the burden of proof from the utility to the opponents of the stipulation. There is a danger that when presented with a ready-made solution, the Commission might unconsciously require that the opponents refute the agreement, rather than require the utility to prove affirmatively that the proposed rates are just and reasonable. This danger is increased when the Commission staff is a signatory party and is in a position of advocating the stipulation.

Cities of Abilene v. Public Util. Comm'n, 854 S.W.2d 932, 938-39 (Tex. Ct. App. 1993), *rev'd in part on other grounds*, 909 S.W.2d 493 (Tex. 1995).

In analyzing the evidentiary weight to be given a nonunanimous stipulation, we find particularly persuasive the reasoning of the United States Supreme Court in *Mobil Oil Corp. v. Federal Power Comm'n*, 417 U.S. 283, 41 L. Ed. 2d 72 (1974). In *Mobil Oil*, the Supreme Court approved the manner in which the Federal Power Commission ("the FPC") examined a nonunanimous stipulation as simply one piece of evidence among many to be considered by the FPC. The Supreme Court stated:

> The Commission clearly had the power to admit the agreement into the record—indeed, it was obliged to consider it. That it was admitted for the record did not, of course, establish without more the justness and reasonableness of its terms. But the Commission did not treat it as such. As we have noted, the Commission weighed its terms by reference to the entire record . . . and further supplemented that record with extensive testimony and exhibits directed at the proposal's terms. We think that the Court of Appeals correctly analyzed the situation and stated the correct legal principles:
>
> > "No one seriously doubts the power—indeed, the duty—of [the] FPC to consider the terms of a proposed settlement which fails to receive unanimous support as a decision on the merits. We agree with the DC Circuit that even 'assuming that under the Commission's rules [a party's] rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*.' "
> >
> > . . . .
> >
> > "As it should [the] FPC is employing its settlement power . . . to further the resolution of area rate proceedings. If a proposal enjoys unanimous support from all of the immediate parties, it could certainly be adopted as a settlement agreement if approved in the general interest of the public. But even if there is a lack of unanimity, it may be adopted as a resolution *on the merits*, if [the] FPC makes an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates for the area."

The choice of an appropriate structure for the rate order is a matter of Commission discretion, to be tested by its effects. The

choice is not the less appropriate because the Commission did not conceive of the structure independently.

Mobil Oil, 417 U.S. at 312-14, 41 L. Ed. 2d at 97-98 (citations omitted) (footnotes omitted).

[3],[4] Thus, we hold that a stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under chapter 62 should be accorded full consideration and weighed by the Commission with all other evidence presented by any of the parties in the proceeding. The Commission must consider the nonunanimous stipulation along with all the evidence presented and any other facts the Commission finds relevant to the fair and just determination of the proceeding. The Commission may even adopt the recommendations or provisions of the nonunanimous stipulation as long as the Commission sets forth its reasoning and makes "its own independent conclusion" supported by substantial evidence on the record that the proposal is just and reasonable to all parties in light of all the evidence presented. Only those stipulations that are entered into by all of the parties before the Commission may form the basis of informal disposition of a contested proceeding under section 62-69(a).

Our holding in this respect should not be interpreted as either express or tacit disapproval of informal disposition of proceedings through negotiation. Quite the contrary, this Court recognizes the crucial role that informal disposition plays in quickly and efficiently resolving many contested proceedings and encourages all parties to seek such resolution through open, honest and equitable negotiation. Our decision here merely recognizes that such negotiation and settlement is subversive of due process and the legislative authority delegated to the Commission if it lacks representation of all the parties with a certified interest in the outcome of the proceeding.

[5] Applying the foregoing principles to the case *sub judice*, it is evident that the Commission's adoption of the 11.4% rate of return on equity embodied in the nonunanimous stipulation does not meet the standards established by section 62-133 and chapter 62 as a whole. The stipulated 11.4% rate should have been considered and analyzed by the Commission along with all the evidence regarding proper rate of return, including the testimony of Mr. O'Donnell on behalf of CUCA that 10.55% was the appropriate return on equity. The only other evidence supporting the 11.4% rate was the rebuttal testimony of Mr. Lurie in defense of the stipulation that the stipulated rate was "just

and reasonable." In light of the facts that Mr. Lurie's initial recommendation was 13.34% and that no other evidence supported the 11.4% rate, it is clear that the Commission adopted wholesale, without analysis or deduction, the 11.4% rate from the partial stipulation, as opposed to considering it as one piece of evidence to be weighed in making an otherwise independent determination. Thus, the Commission failed to adduce "its own independent conclusion" as to the appropriate rate of return on equity, and this case must be remanded to the Commission for its further consideration and findings on rate of return on equity consistent with this opinion.

B. Cost of Service

We now turn to the Commission's findings on cost of service and rate design. Examination of the Commission's order reveals the Commission failed to make sufficient findings regarding the Company's cost of service, and therefore the rate design, applicable to the Company's customer classes.

[6] Cost of service to the various customer classes is a material fact in the present case for two significant reasons. First, the utility company's cost of providing service to each of its customer classes is an integral part of the formula for determining the appropriate rates of return for each customer class as it pertains to the ordered rate design. Under section 62-133, determining the effective rate of return for a particular customer class of a gas utility involves a mathematical computation of several components. *State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n*, 323 N.C. 238, 244-45, 372 S.E.2d 692, 696. The three basic components that must be ascertained in making the computation are: (1) the total rate base applicable to each customer class; (2) the *cost of service* or operating expenses applicable to each customer class; and (3) the revenues collected from each customer class for the test period, adjusted for any subsequent increase in rates. *Id.* at 245, 372 S.E.2d at 696.

Second, cost of service must be examined in reviewing whether there is unjust discrimination in rate design. N.C.G.S. § 62-140 prohibits unreasonable or unjust discrimination among classes of customers. *State ex rel. Util. Comm'n v. Bird Oil Co.*, 302 N.C. 14, 22, 273 S.E.2d 232, 237 (1981). The statute reads in applicable part:

> (a) No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvan-

> tage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service.

N.C.G.S. § 62-140(a) (1989). The charging of different rates for services rendered does not *per se* violate this statute. *State ex rel. Util. Comm'n v. Nello L. Teer Co.*, 266 N.C. 366, 376, 146 S.E.2d 511, 518 (1966). However, classifications of customers and differences in rates must be based on reasonable differences in conditions, and the variance in charges must bear a reasonable proportion to the variance in conditions. *State ex rel. Util. Comm'n v. N.C. Textile Mfrs. Ass'n*, 59 N.C. App. 240, 255, 296 S.E.2d 487, 496 (1982), *rev'd on other grounds*, 309 N.C. 238, 306 S.E.2d 113 (1983). A number of conditions or factors should be considered in determining whether unreasonable discrimination exists, including: (1) quantity of use, (2) time of use, (3) manner of service, and (4) *costs of rendering the various services. State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n*, 323 N.C. 238, 245, 372 S.E.2d 692, 696. Any matter that presents a substantial difference as a ground for distinction between customers or the rates charged is a *material factor* in the determination of rates. *Nello L. Teer*, 266 N.C. at 376, 146 S.E.2d at 518.

In the present case, the Commission concluded the stipulated rate design in Schedule II of the stipulation was just and reasonable and did not subject any customer class to discrimination or "rate shock." This was based on the following findings of fact regarding cost of service and the proposed stipulated rates:

> 35. Pennsylvania & Southern and CUCA presented the results of cost-of-service studies under both the filed and stipulated rates.
>
> 36. The major difference[s] between the cost-of-service studies prepared by Pennsylvania & Southern and CUCA were (1) the allocation of fixed gas costs to the various customer classes and (2) the characterization of firm service fees and sales differential charges as pipeline capacity charges or gas supply costs.
>
> 37. CUCA advocated the adoption of and utilized a 100 percent peak day allocation method in its cost-of-service study and treated firm service fees and sales differential charges as pipeline capacity charges. Using its cost-of-service methodology, CUCA calculated the following rates of return for Pennsylvania & Southern's various customer classes under the stipulated proposed rates:

Rate Schedule	Return on Stipulated Rates
101 Residential	1.10%
102 Small General	16.54%
104 Large General	24.25%
105 Interruptible	38.98%

38. Pennsylvania & Southern utilized the Seaboard Method for allocation purposes in its cost-of-service studies attributing 50 percent of fixed gas costs on a peak day basis and 50 percent of fixed gas costs on an average annual sales basis. Pennsylvania & Southern also treated firm service fees and sales differential charges as gas supply costs. Using its cost-of-service methodology, Pennsylvania & Southern calculated the following rates of return for its various customer classes under the stipulated proposed rates:

Rate Schedule	Return on Stipulated Rates
101 Residential	3.68%
102 Small General	23.67%
104 Large General	18.12%
105 Interruptible	19.02%

39. Estimated cost-of-service studies are subjective and judgmental, and while they can provide useful information in the rate design process, they should not be relied upon as the exclusive measure in setting rates. Instead, they should be analyzed in conjunction with other appropriate factors in determining proper rate design. These other appropriate factors include the value of the service to the customer, the type and priority of the service received by the customer, the frequency of interruptions of interruptible service, the quantity of use, the time of use, the manner of service, the competitive conditions related to both the retention of sales to and transportation for existing customers and the acquisition of new customers, the historic rate design and differentials between the various classes of customers, the revenue stability of the utility, and economic and political factors including the encouragement of expansion.

40. It is not appropriate to set rates in this proceeding based solely on any one or more of the estimated cost-of-service studies presented by CUCA and Pennsylvania & Southern.

41. In general, the cost-of-service studies presented in this proceeding show that somewhat higher rates of return exist

under the filed and stipulated proposed rates for Large General and Interruptible customers than for Residential customers and that the rate of return on Residential customers is below the total Company returns.

42. CUCA advocates moving to essentially equalized rates of return where the difference in rates of return between Residential and Interruptible customers would be no more than 2.5 percent.

43. Rates to Industrial customers have decreased in the last three Pennsylvania & Southern general rate cases. Rates to Residential customers have historically risen. Pennsylvania & Southern and the Public Staff have agreed to further the trend of greater increases in Residential rates in this general rate case as follows:

Rate Schedule	% Increase from Existing Rates
101 Residential	6.21%
102 Small General	0.98%
104 Large General	0.50%
105 Interruptible	0.00%

44. Pennsylvania & Southern's residential customers, unlike its large commercial and industrial customers, have very little ability to switch to alternate fuels without major expense. Pennsylvania & Southern's residential customers also do not have the ability to negotiate lower rates as do industrial customers and, in fact, bear the risk of being required to make up margin losses from negotiated rates. These factors, among others, justify higher rates of return from Large General and Interruptible customers and lower rates of return from residential customers.

45. Rates based solely on equalized rates of return among customer classes are not reasonable for purposes of this proceeding.

46. The proposed rates set forth on Schedule II of the Stipulation are just and reasonable for purposes of this proceeding and do not subject any customer or class of customers to rate shock or unjust or discriminatory rates.

[7] These findings by the Commission with regard to cost of service, while extensive in reciting what the parties have done in this respect,

nevertheless lack analysis and are thus insufficient to enable this Court to properly review the ordered rate design. The findings are inadequate in several respects. First, the only determination made regarding the cost of service calculation, despite acknowledging substantial evidentiary presentation and differing opinions by the opposing witnesses, was Finding of Fact No. 41: "In general, the cost-of-service studies presented in this proceeding show that somewhat higher rates of return exist under the filed and stipulated proposed rates for Large General and Interruptible customers than for Residential customers and that the rate of return on Residential customers is below the total Company returns." This blanket statement alone fails to provide any independent comparative thought, analysis or weighing process on the part of the Commission itself in measuring the disputed positions of the parties and determining what it considers to be a fair allocation of costs between the various customer classes and thus a fair and nondiscriminatory rate design. It also fails to identify the method the Commission used for analyzing the cost-of-service differentials and their impact on the ultimate rate-of-return issue. Second, the findings do not establish the magnitude of the differences among the rates of return provided by the various customer classes. As a result, this Court is prevented from reviewing the manner in which the Commission considered cost-related versus non-cost-related factors in adopting the stipulated rate design. Third, the findings do not set forth the existing rate differences with respect to the cost of serving the several customer classes. This prevents the Court from analyzing the factual basis of the Commission's conclusion that no customer or class of customers will suffer from "rate shock or unjust or discriminatory rates." Finally, the Commission's characterization of industrial class rates as "somewhat higher" under the stipulated rates is not only vague, but arguably contrary to the evidence. Even under the Company's more conservative calculation method, rates for rate schedules 102, 104 and 105 are approximately six to seven times higher than for residential customers in schedule 101.

In *State ex rel. Util. Comm'n v. N.C. Textile Mfrs. Ass'n*, 313 N.C. 215, 328 S.E.2d 264 (1985), this Court addressed a similar situation as follows:

> In light of the substantial difference between cost of service and rate of return for the various classes of customers, the question of unreasonable discrimination among and within the classes of service is a material issue of fact and law. The

> Commission's failure to [adequately] address this issue in its findings of fact is error prejudicing the substantial rights of defendants.

Id. at 223, 328 S.E.2d at 269. In the case *sub judice*, the Commission's insufficient findings regarding cost of service undermine its formulation of the rate of return under section 62-133 and its ultimate adoption of the stipulated rate design. Accordingly, this case must be remanded to the Commission for its further consideration of this issue and appropriate findings not inconsistent with this opinion.

II. "Full Margin" Transportation Rates

[8] CUCA also assigns error to the Commission's approval of the Company's use of full margin transportation rates. CUCA contends that full margin rates are improper and unlawful due to their inclusion of certain fixed gas costs which, CUCA argues, are not related to the provision of transportation services. CUCA maintains that transportation rates should be based on cost of service alone. We disagree.

An examination of prior case law reveals this Court has addressed the lawfulness of full margin rates several times and has consistently affirmed the Commission's approval of such rates. *State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n [CUCA]*, 328 N.C. 37, 399 S.E.2d 98 (1991); *State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n [CUCA]*, 323 N.C. 238, 372 S.E.2d 692; *State ex rel. Util. Comm'n v. N.C. Textile Mfrs. Ass'n*, 313 N.C. 215, 328 S.E.2d 264. While CUCA is correct in its assertion that "the final order of the Commission [in a general rate case] is not within the doctrine of *stare decisis*," *State ex rel. Util. Comm'n v. Carolina Power & Light Co.*, 250 N.C. 421, 430, 109 S.E.2d 253, 260 (1959); *accord State ex rel. Util. Comm'n v. Thornburg*, 325 N.C. 463, 468-69, 385 S.E.2d 451, 454 (1989), prior decisions of this Court regarding general questions of law and the principles underlying those decisions serve to guide the Court's decisions in individual cases.

In *Textile Mfrs.*, 313 N.C. 215, 328 S.E.2d 264, this Court stated: "We do not hold that it is unjust and unreasonable as a matter of law for a utility to earn the same profit margin on transported gas that it earns on its own retail sales of gas." *Id.* at 225, 328 S.E.2d at 270. This principle was reiterated in *Utilities Comm'n v. CUCA*, 323 N.C. 238, 372 S.E.2d 692, where we stated, "on this record it was not unlawful to permit the transportation rates to have the same margins as the sales rates." *Id.* at 254, 372 S.E.2d at 701. Finally, in *Utilities Comm'n*

v. CUCA, 328 N.C. 37, 399 S.E.2d 98, we stated, "Both the Commission and this Court have consistently rejected the notion that cost of service should be the sole factor in determining rates or rate designs, whether the rates are for the sale of gas or the transportation of gas." *Id.* at 46, 399 S.E.2d at 103. We decline to overrule these decisions and continue to hold full margin transportation rates proper as a matter of law so long as they are supported by competent, material and substantial evidence in view of the entire record, pursuant to the standard of appellate review codified in N.C.G.S. § 62-94.

Examination of the case *sub judice* reveals substantial evidence to support the Commission's approval of the Company's full margin transportation rates. In its order, the Commission made the following findings of fact regarding full margin transportation rates:

> 47. The Commission has approved the use of full margin transportation rates for all of the LDCs [local distribution companies] in North Carolina.
>
> 48. The underlying premise of full margin transportation rates is that transportation rates should not provide an incentive or disincentive for an LDC to transport gas rather than sell gas under its filed tariff rate. In order for an LDC to be neutral on this issue, transportation customers must pay the same fixed costs they would pay as sales customers.

The Commission enunciated its reasons for these findings in its section "Evidence and Conclusions for Findings of Fact Nos. 47-48":

> The Company proposes to continue its use of full margin transportation rates. CUCA witness O'Donnell testified that such rates were unfair because they forced transportation customers to pay a portion of the Company's fixed gas costs. Company witness Carl testified that pipeline capacity costs incurred by the Company support not only peak deliverability but also seasonal and annual deliverability and storage injections as well.
>
> The Commission has addressed the issue of full margin transportation rates on many prior occasions, and has approved the use of such rates for each of the LDCs now operating in the State. The Commission continues to believe that such rates are reasonable and appropriate for purposes of this docket.

The record also reveals Company witness Carl testified that the ability of certain customers to switch from transportation to sales rates

when necessary or expedient necessitated the Company's inclusion of fixed gas costs in its rates to meet such contingencies without costs shifting to customers who do not possess such flexibility. Moreover, Company witness Carl undermined CUCA's assertion that full margin rates exceed cost of service by testifying to the difficulty, if not impossibility, of extracting costs from the full margin rate so as to isolate only "transportation" services. This record evidence, combined with the Commission's analysis of prior cases addressing the legality of full margin rates, is more than adequate to support the Commission's approval of the Company's full margin transportation rates. This portion of the Commission's order is affirmed.

Accordingly, while we affirm the Commission's determination as to full margin transportation rates, we must reverse with respect to its conclusion on rate of return and cost of service and remand for the Commission's further determination not inconsistent with this opinion. The order of the Commission is

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. JOHNNY DEAN LEE

No. 544PA96

(Filed 9 July 1998)

1. Evidence and Witnesses § 287 (NCI4th)— prior bad acts— admission not plain error

The trial court did not commit plain error by admitting evidence of defendant's prior bad acts in a prosecution for first-degree sexual offense and first-degree murder of a child. Testimony by the child's mother that defendant bought marijuana during the week of the child's death and a detective's testimony that the mother had said that defendant was a "pot" smoker and drank alcohol was inconsequential to the determination of whether defendant committed the murder and could not have denied a fundamental right of the defendant. Further, statements that defendant made to an investigator that he had gotten into a fight and was convicted of assault several years earlier in Colorado was not especially probative of whether he repeatedly abused and sexually assaulted a small child, and admission of this

evidence could not have created a miscarriage of justice in light of other evidence showing that defendant repeatedly abused the child, including admissions by defendant that he caused several bruises apparent on the child victim's body. N.C.G.S. § 8C-1, Rule 404(b).

2. Evidence and Witnesses § 3164 (NCI4th)— prior consistent statements—corroboration—exception to hearsay rule

In a prosecution for first-degree murder of a child, the trial court properly admitted under the prior consistent statement exception to the hearsay rule statements made by the victim's mother to a detective that her husband was afraid defendant would beat up her minor child, that she believed defendant may have done something to the child, that defendant got mad because he believed the child's autopsy report was wrong, that she knew defendant injured the child, and that she and defendant tried to get their stories straight, since all of the statements corroborate and add weight to the mother's trial testimony. Although the mother's statement to the detective that defendant said he was abused as a child did not corroborate any trial testimony, the erroneous admission of this statement did not constitute plain error.

3. Criminal Law § 467 (NCI4th Rev.)— closing argument—hypothetical thoughts of defendant and victim—inferences supported by evidence

In this prosecution for first-degree murder of a child, closing argument statements by the prosecutor which were offered as hypothetical thoughts that defendant and the victim may have made during the week of the homicide were reasonable inferences drawn from the evidence and did not require intervention by the trial court *ex mero motu*.

4. Criminal Law § 439 (NCI4th Rev.)— closing argument—characterizations of defendant as bad, mean, dangerous—inferences from evidence

The prosecutor's characterizations of defendant as "mean" and "bad" in closing argument statements of hypothetical thoughts of the child murder victim during the last week of his life were reasonable inferences based on testimony by the child's mother that defendant had bruised the child. Further, the prosecutor's characterization of defendant as a dangerous man during closing argument was also a reasonable inference which may

have been derived from testimony by the child's mother and various expert witnesses that the child was abused. Therefore, these arguments did not require the trial court to intervene *ex mero motu*.

5. Homicide § 261.1 (NCI4th)— murder by torture—sufficient evidence

The State's evidence was sufficient to support defendant's conviction for first-degree murder by torture of a two-year-old child where it tended to show that, during a one-week period, the child consistently emerged from defendant's care with myriad bruises, many of which defendant admitted to causing under the guise of either punishment or protection; on Saturday, 23 October 1993, defendant hit the child to punish him; on the following Monday, the child had visible bruises on both sides of his face after spending six hours alone with defendant on Sunday; on Wednesday, after being alone with defendant for four hours, the child had new bruises on his arm and visible bruises on both sides of his neck, he was vomiting, he had diarrhea, and his eyes were crossed; four doctors testified that the child's death was the result of a brain injury which caused massive bleeding in his brain; each doctor testified that the bruises and head injury did not appear accidental but were more likely the result of severe child abuse, battered child syndrome, or shaken baby syndrome; one doctor testified that the child probably died around 2:00 a.m. on Friday morning based on the amount of blood that was in his brain; and the child's mother testified that she saw defendant standing over the child that night between midnight and 5:00 a.m.

6. Rape and Allied Offenses § 107 (NCI4th)— first-degree sexual offense—sufficient evidence

The State's evidence was sufficient to support defendant's conviction of first-degree sexual offense against a two-year-old child where it tended to show that when the child was discovered dead on Friday morning from a brain injury inflicted by defendant, he had a tear in his rectum that was about two inches into his anal canal, skin abrasions adjacent to the anal opening were apparent, and there was mucus and blood around his anus; the child had no anal injury when he was examined by a doctor on Thursday; a pathologist testified that it was likely that the child was penetrated by an object that was two to three inches in length and three-fourths of an inch in diameter while he was still

alive; the child was left alone with defendant from 6:00 p.m. until 10:00 p.m. on Thursday night because his mother had to be at work; when the mother returned home, she noticed that the child's underpants were wet; she removed the pants and placed a towel over the lower half of his body; and later that night, she awoke to find defendant standing over the child. The jury could reasonably find that defendant sexually assaulted the child on Thursday night, when he was in the exclusive care of defendant, or Friday morning when the child's mother saw defendant standing over him.

7. Constitutional Law § 286 (NCI4th)— ineffective assistance of counsel—required showing

To establish ineffective assistance of counsel, the defendant must show (1) that counsel's performance fell below an objective standard of reasonableness as defined by professional norms, and (2) that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

8. Constitutional Law § 306 (NCI4th)— character evidence—counsel's failure to object—not ineffective assistance

Defendant was not denied the effective assistance of counsel by his attorney's failure to object to character evidence regarding defendant's prior assault, probation, alcoholism and marijuana use where all of this evidence was admissible except for one item, and defendant was not denied a fair trial by the admission of this one item.

9. Constitutional Law § 306 (NCI4th)— photographs—counsel's failure to object—not ineffective assistance

A defendant on trial for the first-degree murder of a child was not denied the effective assistance of counsel by his attorney's failure to object to four photographs of defendant's living room which showed two small signs and a mannequin head with a knife through it where the photographs were authenticated, relevant and admissible to show the circumstances of the child's death, to illustrate testimony of the child's mother, and to show how the child could have injured himself in defendant's home. The mere fact that defendant owned what he now considers inappropriate items and that the photographs displayed these objects does not make the photographs inadmissible.

10. Constitutional Law § 306 (NCI4th)— hearsay statements—counsel's failure to object—admissible or harmless error—not ineffective assistance

Defense counsel's failure to object to hearsay testimony was not negligent conduct and therefore did not constitute ineffective assistance of counsel where all of the hearsay statements except the first were admissible as prior consistent statements which corroborated a witness's trial testimony, and the admission of the first statement constituted harmless error.

On writ of certiorari pursuant to N.C.G.S. § 7A-32 to review a judgment imposing a sentence of life imprisonment entered by Sitton, J., on 31 March 1995 in Superior Court, Catawba County, upon a jury verdict of guilty of first-degree murder and first-degree sexual offense. Heard in the Supreme Court 20 November 1997.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Jonathan P. Babb, Assistant Attorney General, for the State.

J. Scott Hanvey for defendant-appellant.

ORR, Justice.

On 6 December 1993, defendant was indicted for first-degree murder in violation of N.C.G.S. § 14-17 and first-degree sexual offense in violation of N.C.G.S. § 14-27(a)(1). Defendant pled not guilty to both charges. On 29 March 1995, the jury returned verdicts of guilty as charged on both counts. Following a sentencing hearing, the jury recommended that defendant receive a sentence of life imprisonment for the first-degree murder conviction. Thereafter, the trial court sentenced defendant to two consecutive life terms for the convictions.

On 31 March 1995, defendant filed notice of appeal. In accordance with Rule 25 of the North Carolina Rules of Appellate Procedure, an order was entered on 19 March 1996 dismissing defendant's appeal because he had failed to perfect it within the time period allowed. Having lost his statutory right to appeal, defendant filed a petition for writ of certiorari to this Court pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. We granted review on 7 February 1997.

Based substantially on the testimony of Brenda Finch, the evidence presented at trial tended to show the following facts. In

January 1993, defendant began having an extramarital affair with Brenda Finch. Brenda was married to Brian Finch and had one child from the marriage, Robbie, the two-year-old victim in this case who was murdered and sexually assaulted.

In October 1993, Brenda left her husband Brian and moved into defendant's home. She left Robbie in the care of his natural father upon leaving the marital home. Two weeks later, on Friday, 22 October 1993, Brenda picked Robbie up from a sitter and took him to defendant's home. No incidents occurred on that Friday. On the following day, however, Brenda heard Robbie scream while she was inside defendant's house. Brenda had gone inside the house for only a moment, leaving Robbie and defendant alone in the front yard. When Brenda asked what happened, defendant asserted that he had to "tap" Robbie on the behind because the child had gotten too close to the road.

The following Sunday, 24 October 1993, another incident occurred. At approximately 4:00 p.m., Brenda went to work at K-Mart and left defendant to care for Robbie. That evening at 7:00 or 8:00 p.m., she called defendant from work to inquire about Robbie. Defendant told her that he could not talk at the moment because Robbie had fallen out of the bathtub, hit his head pretty hard, and was screaming. At 10:00 p.m., Brenda arrived home and found Robbie sleeping on the couch. The next morning, she noticed a bruise on each side of Robbie's face. Defendant said that the bruise on the left side of his face was from Robbie's falling out of the bathtub. The other bruise, he said, resulted from defendant accidentally hitting Robbie in the face with a door that he opened, not knowing that Robbie was behind it. Both injuries occurred while Robbie was in defendant's exclusive care from 4:00 to 10:00 p.m. on that Sunday.

On Monday, Brenda went to work at about 6:00 p.m. and left Robbie in the care of his natural father, Brian. Brian saw the bruises on his son's face and immediately became very upset. Brenda explained to Brian that defendant had told her that the injuries were accidental. Brian responded by explaining that he did not want it to happen again. Later that evening, however, Brian took Robbie to visit three neighbors and asked each neighbor to look at Robbie's bruises. He discovered also that evening that his electricity had been cut off and therefore returned Robbie to Brenda at about 8:00 or 8:30 p.m. after she had gotten off work.

On Tuesday, 26 October 1993, Brenda stayed home with Robbie for most of the day. In the afternoon, she left Robbie with Brian while she did laundry for two hours. At this point, both Brenda and Brian noticed that Robbie was behaving strangely. Brenda saw Robbie walk directly into a door, and Brian noticed that Robbie, a typically active child, was lethargic and not interested in toys or other people. Despite these observations, Brenda took Robbie back to defendant's home and put him to bed.

On Wednesday, 27 October 1993, Brenda asked defendant to take care of Robbie for a few hours while she retrieved her property from Brian's home. Robbie remained in defendant's care for about two hours while Brenda was gone. After moving, Brenda again left Robbie in defendant's care for about an hour while she went to a job interview. Upon returning from the interview, Brenda saw that Robbie had two new bruises on his arm and new bruises on both sides of his neck. In contrast to how she had left him, he was now also vomiting, he had diarrhea, and his eyes were crossed. After inquiring about what happened to bring about these changes in Robbie, defendant admitted that he may have caused the bruises. The bruise on Robbie's arm, he said, came from his grabbing Robbie too tight when he tried to stop him from falling off the couch. The neck bruises, he said, were possibly caused by his holding Robbie too tight under his chin while he wiped his nose. Brenda gave Robbie medicine for the vomiting and decided to take him to the emergency room the next morning. That evening, she stayed up with him all night because he woke up every hour wanting something to eat or drink.

The next day at about noon, Brenda took Robbie to the emergency room at Catawba Memorial Hospital where Dr. Steven Williamson examined him. Dr. Williamson noted the bruises on Robbie's face and neck and his difficulty in walking straight. After a CAT scan was taken, Dr. James Owsley, the attending radiologist, read it as being normal. This reading was later found to be incorrect because the report did show bleeding in Robbie's brain. At the time, however, there was no explanation for the problems that Robbie was experiencing. Dr. Williamson, who remained troubled by the symptoms, made an appointment for Robbie with a pediatrician for the following morning at 8:00 a.m. Robbie was released at about 2:30 or 3:00 p.m., and he and Brenda returned to defendant's home.

Three hours later, Brenda went to work at K-Mart and left Robbie in defendant's care once again. When she arrived home at about 10:00

p.m., she found Robbie sleeping on the couch. His pants were soaking wet, which was unusual because Robbie was potty trained and did not typically wet himself. After removing the wet pants, Brenda placed a towel across Robbie, and then she and defendant went to bed. This was at about midnight. Brenda could hear Robbie snoring in the other room as she dozed off. At some point during the night, Brenda woke up and saw defendant standing over Robbie. She asked defendant if Robbie was all right, and he replied that Robbie was fine. After this exchange, both Brenda and defendant went back to sleep. At about 5:00 a.m., however, Brenda woke up, checked on Robbie, and thought that he looked dead. Brenda yelled to defendant to call 911, but he said that he did not believe that 911 could do anything. Brenda then called 911. The police and paramedics subsequently arrived and took Robbie to Glen R. Frye Hospital, where he was pronounced dead. Later, it was determined that Robbie died from head trauma that resulted in massive bleeding over the surface of both sides of his brain causing a subdural hematoma and compression of the brain stem.

Several physicians testified to the myriad bruises and injuries found on Robbie's body on the morning of his death. Dr. Dennis Kimbleton observed Robbie that morning and said that he had bruises on his face, chin, jaw, arms, knee, hip, shoulders, and lower leg. Dr. Sara Sinal, a pediatrician, testified to the large number of bruises and explained that the location of the bruises indicated that the injuries were not inadvertent. Also, Dr. Sinal stated that the brain injury that Robbie had was a common injury in child abuse cases and that based on that injury as well as the other physical traumas, she believed that Robbie had died from battered child syndrome. Dr. James Parker, the pathologist who performed the autopsy, testified that in his opinion Robbie had been physically abused and that the two severe brain hemorrhages were the result of trauma to the skull from a blunt object, such as a club, bat, or hand. Dr. Sam Auringer, another State witness, testified that bleeding between the hemispheres of a child's brain is a relatively specific sign for child abuse due to shaking and that in his opinion, Robbie had been severely abused. Dr. Gregory Davis reviewed the autopsy report, CAT scan, and photographs and testified that, in his opinion, Robbie died as a result of child abuse. Dr. Davis also stated that the injuries were not the kind that would result from falling out of a bathtub; he explained that the brain injury was indicative of child abuse and that the location and pattern of the bruises on Robbie's body indicated that the injuries were not accidental.

Dr. Kimbleton and Dr. Parker also testified to an anal injury that was discovered on Robbie on the morning of his death. Dr. Kimbleton observed that Robbie's rectum was bruised and stretched and that there was blood in his rectal canal and a smear of blood in the crease between his right and left buttock. Dr. Parker, when performing the autopsy, also observed this tear in the lining of Robbie's rectum and noticed that his anal canal was dilated wider than normal. A Caucasian hair, not matching defendant's hair, and several dark pubic hairs were found in the area of Robbie's buttocks.

[1] In defendant's first assignment of error, he asserts that the trial court erred by admitting evidence of prior bad acts, thus violating Rule 404(b) of the North Carolina Rules of Evidence. Having not objected to this evidence at trial, defendant alleges this error for the first time on appeal under the plain error rule. The plain error rule holds that the Court may review alleged errors affecting substantial rights even though the defendant failed to object to admission of the evidence at trial. *State v. Cummings*, 346 N.C. 291, 313, 488 S.E.2d 550, 563 (1997), *cert. denied*, — U.S. —, — L. Ed. 2d —, 66 U.S.L.W. 3491 (1998). This Court has chosen to review such "unpreserved issues for plain error when Rule 10(c)(4) of the Rules of Appellate Procedure has been complied with and when the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *Id.* at 313-14, 488 S.E.2d at 563. The rule must be applied cautiously, however, and only in exceptional cases where

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

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)). Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error. *Id.* at 661, 300 S.E.2d at 378-79.

A review of the evidence in the present case reveals that this is not the exceptional case where such a pervasive defect or plain error occurred which would have tainted all results and denied defendant a right to a fair trial. Defendant alleges that admission of statements that he made to Investigator John Little in a taped interview about his prior assault conviction, probation, and alcoholism violated Rule 404(b). The taped interview, which was played for the jury in its entirety, contained the following:

> Defendant Lee: . . . I still told the patrol officer that was there I'm on probation. In 1988, I was out in Colorado and a guy and I got into a fight and I got the better part of the deal, and the Colorado police didn't like the fact that I came from North Carolina and beat up on the people out there. And, at that time, I was a serious heavy drinker. Since then, I changed that and I cleaned up my act.
>
> [Investigator] Little: Okay.
>
> Defendant Lee: My probation officer, Ralph Pittman, he has that information.

Defendant Lee states later:

> I, I, don't have any children. It's in my brain, you know, there's some research that alcoholism is genetic and all that, so I'm like that's not a gene I care to pass on.

In addition to statements from the taped interview, defendant alleges that Brenda Finch's testimony that defendant bought marijuana during the week of Robbie's death was inadmissible. Finally, defendant argues that the trial court improperly admitted Detective Rob Ennis' testimony that Brenda Finch said that defendant was a "pot" smoker and drank alcohol. Admission of this evidence is simply not so fundamental or prejudicial that a miscarriage of justice has occurred. Evidence that defendant drank alcohol and smoked "pot" is inconsequential to the determination of whether defendant committed the murder. There is no way that this evidence could have amounted to a grave error which denied a fundamental right of the accused.

Similarly, admission of the evidence that defendant got into a fight and was convicted for it several years ago in Colorado is not especially probative of whether he repeatedly abused and sexually assaulted a small child. In the wake of other evidence showing that defendant repeatedly abused the child, including admissions by defendant that he caused several bruises apparent on the victim's

body, admission of this evidence certainly could not have created a miscarriage of justice. We conclude that plain error did not occur, thus, this assignment of error is overruled.

[2] In his second assignment of error, defendant argues that the trial court committed plain error by admitting Detective Rob Ennis' testimony regarding statements Brenda Finch made to him in an interview on 2 February 1995. Defendant argues that this evidence constitutes inadmissible hearsay and that the trial court improperly allowed the statements in evidence under the prior consistent statement exception to the hearsay rule.

Under Rule 801 of the North Carolina Rules of Evidence, hearsay is defined as a statement, other than one made by the declarant while testifying at trial, that is offered to prove the truth of the matter asserted. N.C.G.S. § 8C-1, Rule 801(c). "Any hearsay statement as defined in Rule of Evidence 801(c) is inadmissible except as provided by statute or the Rules of Evidence." *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997). One exception to the general bar against admitting hearsay is the prior consistent statement exception to the hearsay rule. Under this exception in North Carolina, there is a liberal policy in allowing prior consistent statements to be admissible even when the witness has not been impeached. *State v. Taylor*, 344 N.C. 31, 48, 473 S.E.2d 596, 606 (1996). To be admissible, the prior consistent statement must first, however, corroborate the testimony of the witness. *State v. Singletary*, 344 N.C. 95, 107, 472 S.E.2d 895, 902 (1996). To constitute corroborative evidence,

> 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. Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence. However, the 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. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

State v. Ramey, 318 N.C. 457, 469, 349 S.E.2d 566, 573-74 (1986) (citations omitted).

In the instant case, defendant contends that the trial court erred by allowing Detective Rob Ennis to testify that: (1) Brenda Finch told him that defendant said he was abused as a child, (2) Brenda Finch told him that her husband was afraid defendant would beat up her minor child, (3) Brenda Finch told him that she believed defendant may have done something to Robbie, (4) Brenda Finch told him that defendant got mad because he believed Robbie's autopsy report was wrong, (5) Brenda Finch told him she knew defendant injured the victim, and (6) Brenda Finch told him she and defendant tried to get their stories straight.

Contrary to defendant's contention, all of the above statements save the first item are admissible in evidence as prior consistent statements which corroborate and add weight to the trial testimony of Brenda Finch. The second statement, concerning Brian Finch's belief that defendant would beat up Robbie, adds credence to Brenda's testimony that she told Brian about Robbie's bruises and that Brian got very upset about them. The statement also adds weight to Brenda's testimony that she immediately told Brian that the injuries were an accident because she did not want Brian to think defendant beat up Robbie. The third statement, in which Brenda admitted that defendant might have done something to Robbie, corroborates Brenda's testimony about defendant admitting to her that he had grabbed Robbie and was therefore responsible for putting the bruises on Robbie's arm and chin. The fourth statement, which concerned defendant believing that the autopsy report was wrong, corroborates Brenda's testimony that she had read the autopsy report three weeks after Robbie's death and had confronted defendant with the autopsy report. The fifth statement, in which Brenda said that she knew defendant injured Robbie, corroborates Brenda's testimony that defendant admitted to inadvertently causing Robbie's bruises. The sixth statement in its entirety read: "She said in the past [that defendant] had asked her a lot of questions about the times and dates that she [had] noticed Robbie's bruising period. She said it was like he was wanting to get their stories straight." This statement adds weight to Brenda's testimony that she still loved defendant and did not believe until he was incarcerated that he had abused or harmed Robbie. Finally, although the first item concerning defendant being abused as a child did not corroborate any trial testimony, this error clearly did not constitute plain error. Having found that five of the statements were admissible and that the sixth statement failed to constitute plain error, we therefore conclude that this assignment of error is also without merit.

[3] In his third assignment of error, defendant contends that the trial court erred by failing to intervene during the prosecutor's closing argument when the prosecutor made arguments allegedly unsupported by evidence. Defendant argues that the prosecutor stated that defendant and the victim made certain statements when there was no evidence to indicate that defendant or the victim made such statements. As defendant failed to object to the prosecutor's 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*." *State v. Woods*, 345 N.C. 294, 312, 480 S.E.2d 647, 655, *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 132 (1997). We find that it was not.

The prosecutor argued that:

(1) Defendant said, "Ain't no use in giving that kid CPR, he's dead, but I got to do something, can't just sit here."

(2) Defendant said, "I don't want this kid around, don't you understand, Brenda."

(3) Defendant said, "Knowing that I might hurt this kid. Who cares. He ain't mine. Well, I'll get rid of this pain, hit him. That's what I got for you, boy."

(4) Defendant said, "Went too far, killed him. Should have known I was going to. I intentionally put those bruises on him. Damn. First Degree Sex Offense."

(5) Defendant said, "Better take the kid to the hospital. Because I just knocked him. Might be suffering from brain damage. Cover my tracks."

(6) Defendant said, "Hey Robbie, how you doin' old boy? Wake up. Wake up. Wake up, you little bastard."

(7) Defendant said, "Get him out of the way; I want mama to myself and, I never blamed it on mama, I never blamed it on Brian, I don't know what happened."

(8) Robbie said, "No, mama, no, don't let him beat me no more. Mama, don't take me in the house, if you take me in there, I'm going to die."

These statements made by the prosecutor during closing argument were not intended as statements of fact, but were instead offered as hypothetical thoughts that defendant and the victim may

have had during the week of the homicide. In the past, we have held that it is not improper for a prosecutor to argue or propose what thoughts the victim may have had while being victimized if the inference is supported by the record. *Id.* We have also held that it is not improper for a prosecutor to argue or suggest to the jury what the defendant may have been thinking in committing a crime when the argument is a reasonable inference based on facts in evidence. *State v. Shank*, 327 N.C. 405, 410-11, 394 S.E.2d 811, 815 (1990). In the instant case, the prosecutor's comments during his closing argument were also reasonable inferences drawn from the evidence. The trial court, therefore, did not err by failing to intervene. Accordingly, this assignment of error is overruled.

[4] In his fourth assignment of error, defendant contends that the trial court erred by failing to intervene *ex mero motu* during closing argument when the prosecutor characterized the defendant as a "mean," "bad," and "dangerous" man. In his closing, the prosecutor hypothesized that the victim may have had the following thoughts during the last week of his life: (1) "I'm going back to where the mean or bad man stays"; and (2) "Mama, don't take me back to the place where the bad man lives." The prosecutor also argued during his closing that defendant should be considered a dangerous man.

Once again, because defendant did not object to these arguments at trial, the standard of review is whether the argument was so grossly improper that the trial court erred by failing to intervene *ex mero motu*. *State v. Woods*, 345 N.C. at 312, 480 S.E.2d at 655. As previously discussed, it is not improper for the prosecutor to argue what thoughts the victim could have had as long as the argument is a reasonable inference based on the evidence. *State v. Woods*, 345 N.C. at 305, 480 S.E.2d at 651. In this case, the two hypothetical thoughts that the prosecutor argued the victim may have had are both reasonable inferences based on the evidence. Both statements could be drawn from Brenda Finch's trial testimony that defendant bruised Robbie. Due to the bruising, Robbie could have had fearful thoughts about defendant and not have wanted to be left alone with him. The prosecutor's characterization of defendant as dangerous is also a reasonable inference which may have been derived from Brenda Finch's testimony that defendant bruised Robbie or from the various expert witnesses who testified that Robbie was abused. Clearly, these arguments were not so grossly improper as to require the trial court to intervene *ex mero motu*. Accordingly, this assignment of error is overruled.

[5] In his fifth assignment of error, defendant contends that the trial court erred in denying his motions to dismiss the first-degree murder conviction made at the close of the State's case and at the close of all the evidence submitted at trial. Defendant argues that the court should have granted his motions because there was insufficient evidence to support the murder conviction. Defendant asserts that the State failed to offer any direct evidence linking him to the homicide and therefore raised only a suspicion of guilt. We shall consider only the appeal of the denial of the motion made at the close of all the evidence since defendant introduced evidence at trial and therefore waived his right to appeal the motion made at the close of the State's case. N.C.G.S. § 15-173 (1983); *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

To survive a motion to dismiss, the State must offer substantial evidence of each essential element of the offense and substantial evidence that defendant is the perpetrator. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). Substantial evidence is defined as relevant evidence which a reasonable mind could accept as adequate to support a conclusion. *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). When deciding whether substantial evidence exists, " 'the trial judge must view all the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it and resolving any contradiction in the evidence in its favor.' " *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995) (quoting *State v. Abraham*, 338 N.C. 315, 328, 451 S.E.2d 131, 137 (1994)). The motion should not be granted against the State " 'if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction.' " *State v. Stephenson*, 218 N.C. 258, 263, 10 S.E.2d 819, 822-23 (1940) (quoting *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930)). The trial court is "not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss." *Franklin*, 327 N.C. at 172, 393 S.E.2d at 787. Also, contradictions and inconsistencies do not warrant dismissal; the trial court is not to be concerned with the weight of the evidence. *Id.* Ultimately, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). If, upon consideration of all the evidence, only a suspicion of guilt is raised, then the evidence is insufficient, and the motion to dis-

miss should be granted. *State v. Wilson*, 345 N.C. 119, 125, 478 S.E.2d 507, 511 (1996).

In this case, the jury found defendant guilty of first-degree murder by torture. "First-degree murder by torture requires the State to prove that the accused 'intentionally tortured the victim and that such torture was a proximate cause of the victim's death.' " *State v. Pierce*, 346 N.C. 471, 492, 488 S.E.2d 576, 588 (1997) (quoting *State v. Stroud*, 345 N.C. 106, 112, 478 S.E.2d 476, 479 (1996), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 43 (1997)); *see State v. Crawford*, 329 N.C. 466, 479-81, 406 S.E.2d 579, 586-88 (1991)). Torture is defined as " 'the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure.' " *State v. Anderson*, 346 N.C. 158, 161, 484 S.E.2d 543, 545 (1997) (quoting *Crawford*, 329 N.C. at 484, 406 S.E.2d at 589). Course of conduct is defined as " 'the pattern of the same or similar acts, repeated over a period of time, however short, which establish[es] that there existed in the mind of the defendant a plan, scheme, system or design to inflict cruel suffering upon another.' " *Id.* (quoting *Crawford*, 329 N.C. at 484, 406 S.E.2d at 589). The " 'presence or absence of premeditation, deliberation and specific intent to kill is irrelevant' " in determining whether the evidence is sufficient for first-degree murder by torture. *Id.* (quoting *State v. Evangelista*, 319 N.C. 152, 158, 353 S.E.2d 375, 380 (1987)).

When viewing all of the evidence in the light most favorable to the State, we conclude that the trial court did not err in denying defendant's motion to dismiss the murder conviction. The evidence at trial tended to show that defendant intentionally tortured the victim, Robbie Finch, by subjecting him to repeated physical abuse from Saturday, 23 October 1993, to Friday, 29 October 1993, and that this abuse was the proximate cause of Robbie's death. During this one-week period, Robbie consistently emerged from defendant's care with myriad bruises, many of which defendant admitted to causing under the guise of either punishment or protection. On Saturday, 23 October 1993, defendant hit Robbie allegedly to punish him. On Monday, 25 October 1993, Robbie had visible bruises on both sides of his face after spending six hours alone with defendant on Sunday. On Wednesday, 27 October 1993, after being alone with defendant for about four hours, Robbie had new bruises on his arm and visible bruises on both sides of his neck, he was vomiting, he had diarrhea, and his eyes were crossed. This evidence taken together tends to

show that defendant engaged in a course of conduct where he repeatedly abused or tortured Robbie.

The State's evidence also tended to show that Robbie died from a brain injury which was the result of the severe physical abuse. Dr. Sara Sinal, Dr. James Parker, Dr. Gregory Davis, and Dr. Sam Auringer all testified that Robbie's death was the result of a brain injury which caused massive bleeding in his brain. Each doctor also testified that the rampant bruises and head injury did not appear accidental, but were more likely the result of severe child abuse, battered child syndrome, or shaken baby syndrome. In addition, Dr. Parker testified that Robbie probably died around 2:00 a.m. on Friday morning based on the amount of blood that was in his brain. Dr. Parker explained that Robbie would have survived only a few hours after receiving the head injury. Brenda testified that she saw defendant standing over Robbie that night between midnight and 5:00 a.m. Considering all this evidence together in the light most favorable to the State, it seems clear that a jury could reasonably find that defendant committed first-degree murder by torture. Accordingly, this assignment of error is overruled. Defendant has failed to show that there was insufficient evidence to support the murder conviction.

[6] In his sixth assignment of error, defendant argues that the trial court erred in denying his motion to dismiss the first-degree sexual offense conviction. Defendant argues that there was insufficient evidence to support this conviction as well. Again, we find defendant's contention to be without merit. When viewed in the light most favorable to the State, the evidence tended to show that the jury could find that the sexual assault occurred between Thursday afternoon and about 2:00 a.m. on Friday morning when Robbie was still alive. Dr. Williamson, the physician who examined Robbie on Thursday, made no mention of an anal injury. The attending nurse who aided in the exam also made no mention of this injury. No evidence, therefore, suggested that the sexual assault occurred before Thursday night, 28 October 1993.

On Friday morning when Robbie was discovered dead, it was determined that he had a tear in his rectum that was about two inches into his anal canal. Skin abrasions adjacent to the anal opening were apparent, and there was mucus and blood around his anus. According to Dr. James Parker, the pathologist who examined Robbie, it was likely that Robbie was penetrated by an object that was two to three inches in length and three-fourths of an inch in diameter while he was

still alive sometime before 2:00 a.m. on Friday morning. Only Brenda Finch and defendant had access to Robbie from Thursday afternoon until 2:00 a.m. on Friday morning when Robbie died. Robbie was left alone with defendant from 6:00 p.m. until 10:00 p.m. on Thursday night because Brenda had to be at work. When she returned home, she noticed that Robbie's underpants were wet. She removed the pants and placed a towel over the lower half of his body. Later that night, she awoke to find defendant standing over Robbie. Viewing all of this evidence in the light most favorable to the State and taking into consideration evidence that defendant had exclusive access to Robbie, had an opportunity to commit the assault, and had demonstrated ill will toward Robbie by repeatedly bruising him, the jury could reasonably find that defendant sexually assaulted Robbie on Thursday night, when he had exclusive care of him, or Friday morning, when Brenda saw defendant standing over him. Thus, the trial court did not err in denying defendant's motion to dismiss the first-degree sexual offense charge. Accordingly, this assignment of error is overruled.

[7] In his last assignment of error, defendant argues that his Sixth Amendment right to effective assistance of counsel at trial was violated because his attorney failed to make objections to inadmissible evidence. To establish ineffective assistance of counsel, defendant must satisfy a two-prong test which was promulgated by the United State Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). In *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985), this Court expressly adopted the two-part *Strickland* test as the standard to be applied for ineffective assistance claims. Under this two-prong test, the defendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms. *Id.* at 561-62, 324 S.E.2d at 248. This means that defendant must show that his attorney made " 'errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' " *Id.* at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error. *Id.* at 695, 80 L. Ed. 2d at 698. Thus, defendant must show that the error committed was so grave that it deprived him of a fair trial because the result itself is considered unreliable. *Id.* at 687, 80 L. Ed. 2d at 693.

In the instant case, defendant argues that counsel's failure to object to allegedly inadmissible character and hearsay evidence denied him his right to effective assistance. The character evidence that defendant argues was inadmissible is as follows: (1) testimony regarding defendant's prior assault, probation, alcoholism, and marijuana smoking; (2) testimony that defendant bought marijuana during the week of Robbie's death; and (3) four photographs of defendant's living room, which showed a small sign stating, "Notice. Anyone found here at night will be found here in the morning," and another sign stating, "Tact, the ability to tell a man to go to hell and make him happy to be on the way." Two of the photographs showed a mannequin head on a table in the living room with a knife through it. The hearsay testimony which defendant argues was inadmissible and therefore should have been objected to by his attorney is the same evidence that defendant objected to under his second assignment of error.

[8] Defendant's ineffective assistance claim based on his attorney's failure to object to the character and hearsay evidence must fail. First, all of the character evidence to which defendant's attorney failed to object was admissible evidence except one item. In this opinion, we addressed the admissibility of this same character evidence under the first assignment of error. There, we concluded that all of the testimony concerning defendant's assault, probation, drinking, and marijuana smoking was admissible. Since we concluded that this evidence was admissible, the defense attorney's failure to object to it cannot constitute ineffective assistance. The first part of the *Strickland* test is not satisfied where defendant cannot even establish that an error occurred. The admission, without objection, of evidence that defendant drank alcohol also does not constitute ineffective assistance because even if defendant could show that this error fell below an objective standard of reasonableness, defendant could not show that the error deprived him of a fair trial.

[9] Failure to object to the four photographs also did not constitute ineffective assistance since the photographs were authenticated, relevant, and admissible. All of the photographs of defendant's living room were admissible to show the circumstances of Robbie's death and explain Brenda Finch's trial testimony regarding incidents which occurred at defendant's home. The photographs helped the jury visualize the living room and better understand certain testimony, such as Brenda's testimony about Robbie falling off the living room couch and defendant grabbing him. Brenda also testified about coming

home from work the night prior to Robbie's death and finding him lying on the living room couch with his pants soaking wet. The photographs were also relevant to show how Robbie could have hurt or injured himself in defendant's home. The photographs were authenticated by Brenda Finch during her testimony, and the judge instructed the jury to consider the exhibits only for the purpose of illustrating her testimony alone. The mere fact that defendant owned what he now considers inappropriate items and that the photographs displayed these objects does not make the photographs inadmissible. "It has long been the law in this State that a photograph, despite its unpleasant depiction, is competent evidence when properly authenticated as representing a correct portrayal of conditions observed by the witness and used to illustrate the witness's testimony." *State v. Lowery*, 318 N.C. 54, 72, 347 S.E.2d 729, 741 (1986). The photographs were admissible, and the failure of his attorney to object to their admission was not error. Since the failure to object to the evidence was not error, defendant again cannot satisfy the first part of the *Strickland* test. Thus, defendant has no ineffective assistance claim on these grounds as well.

[10] Lastly, the failure by defendant's attorney to object to the hearsay evidence was not negligent conduct and therefore did not constitute ineffective assistance. We analyzed the admissibility of the six hearsay statements defendant points to under his second assignment of error. There, we concluded that all of the hearsay statements except the first were admissible as prior consistent statements which corroborated Brenda Finch's trial testimony. Since the items were found to be admissible, it cannot be error for the defense attorney to remain silent. *Lowery*, 318 N.C. 54, 347 S.E.2d 729 (holding that trial counsel properly did not object to testimony as inadmissible hearsay because statements were in fact admissible as statements of a party opponent or statements made by co-conspirators). We also determined in that analysis that admission of the first statement constituted harmless error, and thus, failure to object to its admission could not have deprived defendant of a fair trial. Thus, we conclude that defendant's seventh assignment of error is also without merit.

Having considered and rejected all of the assignments of error presented by defendant, we conclude that defendant's trial was free from prejudicial error. The sentences against defendant should therefore remain undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
WENDELL FLOWERS	)	

No. 553A94

(Filed 8 July 1998)

Following defendant's direct appeal to this Court and the denial of his petition for writ of certiorari to the United States Supreme Court, the Warden of Central Prison set an execution date of 24 April 1998. On 23 April 1998, Doris Flowers, filing as "next friend of Wendell Flowers," petitioned this Court for a Writ of Certiorari requesting that this Court enter an order, *inter alia*, staying Flowers' then-scheduled 24 April 1998 execution. Pursuant to Doris Flowers' petition, this Court granted a stay of execution, ordering the Rowan County Superior Court to conduct an evidentiary hearing to determine Flowers' competence as defined in N.C.G.S. § 15A-1001(a). Upon completion of said hearing, the Superior Court, Rowan County, was directed to certify to this Court within 20 days of the entry of its order, a copy of said order and a transcript and record of the proceedings. At the conclusion of all the evidence, Judge Jerry Cash Martin concluded as a matter of law that Flowers "is competent and has the legal capacity to proceed as defined as set forth in N.C.G.S. § 15A-1001(a) including the legal capacity to make any decisions incident to the legal issues which exist pursuant to his sentence of death."

Consequently, defendant's *Pro Se* Motion to Set Execution Date is allowed for the limited purpose of entering the following order.

The Court hereby dissolves its previous stay of execution entered on 23 April 1998.

The Warden of Central Prison is hereby directed to schedule a date for the execution of the original death sentence not less than 30 days nor more than 45 days from the date of receiving this order.

By order of the Court in Conference, this 8th day of July, 1998.

Orr, J.
For the Court

ADAMS v. AVX CORP.

No. 151PA98

Case below: 128 N.C.App. 749

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 July 1998.

BAGWELL v. KING

No. 157P98

Case below: 129 N.C.App. 115

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

BALL v. RANDOLPH COUNTY BD. OF ADJUST.

No. 172PA98

Case below: 129 N.C.App. 300

Petition by respondent (Randolph County Board of Adjustment) for discretionary review pursuant to G.S. 7A-31 allowed 8 July 1998.

BROWN v. FLOWE

No. 110PA98

Case below: 128 N.C.App. 668

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 July 1998.

CARRINGTON v. WAKEMAN

No. 208P98

Case below: 129 N.C.App. 262

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 8 July 1998.

CITY OF DURHAM v. WOO

No. 194P98

Case below: 129 N.C.App. 183

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

DIXON v. CITY OF DURHAM

No. 91P98

Case below: 128 N.C.App. 501

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

DTH PUBLISHING CORP. v. UNC AT CHAPEL HILL

No. 123P98

Case below: 128 N.C.App. 534

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

FANTASY WORLD, INC. v. GREENSBORO BD. OF ADJUST.

No. 143P98

Case below: 128 N.C.App. 703

Notice of appeal by appellant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 8 July 1998. Petition by appellant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

FERGUSON v. KILLENS

No. 168P98

Case below: 129 N.C.App. 131

Petition by appellant for writ of supersedeas denied 8 July 1998. Petition by appellant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998. Motion by appellee to dismiss appeal allowed 8 July 1998.

FIELDCREST CANNON, INC. v.
FIREMAN'S FUND INSURANCE CO.

No. 38P98

Case below: 124 N.C.App. 232

Petition by plaintiff (Fieldcrest Cannon, Inc.) and defendant (North River Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

FLOYD AND SONS, INC. v. CAPE FEAR FARM CREDIT

No. 27A98

Case below: 127 N.C.App. 753

Motion by defendant to dismiss appeal denied 8 July 1998.

HITESMAN v. N.C. DEPT. OF TRANSP.

No. 165P98

Case below: 129 N.C.App. 115

Motion by plaintiff to dismiss appeal dismissed 8 July 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

HOLLOWAY v. LIVINGSTONE COLLEGE

No. 181P98

Case below: 129 N.C.App. 262

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

HUFFMAN v. TAYLOR

No. 132P98

Case below: 128 N.C.App. 533

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

IN RE RICHMOND

No. 195P98

Case below: 129 N.C.App. 427

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

IN RE WILL OF LITTLE

No. 163P98

Case below: 129 N.C.App. 116

Petition by appellant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

JACOBS v. WINSTON-SALEM ZONING BD.

No. 160P98

Case below: 129 N.C.App. 116

Petition by appellants for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

JENKINS v. WYSONG & MILES CO.

No. 164P98

Case below: 129 N.C.App. 263

Petition by defendant (Highland Tank and JJF Properties) for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998. Conditional petition by defendant (Wysong & Miles) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 8 July 1998.

LEAK v. LEAK

No. 189P98

Case below: 129 N.C.App. 142

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

LOCKLEAR v. NIXON

No. 166P98

Case below: 129 N.C.App. 105

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

MEADS v. N.C. DEPT. OF AGRICULTURE

No. 139A98

Case below: 128 N.C.App. 750

Petition by petitioner (Meads) 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 8 July 1998.

MOORE v. McRORIE

No. 152P98

Case below: 129 N.C.App. 116

Notice of appeal by plaintiffs pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 8 July 1998. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

MUSE v. BRITT

No. 373P97

Case below: 347 N.C. 268
347 N.C. 577
123 N.C.App. 357

Motion by plaintiff for reconsideration of petition for discretionary review dismissed 8 July 1998.

OKWARA v. DILLARD DEPT. STORES

No. 121P98

Case below: 128 N.C.App. 748

Petition by plaintiff for discretionary review pursuant to G.S. A-31 denied 8 July 1998. Motion by defendant to dismiss appeal allowed 8 July 1998.

PENLAND v. PRIMEAU

No. 239P98

Case below: 129 N.C.App. 647

Motion by defendant for temporary stay denied 22 June 1998.

PHILLIPS v. STATE FARM MUTUAL AUTO. INS. CO.

No. 144P98

Case below: 129 N.C.App. 111

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

PIAZZA v. LITTLE

No. 193PA98

Case below: 129 N.C.App. 77

Petition by unnamed defendant (Automobile Insurance Company of Hartford) for discretionary review pursuant to G.S. 7A-31 allowed 8 July 1998.

R. J. REYNOLDS TOBACCO CO. v. LIGGETT GROUP, INC.

No. 179P98

Case below: 129 N.C.App. 264

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

ROBERTSON v. CITY OF HIGH POINT

No. 155P98

Case below: 129 N.C.App. 88

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

RUSSELL v. BUCHANAN

No. 228P98

Case below: 129 N.C.App. 519

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

RYAN v. UNC HOSPITALS

No. 48PA98

Case below: 128 N.C.App. 300

Petition by defendant (University of North Carolina Hospitals) for discretionary review pursuant to G.S. 7A-31 allowed 8 July 1998.

SCHMIDT v. OLINGER

No. 142P98

Case below: 128 N.C.App. 751

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

SNEAD v. CAROLINA PRE-CAST CONCRETE, INC.

No. 221P98

Case below: 129 N.C.App. 331

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

SOUTH BLVD. VIDEO & NEWS v. CHARLOTTE ZONING BD.

No. 205P98

Case below: 129 N.C.App. 282

Motion by respondents to dismiss the appeal for lack of substantial constitutional question allowed 8 July 1998. Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. ANTHONY

No. 257A82-2

Case below: Cabarrus County Superior Court

Petition by defendant for writ of certiorari allowed 8 July 1998 for the limited purpose of remanding this case to the Superior Court, Cabarrus County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. Bates*, 348 N.C. 29.

STATE v. BABSON

No. 220P98

Case below: 129 N.C.App. 644

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 8 July 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. BOOKER

No. 241P98

Case below: 129 N.C.App. 644

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. BREWER

No. 210P98

Case below: 129 N.C.App. 428

Petition by defendant (Pro Se) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

STATE v. CARTER

No. 160A92-2

Case below: Wayne County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Wayne County denied 8 July 1998.

STATE v. COCKERHAM

No. 182P98

Case below: 129 N.C.App. 221

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. CORPENING

No. 159P98

Case below: 129 N.C.App. 60

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. CRAIG

No. 257A82-2

Case below: Cabarrus County Superior Court

Petition by defendant for writ of certiorari allowed 8 July 1998 for the limited purpose of remanding this case to the Superior Court, Cabarrus County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. Bates*, 348 N.C. 29.

STATE v. DAUGHTRY

No. 412A93-4

Case below: Johnston County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Johnston County denied 8 July 1998. Petition by defendant for writ of supersedeas of the judgment of the Superior Court, Johnston County denied 8 July 1998.

STATE v. DECASTRO

No. 221A93-2

Case below: Johnston County Superior Court

Petition by defendant for writ of certiorari allowed 8 July 1998 for the limited purpose of remanding this case to the Superior Court,

Johnston County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. Bates*, 348 N.C. 29.

STATE v. FLOWERS

No. 553A94

Case below: Rowan County Superior Court

Motion by defendant to drop appeal allowed 8 July 1998. Motion by Attorney General to vacate stay of execution and remand to Rowan County for setting execution date or direct rescheduling of execution date pursuant to G.S. 15-194 (1996) dismissed as moot 8 July 1998. Motion by defendant to dismiss counsel allowed 8 July 1998. Motion by defendant to fire attorneys dismissed as moot 8 July 1998.

STATE v. FLY

No. 472A97

Case below: 127 N.C.App. 286

Petition by Attorney General for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

STATE v. GADDY

No. 148P98

Case below: 128 N.C.App. 748

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. GREGORY

No. 232A93-2

Case below: Pitt County Superior Court

Petition by defendant for writ of certiorari allowed 8 July 1998 for the limited purpose of remanding this case to the Superior Court, Pitt County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254 and *State v. Bates*, 348 N.C. 29.

STATE v. HALEY

No. 173P98

Case below: 129 N.C.App. 265

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. HAYES

No. 162P98

Case below: 129 N.C.App. 117

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. HILL

No. 202P98

Case below: 129 N.C.App. 429

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 July 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. HOWARD

No. 37P98

Case below: 128 N.C.App. 532

Petition by Attorney General for writ of supersedeas denied 8 July 1998. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. INGRAM

No. 197P98

Case below: 129 N.C.App. 265

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998 without prejudice to file in the Court of Appeals.

STATE v. JACOBS

No. 112P98

Case below: 128 N.C.App. 559

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. JACOBS

No. 183P98

Case below: 129 N.C.App. 265

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 July 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. JONES

No. 395A91-4

Case below: Wake County Superior Court

Petition by defendant for writ of certiorari allowed 8 July 1998 for the limited purpose of remanding this case to the Superior Court, Wake County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254 and *State v. Bates*, 348 N.C. 29. Petition by defendant for writ of supersedeas allowed 8 July 1998.

STATE v. JONES

No. 497A93-2

Case below: Duplin County Superior Court

Petition by defendant for writ of certiorari allowed 8 July 1998 for the limited purpose of remanding this case to the Superior Court, Duplin County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254 and *State v. Bates*, 348 N.C. 29.

STATE v. KELLY

No. 138P98

Case below: 129 N.C.App. 117

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

STATE v. KING

No. 69A94-2

Case below: Durham County Superior Court

Petition by defendant for writ of certiorari allowed 8 July 1998 for the limited purpose of remanding this case to the Superior Court, Durham County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254; in all other respects, the petition is denied.

STATE v. McCARVER

No. 384A92-2

Case below: Cabarrus County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Cabarrus County denied 8 July 1998.

STATE v. RANSOM

No. 140P98

Case below: 128 N.C.App. 753

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. ROBINSON

No. 171P98

Case below: 129 N.C.App. 117

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

STATE v. ROUSE

No. 120A92-2

Case below: Randolph County Superior Court

Petition by defendant for writ of certiorari allowed 8 July 1998 for the limited purpose of remanding this case to the Superior Court, Randolph County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254 and *State v. Bates*, 348 N.C. 29.

STATE v. STINNETT

No. 177P98

Case below: 129 N.C.App. 192

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998. Motion by Attorney General to dismiss appeal allowed 8 July 1998.

STATE v. SWINDLER

No. 161A98

Case below: 129 N.C.App. 1

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 8 July 1998.

STATE v. WHITE

No. 154A98

Case below: 129 N.C.App. 52

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 allowed 8 July 1998.

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

STATE v. WHITFIELD

No. 211P98

Case below: 129 N.C.App. 430

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 dismissed 8 July 1998.

STATE v. WILLIAMS

No. 264A90-4

Case below: Wayne County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Wayne County denied 8 July 1998.

TEXIDOR v. EATHERLY

No. 125P98

Case below: 128 N.C.App. 749

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 8 July 1998.

TRAPP v. MACCIOLI

No. 190P98

Case below: 129 N.C.App. 237

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

PETITION TO REHEAR

REGAN v. AMERIMARK BUILDING PRODUCTS, INC.

No. 449A97

Case below: 347 N.C. 665

Petition by plaintiff to rehear pursuant to Rule 31 denied 18 May 1998.

STATE OF NORTH CAROLINA v. WILLIE LEE GARY, JR.

No. 375PA97

(Filed 9 July 1998)

1. **Indigent Persons § 10 (NCI4th)— appointed counsel—refusal to call certain witnesses—motion for new counsel denied**

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion for a new counsel where defense counsel decided not to subpoena certain witnesses whom defendant claimed would have provided alibi testimony. Nothing in the record supports defendant's claim of ineffective assistance of counsel and nothing supports defendant's claim that he was denied his right to present his own witnesses and to establish a defense; a disagreement between the defendant and his court-appointed counsel over trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney.

2. **Criminal Law § 381 (NCI4th Rev.)— judge's comment—contrasting positions—defendant not directly implicated**

A noncapital first-degree murder defendant did not show substantial evidence of partiality or the appearance of partiality where the court included in its findings on defendant's motion to replace his appointed counsel the statement that "[i]t is readily apparent to anyone with an IQ level above room temperature that the differences between counsel and the defendant relate to trial strategy and tactics." That statement did not directly implicate either defendant or the merits of the case; read in context, it merely attempted to draw the contrast between defendant's characterization of a fundamental conflict involving his basic constitutional right to call witnesses and a more proper characterization of a difference of opinion as to trial strategy.

3. **Appeal and Error § 341 (NCI4th)— admission of evidence—no objection—no assignment of error—issues not considered**

A noncapital murder defendant's assignments of error to the admission of certain evidence were overruled where defendant made no objection at trial and waived plain error analysis by failing to assert plain error in his assignments of error.

4. Evidence and Witnesses § 390 (NCI4th)— noncapital first-degree murder—defendant's prior bad acts—nature of relationship

The trial court did not abuse its discretion in a noncapital first-degree murder prosecution by admitting testimony from the victim's mother concerning defendant's prior bad acts where, in context, the testimony was relevant to show the nature of the relationship between defendant and the victim and was not so inflammatory as to be excluded as unfairly prejudicial.

5. Evidence and Witnesses §§ 322, 343 (NCI4th)— noncapital first-degree murder—prior assault on victim—admissible to show intent and identity

The trial court did not abuse its discretion in a noncapital first-degree murder prosecution by admitting testimony concerning defendant's prior convictions for assault on a female and communicating threats. Defendant's prior assault on the victim tends to establish malice, intent, premeditation, and deliberation, and remoteness in time goes to the weight of the evidence rather than its admissibility. This evidence was also admissible to show identity in that evidence that defendant had assaulted the victim by throwing a hammer at her and the evidence that her death resulted from blows most likely caused by a hammer are sufficiently similar for the evidence of the prior assault to be admissible to show identity. The *voir dire* conducted by the court suggests that the trial judge weighed the probative value against the danger of unfair prejudice and did not abuse its discretion.

6. Evidence and Witnesses § 876 (NCI4th)— noncapital first-degree murder—threats by defendant to victim—hearsay—admissible—state of mind

The trial court did not err in a noncapital first-degree murder prosecution by allowing hearsay testimony from the victim's mother regarding threats made by defendant to the victim. N.C.G.S. § 8C-1, Rule 803(3) allows the admission of hearsay testimony if it tends to demonstrate the victim's then-existing state of mind; this testimony was admissible to show the victim's fear at the time of the conversation with her mother and to demonstrate the basis for her fear, namely, the threat to her life. The fact that this hearsay statement by defendant was contained within a hearsay statement by the victim does not affect its admissibility since both statements were admissible.

7. Homicide § 250 (NCI4th)— first-degree murder—abusive relationship—premeditation and deliberation—evidence sufficient

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motions to dismiss where defendant contended that this was a crime of passion and that the State did not offer any direct evidence of premeditation or deliberation, but the evidence viewed in the light most favorable to the State showed that the victim and defendant had a stormy relationship, defendant abused the victim physically and the victim was afraid of defendant, defendant had on a prior occasion thrown a hammer at the victim and stated that he would kill her if she called the police, the victim had called the police and defendant had pled guilty to assault and communicating threats, defendant had threatened to kill the victim if she broke up with him, the victim was trying to break up with defendant, and she died as a result of repeated blows to her head with a hammer or hammer-shaped object. On this record, the State presented substantial evidence of premeditation and deliberation.

8. Homicide § 552 (NCI4th)— first-degree murder—instruction on second-degree refused—no error

The trial court did not err in a noncapital first-degree murder prosecution by not charging the jury as to the lesser-included offense of second-degree murder where all of the evidence supports a finding of premeditation and deliberation. Defendant argues that the wounds were consistent with a killing done in the heat of passion, but evidence of multiple blows to the head with a heavy, blunt object, any one of which could have killed the victim, does not in and of itself constitute evidence of a killing in the heat of passion; nothing else appearing, evidence that the fatal wounds were inflicted by a hammer or hammer-shaped object and that a hammer had been beside the victim's bed three days before the murder is insufficient for a rational juror to find that premeditation and deliberation are negated; and the contention that an argument or fight may have arisen in a "quasi-domestic relationship" based on the victim being found wearing only socks is mere speculation.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review judgment imposing a sentence of life imprisonment entered by Albright, J., at the 3 October 1994 Criminal Session of Superior Court,

Guilford County, upon a jury verdict of guilty of first-degree murder in a noncapital trial. Heard in the Supreme Court 27 May 1998.

Michael F. Easley, Attorney General, by Tina A. Krasner, Associate Attorney General, for the State.

A. Wayland Cooke and H. Davis North, III, for defendant-appellant.

PARKER, Justice.

Defendant Willie Lee Gary, Jr. was indicted on 13 December 1993 for the first-degree murder of Carolyn Hammonds ("victim") on 26 October 1993. At the noncapital trial defendant was found guilty as charged and sentenced to life imprisonment. For the reasons discussed herein, we conclude that defendant's trial was free from prejudicial error.

The State presented evidence at trial tending to show that defendant and the victim had been seeing each other socially and that the victim was trying to break up with defendant because he had become physically abusive toward her. In May of 1993 defendant had assaulted the victim by throwing a hammer at her and threatening to harm her or kill her if she broke up with him or called the police. On 27 October 1993 the victim's father found the victim dead in her home in Greensboro, North Carolina. She was found lying on her back on the bed in her blood-spattered bedroom, wearing only socks. She had a large amount of blood on her head and face. She died as a result of blows to her head with a blunt object which, according to an expert medical examiner, was either a hammer or hammer-shaped object. Almost any of the several blows she suffered would have led to her death.

Detective David Spagnola of the Greensboro Police Department talked to the victim's parents, who lived three doors away and had seen defendant's truck go by the victim's house several times the night of the murder, 26 October 1993. The victim's next-door neighbor saw defendant's truck parked on the street outside the victim's house on the evening of 26 October 1993. Detective Spagnola obtained defendant's address and telephone number, drove to defendant's house, and called him from his car telephone. Detective Spagnola told defendant that he needed to speak with him and that he would send a police officer to pick him up if he would come out on the front porch. The detective then saw defendant go out the back door of the

house toward a storage shed. Detective Spagnola approached defendant, identified himself, and told defendant to sit down on the ground. An officer then arrived and arrested defendant on some outstanding warrants.

Michael DeGuglielmo, an expert in forensic analysis and DNA testing, compared the bloodstains found on pants owned by defendant to the victim's blood. He found the blood on defendant's pants to be consistent with the victim's blood to a statistical certainty of one in 1.4 billion.

Defendant presented no evidence.

[1] Defendant first contends that the trial court erred and violated both his federal and state constitutional rights by denying his motions for new counsel. Defendant was granted a pretrial hearing on his *pro se* motion alleging ineffective assistance of counsel. Judge Peter McHugh denied the motion and made the following findings of fact and conclusions of law: that there was no showing of ineffective assistance of counsel, that the standards of practice of defendant's trial counsel were in all regards according to the standards of legal practice in North Carolina, and that defendant failed to show good cause for an order from the court substituting counsel of record.

Defendant renewed his objections at trial; and, in the absence of the jury, the trial court entertained a lengthy and disjointed argument from defendant. The essence of defendant's contention was that his counsel's representation was ineffective in that counsel had decided not to subpoena certain witnesses whom defendant claimed would have provided alibi testimony. The trial judge denied defendant's motion for substitute counsel and entered the following findings of fact:

> 6. Basically, a conflict of wills has developed between the defendant and his court-appointed lawyer with regard to trial tactics and strategies;
>
> . . . .
>
> 10. Indeed, the so-called witnesses that the defendant desires to subpoena are witnesses known to [defense counsel] and do not surprise him in the least. He is aware of what these witnesses will testify to, if called. He has made a strategic legal decision that these witnesses should not be called for [the] reason that in

his professional opinion they will do more harm than good to the defendant's cause[.]

Based on these findings of fact, the trial court concluded as a matter of law:

10. A mere disagreement between the defendant and his court-appointed counsel as to trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney. Trial counsel, whether court appointed or privately employed, is not the mere lackey or "mouthpiece" of his client. Indeed, he is in charge of and has the responsibility for the conduct of the trial, including the selection of witnesses to be called to the stand on behalf of his client and the interrogation of them. He is an officer of the Court and owes duties to it as well as to his client;

11. The existence here of a conflict of wills between the defendant and his court-appointed counsel with regard to trial strategy and tactics and the call of witnesses do[es] not require this Court to replace present counsel with another attorney under the totality of the circumstances. Indeed, the defendant's dissatisfaction with his court-appointed counsel appeared to the trial court to have been completely unjustified;

12. Such conflict of will, as described by the defendant in vague, general and overbroad terms does not rise to the level of a fundamental conflict involving the defendant's basic rights;

13. In the present case, this defendant has not shown ineffective assistance of counsel at trial or any impediment to the presentation of his defense caused by counsel's exercise of professional judgment. There is no substantial reason shown for the appointment of a replacement counsel[.]

Defendant now concedes that if this were a mere disagreement over trial tactics, defendant would not be entitled to new counsel. *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). Defendant asserts, however, that this is a more substantial issue than a disagreement over trial tactics. Defendant contends that because his counsel did not issue process for or call his alibi witnesses to testify, defendant was denied his basic rights under both the Sixth Amendment to the United States Constitution, which affords criminal defendants the right "to have compulsory process for obtaining witnesses in his favor," and Article I, Section 23 of the North Carolina

Constitution, which guarantees a criminal defendant the right to "confront the accusers and witnesses with other testimony." We disagree with defendant's contentions.

After a review of the transcript and record, we conclude that the trial court properly denied defendant's motion for substitute counsel and that this denial does not impinge upon defendant's constitutional rights. As we have previously stated, "the type of defense to present and the number of witnesses to call is a matter of trial tactics, and the responsibility for these decisions rests ultimately with defense counsel." *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 211 (1991). A disagreement between the defendant and his court-appointed counsel over trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney. *State v. Robinson*, 290 N.C. 56, 66, 224 S.E.2d 174, 179-80 (1976). In order to be granted substitute counsel, "the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict." *State v. Sweezy*, 291 N.C. 366, 372, 230 S.E.2d 524, 528-29 (1976). Substitution of counsel rests in the sound discretion of the trial court. *Robinson*, 290 N.C. at 66, 224 S.E.2d at 180. Nothing in the record in this case supports defendant's claim of ineffective assistance of counsel, and nothing in the record supports defendant's claim that he was denied his right to present his own witnesses to establish a defense. Accordingly, this assignment of error is overruled.

[2] Defendant next contends that the trial judge made a disparaging comment about defendant's intelligence which called into question the trial judge's impartiality and which now entitles defendant to a new trial. Outside the presence of the jury, an extensive colloquy took place between defendant and the trial court when defendant moved to have his trial counsel replaced for failure to subpoena witnesses whom defendant wanted called. After this colloquy, in a lengthy dictated order denying defendant's motion, the trial court included in its findings of fact the statement that "[i]t is readily apparent to anyone with an IQ level above room temperature that the differences between counsel and the defendant relate to trial strategy and tactics." Defendant asserts that the trial judge should have recused himself under Canon 3C(1) of the North Carolina Code of Judicial Conduct, which provides in pertinent part that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned," such as in a case in which "[h]e has a per-

sonal bias against a party." Code of Judicial Conduct Canon 3C(1)(a), 1998 Ann. R. N.C. 248.

We conclude that defendant has not presented substantial evidence of partiality or evidence manifesting an appearance of partiality on the part of the trial judge. *See State v. Scott*, 343 N.C. 313, 325-26, 471 S.E.2d 605, 612-13 (1996). The trial judge's statement did not directly implicate either defendant or the merits of the case. Read in the context of the entire order, this finding of fact merely attempted to draw the contrast between what defendant characterized as a fundamental conflict involving his basic constitutional right to call witnesses in his defense and what is more properly characterized as a difference of opinion as to trial strategy. Just prior to the finding of fact contested by defendant, the trial court noted that defendant's trial counsel was aware of the witnesses that defendant desired to subpoena; that trial counsel was aware of what those witnesses would testify to if called; and that trial counsel had made a strategic legal decision that those witnesses should not be called since, in his professional opinion, they would do substantially more harm than good to defendant's cause. This assignment of error is overruled.

[3] Defendant next argues five assignments in which he contends the trial court erred in admitting into evidence certain testimony by several of the State's witnesses. Specifically, defendant asserts that admission of the following testimony was error: (i) the testimony of Detective Spagnola that upon seeing defendant go out the back door, "I wasn't sure exactly what he was going to do. In my mind, I thought he was either going to flee the residence or maybe secure or hide a weapon back there or get a weapon"; (ii) the testimony of SBI Agent W.F. Lemmons that the blood stains on defendant's trousers were "high-velocity stains. Very small. Come from an impact"; (iii) the testimony by defendant's grandmother and by Detective D.M. Sexton that defendant had a child by another woman; (iv) the testimony of Carter Allen that on previous occasions he "observed what appeared to be the defendant pushing [the victim] back into her house" and that he saw defendant "forcefully putting his hand on [the victim]"; and (v) the testimony of Detective Sexton that defendant was transported to the Guilford County jail where he was "incarcerated on some unrelated charges."

Defendant concedes that in each instance he lodged no objection when the testimony was offered at trial but asserts in his assignments

of error that the trial court should have intervened *ex mero motu* to strike the testimony as irrelevant and prejudicial. We note that where a criminal defendant has not objected to the admission of evidence at trial, the proper standard of review is a plain error analysis rather than an *ex mero motu* or grossly improper analysis. *See State v. York*, 347 N.C. 79, 86, 489 S.E.2d 380, 384 (1997) (plain error analysis applied to admission of evidence); *State v. Cummings*, 346 N.C. 291, 313-16, 488 S.E.2d 550, 563-65 (1997) (plain error analysis applied to admission of confessions), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 873 (1998); *see also State v. Hester*, 343 N.C. 266, 272-73, 470 S.E.2d 25, 28 (1996) (correct standard of review of prosecutorial argument is not plain error but whether the arguments were so prejudicial and grossly improper as to require corrective action by the trial judge *ex mero motu*). Moreover, where a defendant fails to assert plain error in his assignments of error, as defendant has failed to do in this case, he has waived even plain error review. N.C. R. App. P. 10(c)(4); *State v. Truesdale*, 340 N.C. 229, 232-33, 456 S.E.2d 299, 301 (1995). Even assuming *arguendo* that defendant properly preserved plain error review and that the trial court committed some error in admitting the testimony cited in these assignments of error, we conclude that the alleged errors do not rise to the level of plain error. To prevail on plain error review, defendant must show that (i) a different result probably would have been reached but for the error or (ii) the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). Defendant having failed to make the necessary showing, these assignments of error are overruled.

[4] Defendant also contends that the trial court erred in admitting the testimony of the victim's mother, Hazel Hobbs, concerning prior bad acts of defendant. Defendant objected at trial to the following testimony by Mrs. Hobbs: "He [defendant] cursed me out. I went down there to talk to him and he cursed at me and my husband through me." Defendant argues that although the trial court had ruled, pursuant to Rule 803(3) of the Rules of Evidence, that Mrs. Hobbs could testify to statements made by defendant to the victim to show the victim's state of mind, this statement had nothing to do with the victim's state of mind, was not relevant to any issue in the case, and could have been offered only to prejudice defendant unfairly in the eyes of the jury.

We conclude that, viewed in the context of the entire examination, the witness' testimony is relevant to show the nature of the

relationship between defendant and the victim and is, therefore, admissible:

> Q: In the days or few weeks that preceded October 26, 1993, did you have occasion to speak to your daughter about her relationship with [defendant]?
>
> A: Yes, sir.
>
> Q: And what did she tell you?
>
> A: She—she said, "Mama," she said, "I know how he is." But she said, "Let me work things out myself." Because she didn't want—she was just peace loving. She didn't want him to be angry with her.
>
> Q: Now, when she said she wanted to work things out herself, what had happened or what had transpired or what had occurred to cause her to feel that she needed to work things out herself?
>
> A: He started—he started abusing her. He started—he cursed every breath. He cursed me out. I went down there to talk to him and he cursed at me and my husband through me.
>
> . . . .
>
> Q: Did your daughter say that [defendant] had said anything to her about what he was going to do to her?
>
> A: Yes, sir.
>
> Q: Tell the jury about that[.]
>
> A: I kept talking to her. And she had been under the doctor's care for her nerves, and she was beginning to look so peaked, I said, "Honey, what's the matter?" She said—she said, "He told me he'd kill me if I left him." And then he threatened her all along. And he told her again. She said that he would kill her if she didn't marry him. And she —
>
> Q: Do you know when —
>
> A: She just acted like she was just scared to death of him.

Furthermore, in context Mrs. Hobbs' statement to which defendant takes exception, that defendant cursed the victim's parents on one occasion, is not so inflammatory as to be excluded as unfairly prejudicial pursuant to N.C.G.S. § 8C-1, Rule 403. The trial court did not abuse its discretion in failing to exclude this testimony, and we overrule this assignment of error.

[5] By defendant's next assignment of error, he contends that the trial court erred in allowing into evidence testimony concerning defendant's prior convictions for assault on a female and communicating threats. The State offered evidence that defendant pled guilty to assaulting the victim by throwing a hammer at her and communicating a threat to her by stating, "If you call the police, when I get out I am coming back to kill you." Defendant argues that these offenses, which occurred on 2 May 1993, almost six months prior to the victim's death, were too remote in time to be relevant under Rule 404(b) of the Rules of Evidence. Defendant also argues that the evidence should have been excluded under Rule 403 of the Rules of Evidence since its probative value was substantially outweighed by the danger of unfair prejudice.

Under N.C.G.S. § 8C-1, Rule 404(b), " 'evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused.' " *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)). Rule 401 provides that

> "[r]elevant 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). Evidence is competent and relevant when it reveals a circumstance surrounding one of the parties and is necessary to understand properly their conduct or motives or if it allows the jury to draw a reasonable inference as to a disputed fact. *State v. Riddick*, 316 N.C. 127, 137, 340 S.E.2d 422, 428 (1986).

This Court has repeatedly held that evidence of a defendant's prior assaults on the victim for whose murder the defendant is being tried is admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim under N.C.G.S. § 8C-1, Rule 404(b). *State v. Alston*, 341 N.C. 198, 229, 461 S.E.2d 687, 703 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). In this case defendant's prior assault tends to establish malice, intent, premeditation, and deliberation—all elements of first-degree murder. Similarly, evidence of prior threats by a defendant against a victim has also been held by this Court to be admissible in trials for first-degree murder to prove premeditation and deliberation. *State v. Cox*, 344 N.C. 184, 188, 472 S.E.2d 760, 762 (1996). The remoteness in time of the prior assaults or threats generally goes to the weight of the evidence rather than to its admissibility. *Id.*

The evidence of defendant's prior assault on the victim was also relevant to show identity. In order for evidence of defendant's prior crimes or bad acts to be admissible to show the identity of the defendant as the perpetrator of the crime for which he is being tried, there must be " 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes.' " *Riddick*, 316 N.C. at 133, 340 S.E.2d at 426 (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)). The similarities need not rise to the level of the unique and bizarre, but must tend to support a reasonable inference that the same person committed both the earlier and the later acts. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). In this case the State was required to prove the identity of the killer of the victim. Testimony from Dr. John D. Butts, the chief medical examiner, was that the victim died as a result of blows to her head from either a hammer or a hammer-shaped object. The evidence that defendant had assaulted the victim by throwing a hammer at her and the evidence that her death resulted from blows to the head most likely caused by a hammer are sufficiently similar for the evidence of the prior assault to be admissible to show identity under N.C.G.S. § 8C-1, Rule 404(b). *See State v. Carter*, 338 N.C. 569, 587-88, 451 S.E.2d 157, 167 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995).

Whether to exclude relevant evidence as unfairly prejudicial under N.C.G.S. § 8C-1, Rule 403 is a matter left to the sound discretion of the trial court. *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). In this case the trial court conducted *voir dire* to determine whether the evidence of defendant's prior convictions was offered pursuant to Rule 404(b) and was relevant for some purpose other than showing defendant's propensity for the type of conduct at issue. This hearing suggests that the trial judge weighed the probative value of the evidence against the danger of unfair prejudice. We conclude that the trial court did not abuse its discretion under Rule 403 by admitting this evidence. This assignment of error is overruled.

[6] Defendant next contends that the trial court erred in allowing hearsay testimony from Mrs. Hobbs, the victim's mother, regarding threats made by defendant to the victim. In response to the prosecutor's question, "Did your daughter say that [defendant] had said anything to her about what he was going to do to her?" Mrs. Hobbs answered, in pertinent part, "[S]he said, 'He told me he'd kill me if I left him.' " Defendant argues that it was error to admit this testimony over his objection and without a limiting instruction since the testi-

mony constituted double hearsay and since the State offered it for the inflammatory purpose of showing that defendant committed the murder rather than to show the victim's fearful state of mind. We disagree.

N.C.G.S. § 8C-1, Rule 803(3) allows the admission of hearsay testimony if it tends to demonstrate the victim's then-existing state of mind. *See Bishop*, 346 N.C. at 379, 488 S.E.2d at 776. A murder victim's statements falling within the state of mind exception to the hearsay rule are relevant to show the status of the victim's relationship to the defendant. *Scott*, 343 N.C. at 335, 471 S.E.2d at 618. The victim's statements relating factual events that tend to show the victim's state of mind when making the statements are not excluded from the coverage of Rule 803(3) where the facts "serve . . . to demonstrate the basis for the [victim's] emotions." *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 486 (1998). The testimony in this case was admissible to show the victim's fear at the time of the conversation with her mother and to demonstrate the basis for her fear, namely, the threat to her life. *See Lynch*, 327 N.C. at 223, 393 S.E.2d at 819. The fact that this hearsay statement by defendant was contained within a hearsay statement by the victim does not affect its admissibility since both statements were admissible. *State v. Larrimore*, 340 N.C. 119, 147, 456 S.E.2d 789, 803 (1995). This assignment of error is overruled.

[7] In defendant's next assignments of error, he contends that the trial court erred in denying his motions to dismiss the first-degree murder charge at the close of the State's evidence and again at the close of all the evidence on the ground that the State did not offer any direct evidence of premeditation or deliberation. Defendant argues that while there were several wounds to the victim, all indications were that this was a crime of passion carried out in one frenzied attack.

When considering a motion to dismiss for insufficiency of the evidence, the court must examine the evidence in the light most favorable to the State; and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Allen*, 346 N.C. 731, 739, 488 S.E.2d 188, 192 (1997). The court must also consider whether all the elements of the crime are supported by substantial evidence. *Id.* "Substantial evidence" is relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. *Id.* First-degree murder is the unlawful killing of a human being with malice, premed-

itation, and deliberation. *State v. Skipper*, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994), *cert. denied*, 513 U.S. 1134, 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. Notwithstanding cases from other jurisdictions cited by defendant, this Court has stated:

> Among other circumstances from which premeditation and deliberation may be inferred are (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 difficulty 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. Vause, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991).

In this case, viewing the evidence in a light most favorable to the State, the evidence showed the following: that the victim and defendant had a stormy relationship; that defendant abused the victim physically; that the victim was afraid of defendant; that defendant had on an earlier occasion assaulted the victim by throwing a hammer at her and that he threatened her at that time stating, "If you call the police, when I get out I am coming back to kill you"; that the victim called police in that instance, leading to defendant's arrest and guilty plea to charges of assault and communicating threats; that at various other times, defendant threatened to kill the victim if she broke up with him; that the victim was trying to break up with defendant; that the victim died as a result of repeated blows to her head with a hammer or hammer-shaped object. On this record we conclude that the State presented substantial evidence of premeditation and deliberation and that the trial court properly submitted to the jury the question of defendant's guilt of first-degree murder based on the theory of premeditation and deliberation. These assignments of error are overruled.

[8] In his final assignment of error, defendant asserts that the trial court erred in not charging the jury as to the lesser-included offense of second-degree murder. Murder in the second degree is defined as the unlawful killing of another with malice but without premeditation and deliberation. *State v. Lambert*, 341 N.C. 36, 46, 460 S.E.2d 123, 129 (1995). 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). An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and acquit him of the greater. *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995).

Defendant argues that the evidence was sufficient for a jury rationally to conclude that defendant killed the victim in the heat of passion and without premeditation and deliberation. Defendant points to three factors to support this contention: (i) the nature of the wounds, (ii) that defendant may have arrived at the victim's house unarmed, and (iii) that the victim was found wearing only socks. Defendant first argues that the wounds were consistent with a killing done in the heat of passion. Evidence of multiple blows to the head with a heavy, blunt object, any one of which blows could have killed the victim, does not, however, in and of itself constitute evidence of a killing in the heat of passion. Defendant presented no evidence to support a heat-of-passion killing, and mere speculation is not sufficient to negate evidence of premeditation and deliberation.

Next, defendant argues that the State's evidence that a hammer had been beside the bed in the victim's room three days before the murder and that the fatal wounds were inflicted by a hammer or a hammer-shaped object "certainly indicates the murder weapon was on the premises and not brought there by the assailant" and that the

killing might not have been premeditated and deliberate. Nothing else appearing, this evidence is insufficient for a rational juror to find that premeditation and deliberation are negated. Defendant's reliance on *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673 (1986); *State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982); *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980); and *State v. Potter*, 295 N.C. 126, 244 S.E.2d 397 (1978), cases where this Court has recognized evidence that defendant brought a weapon to the murder scene as evidence of premeditation, is misplaced. The fact that a defendant uses a weapon already at the scene does not, standing alone, negate premeditation and deliberation or raise the inference that the defendant acted in the heat of passion.

Finally, defendant argues that the jury could infer from the fact that the victim was found wearing only socks that an argument or fight may have arisen in the "quasi-domestic relationship" existing between her and defendant, which may have led to a killing in the heat of passion. This contention again is mere speculation. No evidence suggested that the victim and defendant argued or fought just prior to the murder or that the victim in any way provoked defendant.

In sum defendant has shown no evidence supporting the submission of second-degree murder. All the evidence in this case supports a finding of premeditation and deliberation: the threats to kill the victim if she left him or if she called the police after he assaulted her with a hammer, the demonstrated malice as evidenced by repeated physical abuse, and the multiple blows to the victim's head with a hammer or hammer-shaped object. Accordingly, the trial court did not err in failing to instruct the jury on second-degree murder, and this assignment of error is overruled.

For the foregoing reasons we conclude that defendant received a fair trial free from prejudicial error.

NO ERROR.

BETTIE B. SHERROD, ADMINISTRATRIX OF THE ESTATE OF SYLVIA BIRTH, DECEASED v. NASH GENERAL HOSPITAL, INC., AND KENNETH C. THOMPSON, JR.

No. 387A97

(Filed 9 July 1998)

1. Appeal and Error § 206 (NCI4th)— notice of appeal—second Rule 59 motion—tolling of time

Plaintiff's second timely Rule 59 motion for a new trial extended the thirty-day limit specified in Rule 3(c) for giving notice of appeal where plaintiff's first oral motion asserted that the verdict was contrary to the weight of the evidence, and her subsequent written motion asserted the additional grounds (1) that the verdict and jury deliberations showed a manifest disregard of the court's instructions, (2) that a number of errors at trial to which plaintiff objected denied her a fair trial, (3) that there was jury misconduct, and (4) that there were delays and disruptions at trial. Therefore, the thirty-day time period for giving notice of appeal commenced when an order was entered ruling on the second motion for a new trial. N.C.G.S. § 1A-1, Rule 59; N.C. R. App. P. 3(c).

2. Trial § 169 (NCI4th)— defendant physician as expert—ruling in jury's presence—prejudicial error

While it was proper for the trial court to rule that defendant physician could testify as an expert in this medical malpractice action, the trial court committed prejudicial error by ruling in the presence of the jury that it in fact and law found defendant physician to be an expert in the field of general psychiatry and that he would be allowed to testify on matters touching upon his expertise. Defendant physician's level or degree of competence was directly at issue in the case, and the court's announcement might well have influenced the jury in its decision that defendant was not negligent in the death of decedent.

Chief Justice MITCHELL dissenting in part and concurring in part.

Justice ORR joins in this dissenting and concurring opinion.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 126 N.C. App. 755, 487 S.E.2d 151 (1997), affirming a judgment for defendants entered by

Butterfield, J., on 7 December 1995 in Superior Court, Nash County. On 29 October 1997, this Court allowed defendant Thompson's petition for discretionary review of an additional issue. Heard in the Supreme Court 12 February 1998.

Leland Q. Towns for plaintiff-appellant and -appellee.

Baker, Jenkins, Jones & Daly, P.A., by Kevin N. Lewis, for defendant-appellant and -appellee Thompson.

LAKE, Justice.

This is a medical malpractice case which presents two issues for determination: first, whether the Court of Appeals erred in holding that plaintiff's appeal was timely filed; and second, whether the trial court committed prejudicial error by ruling in the presence of the jury that defendant Thompson was accepted by the court as an expert and would be allowed to testify as an expert witness in the field of general psychiatry.

The Court of Appeals held that plaintiff's appeal was timely filed, and the majority held that the trial court did not commit reversible error when, in the presence of the jury, it declared defendant Thompson to be an expert witness. This Court allowed defendant Thompson's petition for discretionary review as to the notice of appeal issue, and plaintiff appeals from the dissent below on the expert witness issue. For the reasons hereinafter stated, we affirm the Court of Appeals' holding that plaintiff's appeal was timely filed, and we reverse as to its conclusion on the second issue that the trial court did not commit prejudicial error in declaring, in the presence of the jury, the expertise of the witness.

In this case, the plaintiff brought suit on behalf of the estate of Sylvia Birth against both Nash General Hospital, Inc. (NGH) and Kenneth C. Thompson, Jr. The complaint asserted five specific allegations of negligence against defendant hospital and seven specific allegations of negligence against defendant Thompson and asserted that the negligence of each defendant was a proximate cause of the death of Sylvia Birth.

The record reflects the following evidence was before the trial court. On 30 August 1990, the deceased, sixty-five-year-old Sylvia Birth, was admitted to NGH upon the recommendation of her primary treating physician, Dr. Kenneth C. Thompson, Jr. Ms. Birth had stopped eating and sleeping, and her behavior had become erratic.

Prior to her arrival at NGH, Ms. Birth had been taking the following prescribed medications: 100 milligrams of Imipramine a day; 20 milligrams of Diazepam (Valium) a day; and 40 milligrams of Propranolol (Inderal) twice daily. After Ms. Birth's admission at NGH, Dr. Thompson prescribed Haldol, 5 milligrams; Ativan, 1 milligram; and Diazepam, 5 milligrams twice a day and 10 milligrams at bedtime. He continued her Imipramine, increasing her dosage to 150 milligrams, and increased Inderal to 80 milligrams twice a day. Additionally, he prescribed Mellaril, 50 milligrams by mouth, every eight hours and then as needed; Haldol, 2 milligrams; and Ativan, 1 milligram every four hours as needed.

During Ms. Birth's seventeen-day stay at NGH, her physical and mental condition worsened, and she became increasingly confused, agitated, disoriented and delusional. Ms. Birth was often placed in physical restraints, as she was combative and moved continuously. Dr. Thompson did not order diagnostic tests or consult with any other medical specialist. On 15 September 1990, Ms. Birth was transferred, pursuant to Dr. Thompson's orders, by a deputy sheriff from NGH to Cherry Hospital in Goldsboro. Ms. Birth died on 16 September 1990.

At trial, one of plaintiff's expert witnesses, Dr. Thomas Clark, testified that he performed an autopsy on Ms. Birth and first concluded that she died from Imipramine poisoning but later concluded that multiple drug overdoses caused her death. Dr. Clark also testified that the manner of death was suicide based on his opinion that the drugs in her blood were elevated beyond what he thought she could reasonably have expected to get from taking the drugs in the amounts that were prescribed. Dr. K.N. Murthy testified as an expert that he admitted Ms. Birth at Cherry Hospital; that upon her arrival she was agitated, uncontrolled and disoriented; and that he ordered a physical examination and lab work and that all medications be withheld. Several witnesses from Cherry Hospital testified for plaintiff that while Ms. Birth was at Cherry Hospital, she did not receive any medications other than two doses of Ativan and that she did not bring any medications with her. Cherry Hospital records also indicated that Ms. Birth received no medication other than two doses of Ativan while at the hospital.

Dr. Harold C. Morgan, an expert for plaintiff, testified that, in his opinion, Dr. Thompson was negligent in his treatment of Ms. Birth in that he failed to exercise reasonable care and diligence in his care of Ms. Birth, that he failed to comply with the standard of care required

by law, and that his negligence proximately caused Ms. Birth's death. Specifically, Dr. Morgan testified that Dr. Thompson failed to conduct adequate diagnostic work, overprescribed medication and improperly combined the same class of medication, failed to consult with other specialists, and failed to recognize that Ms. Birth was in a drug-induced delirium. Dr. Morgan also testified that it was unreasonable for Dr. Thompson to base his diagnosis of Ms. Birth on her past hospitalizations because Ms. Birth's 30 August 1990 hospitalization was different from previous hospitalizations. This testimony included the observation that in prior hospitalizations, in contrast to her last admission, Ms. Birth had responded quickly to medications and treatment, had shown auditory hallucinations, and had only been on a total of two or three different medications at lower dosages. William T. Sawyer, a licensed pharmacist and faculty member of UNC School of Pharmacy, and a board-certified pharmacotherapist, testified for plaintiff that Ms. Birth's drug overdose was likely caused by the accumulation of drugs administered during her stay at NGH.

Defendant NGH presented testimony tending to show that the care rendered by NGH nurses was within the standard of care as applied to nurses. Defendant Thompson presented several medical doctors who, in the presence of the jury, were tendered and accepted by the trial court as experts, and who then testified on behalf of defendant Thompson. Dr. Thompson testified extensively in his own behalf, as an expert, that his care of Ms. Birth complied with all generally accepted standards of care within the practice for psychiatrists, that he did not believe she was in a drug delirium, and that there were no signs of overmedication. He testified that there was nothing different about Ms. Birth's condition on 30 August 1990 upon her admission to NGH than in past admissions to the hospital. Dr. Thompson further testified that Ms. Birth ate better and took her fluids better than previously, and that he prescribed Mellaril to Ms. Birth despite her extreme sensitivity to this drug in the past. Additionally, Dr. Thompson testified that although he realized on 11 September 1990 that Ms. Birth was showing no improvement and that the medications were not helping, he did nothing different with respect to her treatment.

On 6 December 1995, the jury answered the liability issue in defendants' favor, finding neither defendant negligent in the death of the decedent. Plaintiff, in open court, orally moved that the verdict be set aside as contrary to the weight of the evidence and the law and for a new trial, which the trial court then orally denied. In so doing,

the trial court stated that "under the new rules I believe civil litigants have thirty days in which to file post-trial motions and you may avail yourself of that rule." The trial court entered judgment in accordance with the jury's verdict. On 15 December 1995, plaintiff filed a written motion for a new trial, pursuant to Rule 59 of the Rules of Civil Procedure, contending that: (1) the jury disregarded the instructions by the trial court, (2) the verdict was contrary to the law and the weight of the evidence, (3) errors of law occurring at trial denied plaintiff a fair trial, and (4) there was juror misconduct. On 15 December 1995, plaintiff also filed a motion for a new trial based on delays and disruptions at trial. These motions were heard before Judge Louis B. Meyer who ruled, on 21 March 1996, that they should be dismissed and in the alternative denied. In denying these motions, Judge Meyer stated:

> The hearing and rulings on these motions have absolutely nothing to do with your right of appeal and doesn't impede it in any way. . . . I think these matters that [are] included in your motions concerning the verdict being inconsistent with the evidence and contrary to the weight, ought to be handled on the appeal of the case.

On 27 March 1996, plaintiff filed notice of appeal from the verdict and judgment and the denial of her post-trial motions. On 16 April 1996, defendant Thompson, and on 18 April 1996, defendant NGH, moved to dismiss plaintiff's appeal for failure to timely file notice of appeal pursuant to Rule 3 of the Rules of Appellate Procedure. Plaintiff made a motion pursuant to Rule 60(b)(6) of the Rules of Civil Procedure to set aside Judge Butterfield's ruling denying plaintiff's oral motions. These motions were heard 9 September 1996 by Judge Howard E. Manning, Jr., who denied defendants' motions to dismiss the appeal and allowed plaintiff's motion. In so doing, the trial court stated that "plaintiff should be relieved from Judge Butterfield's ruling of December 6, 1995 denying plaintiff's oral Motion For A New Trial and Judgment Notwithstanding the Verdict because of the trial court's erroneous instruction regarding plaintiff's right to file written post-trial motions."

With respect to this first issue, Rule 3 of the North Carolina Rules of Appellate Procedure provides:

> 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 . . . by a timely motion filed by any party pursuant to the Rules of Civil Procedure . . . , and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions:
>
> . . . .
>
> (4) a motion under Rule 59 for a new trial.

N.C. R. App. P. 3(c).

[1] Defendant Thompson contends that plaintiff's second motion for a new trial cannot extend the thirty-day limit specified under Rule 3 for giving notice of appeal. We disagree. Plaintiff's subsequent Rule 59 motions of 15 December 1995 asserted additional, substantially different grounds for a new trial than those asserted in her first oral motion on 6 December 1995. Plaintiff's first motion asserted that the verdict was contrary to the weight of the evidence. Her subsequent motions asserted four additional grounds: (1) that the verdict and jury deliberations showed a manifest disregard of the instructions of the court, (2) that there were a number of errors of law that occurred at trial and were objected to by the plaintiff which denied her a fair trial, (3) that there was jury misconduct, and (4) that there were delays and disruptions at trial. When a party files a subsequent Rule 59 new-trial motion asserting different grounds as basis for a new trial, that party should still be entitled to application of the tolling provision of Rule 3(c). It is clear from a reading of Rule 59(a) that the grounds set forth there contemplate situations or circumstances which may arise or become known *after* a party has made the usually perfunctory motions for a new trial at the end of the trial. Rule 59(b) gives a party ten days after entry of the judgment to move for a new trial, and plaintiff here filed her subsequent written motions within nine days. Plaintiff thus filed "a timely motion . . . under Rule 59 for a new trial," pursuant to Rule 3(c), and since plaintiff is therefore entitled to the benefit of the Rule 3(c) tolling provision, the thirty-day time period did not commence until 21 March 1996 when Judge Meyer entered his order ruling on these motions. Accordingly, we hold that plaintiff's appeal was timely filed and affirm the Court of Appeals on this issue.

[2] We turn now to the second issue: whether the trial court committed prejudicial error when it declared in the presence of the jury

that defendant Thompson was found by the court to be an expert in the field of general psychiatry and would be allowed to so testify.

At the focal point of the trial (certainly for the defense), and following the testimony on behalf of defendant Thompson of other medical doctors who, in the presence of the jury, were recognized by the trial court as experts, defense counsel called Dr. Thompson as a material witness for his own defense. After being questioned before the jury about his education, experience and training, defendant Thompson was tendered to the court as a medical expert specializing in the field of psychiatry. The trial court then called counsel to the bench, and at the ensuing bench conference, the following stipulation was placed in the record:

> The parties to this action hereby agree and stipulate that at the trial of the above-captioned action, Ron Baker, attorney for Dr. Kenneth C. Thompson, Jr., tendered Dr. Kenneth C. Thompson Jr. as a duly qualified medical expert specializing in the field of psychiatry. Before making a ruling, Superior Court Judge G.K. Butterfield, Jr., held a bench conference on whether it was proper for the court to recognize Dr. Kenneth C. Thompson, Jr., as a duly qualified medical expert in the presence of the jury. After hearing arguments from all three attorneys, the court concluded that it was proper to recognize Dr. Thompson as a duly qualified medical expert specializing in the field of psychiatry. Plaintiff-appellant objected to the trial court recognizing Dr. Thompson, in the presence of the jury, as a duly qualified medical expert specializing in the field of psychiatry and excepted to the ruling.

In the presence of the jury, the trial court then declared, "I find that the witness is an expert in the field of general psychiatry. He will be permitted to testify as to such matters touching upon his expertise."

The precise issue here presented has been determined by this Court in *Galloway v. Lawrence*, 266 N.C. 245, 145 S.E.2d 861 (1966). There, this Court held that in a medical malpractice case where a defendant medical doctor is testifying in his own defense, it is prejudicial error for the trial court to make a statement finding, in the presence of the jury, that such defendant "is a medical expert." *Id.* at 250, 145 S.E.2d at 866. This Court stated in *Galloway*:

> The ruling should have been put into the record in the absence of the jury for it was an expression of opinion by the court with ref-

> erence to the *professional qualifications* of the defendant. It might well have affected the jury in reaching its decision that the child was not injured by the negligence of the defendant. There was no error in permitting the defendant to testify as an expert witness, for there was ample evidence to support the finding of his qualifications as such and his being a party does not disqualify him. The court's finding should not, however, have been stated in the presence of the jury.

Id. (citations omitted) (emphasis added).

In so holding, this Court was applying the statutory mandate, then set forth in N.C.G.S. § 1-180 and now carried forward in N.C.G.S. §§ 15A-1222, 15A-1232 and 1A-1, Rule 51, that "a judge *shall not* give an opinion as to whether or not a fact is fully or sufficiently proved." N.C.G.S. § 1A-1, Rule 51(a) (1990) (emphasis added). In this regard, this Court in *Galloway* quoted from *Upchurch v. Hudson Funeral Home Inc.*, 263 N.C. 560, 140 S.E.2d 17 (1965), as follows:

> "The slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial."

Galloway, 266 N.C. at 250, 145 S.E.2d at 866 (quoting *Upchurch*, 263 N.C. at 567, 140 S.E.2d at 22).

In the case *sub judice*, the question of defendant Thompson's medical expertise was not simply a question of fact, it was one of *the* most critical questions of fact to be decided by the jury—one which bore directly, and with significant impact, on the ultimate issue for the jury. In the first of seven specific allegations of negligence, the complaint in this case states that defendant Thompson "(a) failed to possess the degree of *professional learning, skill and ability* which others similarly situated ordinarily possessed." (Emphasis added.) Thus, defendant Thompson's level or degree of competence was directly at issue. Against this allegation by the plaintiff, the trial court ruled and declared to the jury: "*I find* that the witness *is an expert* in the field of general psychiatry. He will be permitted to testify as to such matters touching upon *his expertise.*" (Emphasis added.) With this ruling and introduction to the jury by the trial court, defendant Thompson then proceeded to testify that his treatment of Sylvia Birth fully met the standard and was proper in all respects.

When this statement was made to the jury, the trial court was not merely expressing or intimating an opinion as to the facts or evidence; rather, the trial court was actually making, additionally, a legal ruling, a conclusion of law which the jury was duty-bound to accept. This ruling in the instant case was enhanced before the jury by the trial court's calling for a bench conference and the entry of the stipulation, preceding the court's pronouncement of its finding. In this regard, this Court stated in *Galloway*, as to inadvertent comments by the trial court in the presence of the jury:

> [T]hey dealt with the very questions which the jury was called upon to decide and were clearly prejudicial to the plaintiffs. The *professional ability and skill* of the defendant and whether or not he visited his patient . . . are questions for the jury, not for this Court or for the judge presiding at the trial. We express no opinion as to these matters and the trial judge is forbidden to do so by the statute.

Galloway, 266 N.C. at 251, 145 S.E.2d at 866 (emphasis added).

Accordingly, we conclude that while it was entirely proper for the trial court to rule that defendant Thompson could testify as an expert, with the legal parameters and privileges incident to such ruling, it was prejudicial error for the trial court to announce to the jury that it *in fact and law* found defendant Thompson to be an expert. Such announced ruling might well have influenced the jury in its decision that defendant Thompson was not negligent in the death of decedent.

The decision of the Court of Appeals is therefore affirmed with respect to the first issue and is reversed with regard to the second issue, and this case is remanded to the Court of Appeals for further remand to the Superior Court, Nash County, for a new trial.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Chief Justice MITCHELL dissenting in part and concurring in part.

I believe that *Galloway v. Lawrence*, 266 N.C. 245, 145 S.E.2d 861 (1966), the precedent relied upon by the majority in this case, reached the correct result. With regard to the issue of whether it was error for the trial court to qualify the defendant-doctor as an expert medical witness in the presence of the jury, however, I respectfully suggest that *Galloway* reached an erroneous conclusion of law and

then erroneously applied that conclusion to the specific facts presented by that case.

In *Galloway*, the primary question of fact for the jury was whether the defendant-doctor had gone to the hospital to attend to his child-patient in a timely fashion. The defendant testified that he had, but the charge nurse at the hospital testified that she had not seen him in the hospital at the time in question. In the presence of the jury, the trial court stated: "Well, of course, now, the evidence with reference to the doctor going to the hospital is that he went there. . . . There is no evidence that he did not go there . . . ." *Id.* at 249, 145 S.E.2d at 865. Additionally, in *Galloway*,

> defendant testified as a witness in his own behalf. His counsel tendered him "as a medical expert." Plaintiffs' counsel stated that he did not wish to ask the defendant any questions; that is, he did not wish to question the defendant's qualifications to express opinions as an expert witness. The court, in the presence of the jury, said: "Let the record show that the Court finds as a fact that [defendant] is a medical expert, to wit: an expert physician in surgery."

Id. at 250, 145 S.E.2d at 865-66. This Court awarded plaintiffs a new trial on the ground that *both* of the above-quoted statements by the trial court

> dealt with the very questions which the jury was called upon to decide and were clearly prejudicial to the plaintiffs. The professional ability and skill of the defendant and whether or not he visited his patient following the telephone call from the nurses are questions for the jury, not for this Court or for the judge presiding at the trial.

Id. at 251, 145 S.E.2d at 866.

I believe that the Court was incorrect in stating in *Galloway* that, on the facts of that case, the "professional ability and skill of the defendant" was a question which the jury was called upon to decide. The plaintiffs in *Galloway* raised no issue in their pleadings or at trial with regard to the defendant's professional qualifications. The only issue presented by the plaintiffs and before the jury in *Galloway* was whether the defendant exercised reasonable diligence in the application of his professional knowledge and skill to the particular patient's care. This Court's conclusion and holding, to the extent it was based on this reasoning, was erroneous. For this reason, I believe that the

Court misapplied the law it announced in *Galloway* to the facts of that case. However, the Court reached the correct result in awarding the plaintiffs a new trial in *Galloway* due to the trial court's clearly erroneous expression of its opinion with regard to whether the doctor had gone to the hospital and applied his knowledge and skills on behalf of his patient, the very issue the jury was to decide.

Further, I disagree with the conclusion of law in *Galloway* that a trial court's ruling in the presence of the jury allowing a witness to testify as an expert witness will affect a jury in reaching its decision as to his professional qualifications. More to the point, I think this is particularly unlikely in a case such as the one facing us here, where almost all of the witnesses were declared to be medical experts by the trial court in the presence of the jury. First, there is something less than completely candid about requiring a trial court to accept a defendant as an expert witness and allow him to give testimony as an expert but then conceal this fact from the jury. This is particularly troubling in a case such as the present one in which the jury has been informed that the trial court has declared all of the other witnesses to be experts, and they are testifying as such. More importantly, I believe that the rule applied by the majority, at least on the facts of this case, is fundamentally unfair and may deny defendant due process and equal protection of law under the United States Constitution and under the Law of the Land Clause of the North Carolina Constitution. Accordingly, I dissent from the decision of the majority of this Court. I would affirm the decision of the majority in the Court of Appeals on this issue, which held that the trial court did not err in this regard.

Recognizing, however, that the rule announced and applied by the majority today will govern future cases, I suggest one possible practical solution to avoid the constitutional problem I see as possibly arising from the opinion of the majority. If, as the majority appears to believe, the act of the trial court in declaring a witness an expert witness has such a profound effect upon jurors, it seems fundamentally unfair to allow one party to enjoy the full effects of such a powerful statement with regard to each of its witnesses, while depriving the other party of a similar declaration by the trial court. Perhaps the fairest and best course for trial courts in light of the holding of the majority would be one by which the trial courts made their findings and rulings as to *all* expert witnesses in the absence of the jury. The witnesses could still state their qualifications before the jury and give expert testimony, but the jury would not be told that any

of them were found by the court to be experts. In short, it seems to me that the only fundamentally fair procedure would be to apply the same rule to experts for both parties. The sauce to be used on the goose should also be used on the gander.

I concur only in that part of the decision of the majority concluding that plaintiff's appeal was timely filed and affirming the Court of Appeals on this issue.

Justice ORR joins in this dissenting and concurring opinion.

BERNICE A. BRILEY, INDIVIDUALLY AND NED H. BRILEY, AS SPOUSE v. WILLIAM S. FARABOW AND HIGH POINT OB-GYN ASSOCIATES, INC.

No. 473PA97

(Filed 9 July 1998)

1. Physicians, Surgeons, and Other Health Care Professionals § 137 (NCI4th)— medical malpractice—consideration of tardy expert witness designation—summary judgment for defendants

Even if plaintiffs' tardy expert witness designation had been considered by the trial court in ruling on defendants' motion for summary judgment in this medical malpractice action, plaintiffs would not have a sufficient forecast of evidence to overcome defendants' motion where defendants' forecast of evidence tended to show that defendant physician met the applicable standard of care in performing surgery upon the female plaintiff and that defendants were not negligent; plaintiffs filed an affidavit by the female plaintiff incorporating and adopting an expert's report stating the opinion that plaintiffs' negligence allegations were provable; the affidavit had no new evidence beyond what was alleged in the complaint except for the expert's report; the trial court sustained plaintiffs' objection to the report because it did not establish the witness's familiarity with the standard of care and was not under oath; assertions in the expert witness designation that the experts would testify that defendants were negligent did not provide any evidentiary material to create a genuine issue of material fact; the designation was inadmissible as evidence since the experts had not been qualified as such and any opinion they offered would therefore be inadmissi-

ble; and if the designation had not been stricken, plaintiffs would still have only unsupported allegations in the pleadings, an affidavit which repeated such assertions, and no specific facts showing the existence of a triable issue.

2. Judgments § 431 (NCI4th)— attorney's negligence—not excusable neglect

An attorney's negligence in handling a case constitutes inexcusable neglect and is not a ground for relief under the "excusable neglect" provision of N.C.G.S. § 1A-1, Rule 60(b)(1).

3. Judgments § 431 (NCI4th)— failure to designate experts—attorney's negligence—denial of relief under Rule 60

The trial court did not abuse its discretion in denying plaintiffs relief under Rule 60(b)(1) from an order striking their expert witness designation under Rule 26(f1) because of failure to designate experts by a court-ordered deadline where competent evidence supported the trial court's determination that the failure to designate experts was due to the unexcused negligence of plaintiffs' attorney rather than to any mistake and that the attorney's negligence did not constitute "excusable neglect" under Rule 60(b)(1). N.C.G.S. § 1A-1, Rule 26(f1).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 127 N.C. App. 281, 488 S.E.2d 621 (1997), vacating the order denying the Rule 60(b)(1) motion entered by Greeson, J., on 24 October 1996 in Superior Court, Guilford County, and remanding the case for a new hearing. Heard in the Supreme Court 9 March 1998.

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellees.

Elrod Lawing & Sharpless, P.A., by Sally A. Lawing and Damien J. Sinnott, for defendants-appellants.

Brinkley, Walser, McGirt, Miller, Smith & Coles, P.L.L.C., by D. Clark Smith, Jr., Stephen W. Coles, and S. Ranchor Harris, III, on behalf of North Carolina Association of Defense Attorneys, amicus curiae.

ORR, Justice.

This case addresses whether Rule 60(b)(1) of the North Carolina Rules of Civil Procedure may be used to provide relief from sanctions

imposed upon plaintiffs under Rule 26(f1) of the North Carolina Rules of Civil Procedure for their attorney's failure to designate experts by a court-ordered deadline. Plaintiffs initiated this medical malpractice suit against Dr. William S. Farabow and High Point Ob-Gyn Associates, Inc., on 11 August 1995, alleging that defendants negligently performed surgery by unnecessarily removing plaintiff's female reproductive organs and perforating her bladder. On 8 September 1995, defendants filed an answer in which they denied all allegations, and a Rule 26(f1) motion in which they requested that the court conduct a discovery-scheduling conference. On 4 October 1995, the court entered a discovery-scheduling order requiring that the parties designate expert witnesses by specific dates; plaintiffs were ordered to designate expert witnesses on or before 30 November 1995 and defendants were ordered to identify their experts by 15 February 1996. The court explained that failure to designate experts in accordance with the order would result in the expert not being allowed to testify at trial.

On 19 February 1996, defendants filed a summary judgment motion pursuant to Rule 56 of the North Carolina Rules of Civil Procedure in which they argued that summary judgment should be granted because no genuine issue as to any material fact existed and defendants were entitled to judgment as a matter of law. In the motion, defendants asserted that plaintiffs had failed to designate their expert witnesses by the scheduling order deadline, 30 November 1995, and that plaintiffs still had not named any experts to testify by the date of the summary judgment motion. Defendants asserted that pursuant to Rule 26(f1) and the scheduling order, experts not designated by the order's deadline should not be permitted to testify at trial.

In support of the summary judgment motion, defendants also submitted an affidavit by Dr. G. Terry Stewart, a specialist in obstetrics and gynecology. In the affidavit, Dr. Stewart stated that he had experience performing hysterectomies and treating patients similar to plaintiff Mrs. Briley, and that after having reviewed the records of Dr. Farabow's treatment of plaintiff, that he believed that "Dr. Farabow met or exceeded the standard of practice in every respect, before, during, and after the surgery performed on Mrs. Briley." Dr. Stewart explained that the complication plaintiff experienced was a risk of the procedure which was performed on her that can and does occur without negligence. Dr. Stewart stated that, in his opinion, plaintiff's complication occurred without any negligence by defendants.

On 5 March 1996, plaintiffs filed an expert witness designation for the first time, identifying two obstetrician-gynecologists, Dr. Harlan Giles and Dr. Paul D. Gatewood, to testify at trial. On 6 March 1996, plaintiffs then filed an opposition to defendants' summary judgment motion and submitted an affidavit of plaintiff Mrs. Bernice Briley. Mrs. Briley stated in the affidavit that a report by the plaintiffs' expert witness, Dr. Paul Gatewood, was attached and adopted by the affidavit, and requested that the report be "incorporated herein by reference the same as if at this point it were set forth in it's [sic] entirety." Dr. Gatewood had rendered an opinion in the report that plaintiffs' negligence allegations were provable.

On 11 March 1996, defendants filed a motion to strike plaintiffs' tardy expert witness designation. A hearing was held as to defendants' motion to strike and defendants' motion for summary judgment at the 29 April 1996 session of Superior Court, Guilford County. On 1 May 1996, defendants filed an objection to the admissibility of plaintiff's affidavit and Dr. Gatewood's report arguing that: (1) Dr. Gatewood's report should not be considered because he was not designated as an expert by the scheduling order deadline; (2) the affidavit of plaintiff, to the extent that it referred to Dr. Gatewood's report, was not based on personal knowledge; and (3) Dr. Gatewood's report failed to establish that he qualified as an expert. Defendants thus asked the court to sustain their objection and exclude Ms. Briley's affidavit and Dr. Gatewood's report.

On 9 May 1996, the court granted defendants' motion to strike plaintiffs' tardy expert witness designation pursuant to Rule 26(f1). In a separate order on 9 May 1996, the court also granted defendants' motion for summary judgment. In the order granting summary judgment, the court stated that "having granted the defendants' motion to strike plaintiffs' expert designation, and having sustained defendants' objection to the affidavit of Mrs. Briley and the unverified report of Dr. Gatewood, the Court finds that there is no genuine issue as to any material fact, and that defendants are entitled to judgment as a matter of law." On 10 May 1996, plaintiffs filed a notice of appeal only of the order striking the witness designation. Plaintiffs did not file a notice of appeal of the order granting summary judgment.

On 9 July 1996, plaintiffs filed a motion with the trial court under Rule 60(b)(1) of the North Carolina Rules of Civil Procedure requesting that the trial court grant relief from its orders granting summary judgment and the motion to strike the designation. Under Rule

60(b)(1), relief from a prior order or judgment may be granted if the party establishes that the order or judgment was mistakenly entered due to the party's "[m]istake, inadvertence, surprise, or excusable neglect." N.C.G.S. § 1A-1, Rule 60(b)(1) (1990). In this case, plaintiffs argued that they should be provided relief from the two prior orders because their trial attorney's failure to designate their expert witnesses by the scheduling order deadline was "*excusable neglect*" under Rule 60(b)(1). Plaintiffs stated that their attorney had stopped preparing discovery, including the expert witness designation, under the mistaken assumption that "the parties had agreed to informally delay further discovery" since settlement discussions had been initiated. The summary judgment order should thus be stricken because it was based at least in part on the allegedly mistaken order striking the expert designation.

On 7 August 1996, defendants filed a response to the Rule 60(b)(1) motion. In the response, defendants stated that "there was absolutely no discussion or agreement about putting discovery on hold" on 1 December 1995 and that Ms. Young, plaintiffs' attorney, was told settlement was unlikely. On 9 October 1996, a hearing was held in Superior Court, Guilford County, and on 24 October 1996, the trial court entered an order denying plaintiffs' Rule 60(b)(1) motion. In the order, the court held that plaintiffs' failure to designate the experts was due to the *unexcused negligence* of plaintiffs' attorney rather than to excusable neglect. The court made a finding that plaintiffs' counsel "did not . . . offer any excuse for the late designation" and did not request an extension of time to file after the deadline. The court concluded therefore that plaintiffs did not qualify for relief because the "failure to designate expert witnesses as required by a Rule 26(f1) order, due to inexcusable neglect of counsel, does not constitute excusable neglect under Rule 60(b)(1)." Also, the court stated that Rule 26(f1), which requires identification of medical experts within certain time periods, was enacted "to provide for the prompt and orderly completion of expert witness discovery in medical malpractice cases so as to avoid delay and surprise." The court stated that Rule 60(b)(1) should not be used to provide relief from sanctions which the legislature intended to be imposed under Rule 26(f1). Finally, the trial court held that plaintiffs did not qualify for relief under Rule 60(b)(1) of the order granting defendants' summary judgment. The court stated that even if it reversed the order striking the witness designation, plaintiffs still did not have evidence to defeat defendants' motion.

On 5 November 1996, plaintiffs filed an additional notice of appeal with the Court of Appeals in which they appealed the denial of the Rule 60(b)(1) motion. The Court of Appeals reversed the trial court decision and vacated the Rule 60(b)(1) order denying plaintiffs relief. The Court of Appeals explained that reversal of the order was required because the trial court had applied the "incorrect legal standard" in determining whether the conduct constituted "*excusable neglect*" under Rule 60(b)(1). *Briley v. Farabow*, 127 N.C. App. 281, 284, 488 S.E.2d 621, 624 (1997). The court stated that the trial court should have made findings of fact regarding "whether plaintiffs' behavior was excusable or inexcusable, not whether their attorneys' behavior was excusable or inexcusable." *Id.* Thus, the court remanded the case for a new hearing on all issues in the Rule 60(b)(1) motion.

On 23 September 1997, defendants petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A-31, which we granted on 6 November 1997. For the reasons which follow, we hold that the trial court's order denying plaintiffs relief under Rule 60(b)(1) was proper. Accordingly, we reverse the Court of Appeals' decision and reinstate the trial court's order.

[1] Plaintiffs argue that they should be relieved under Rule 60(b)(1) of the order striking their expert witness designation. Plaintiffs assert that the order granting summary judgment should also be stricken because it was based on the order striking the expert witness designation. We shall address whether plaintiffs should be provided relief from the summary judgment order under Rule 60(b)(1) first. We note initially, however, that plaintiffs did not file a notice of appeal of the summary judgment order. Thus, it is clear that plaintiffs are attempting to use the Rule 60(b)(1) motion to gain appellate review of the summary judgment order. Still, we address the issue here because we have determined that even if the Rule 60(b)(1) motion should have been granted and thus, the designation not excluded, plaintiffs still would not prevail on the summary judgment motion.

Plaintiffs essentially argue that if the expert witness designation had been considered in determining whether to grant summary judgment, plaintiffs could have defeated defendants' summary judgment motion. Summary judgment is granted if the moving party shows that there is no genuine issue of material fact for trial and it is entitled to judgment as a matter of law, and the nonmoving party fails to meet its burden to come forward with a forecast of evidence establishing that

a genuine issue of material fact exists. *Vassey v. Burch*, 301 N.C. 68, 72-73, 269 S.E.2d 137, 140 (1980). The moving party bears the initial burden of coming forward with a forecast of evidence tending to establish that no triable issue of material fact exists. *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 910 (1998). Once this burden is met, then the nonmoving party must " 'produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial.' " *Id.* at 526, 495 S.E.2d at 911 (quoting *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)) (alteration in original).

In the case *sub judice*, the trial court determined that summary judgment for defendants was proper because there was no genuine issue as to any material fact and defendants were entitled to judgment as a matter of law. Defendants' forecast of evidence tended to show that defendant Dr. Farabow met the applicable standard of care in performing surgery upon plaintiff and that defendants were not negligent. Defendants submitted an affidavit by their expert, Dr. G. Terry Stewart, in which he stated that he was familiar with the standard of care; that he had performed hysterectomies during that time; that he had experience treating patients like Mrs. Briley; and that in his opinion, Dr. Farabow was not negligent.

Plaintiffs' forecast of evidence, on the other hand, failed to show that a *prima facie* case could be made for trial. Plaintiffs submitted an affidavit by plaintiff Mrs. Briley in which she stated that she caused the action to be filed, that the allegations of negligence were set forth in the complaint, and that Dr. Gatewood's report was incorporated in the affidavit. This affidavit had no new evidence beyond what was alleged in the complaint, except for Dr. Gatewood's report and the expert witness designation. The trial court, however, excluded Dr. Gatewood's report because "it did not establish the witness's familiarity with the standard of care and because it was not under oath." The court concluded that "[h]aving stricken the designation and having sustained the objection to Dr. Gatewood's letter, there was absolutely no evidence before the Court in opposition to the defendants' properly supported motion." Plaintiffs acknowledged such in that the trial court stated that "the sole argument advanced by [plaintiffs' counsel] was that by filing a tardy expert designation, plaintiffs had created a question of fact necessitating denial of defendants' motion for summary judgment."

Even if the trial court's exclusion of the expert witness designation had been reversed, it still would not raise a genuine issue of material fact as to summary judgment. Plaintiffs' expert witness designation named two experts, Dr. Gatewood and Dr. Giles, to testify at trial. Plaintiffs alleged in the designation that the "experts" would testify that defendants were negligent. These assertions in the designation, much like an assertion in a pleading, however, do not provide any evidentiary material to create a genuine issue of a material fact. As evidence, the designation was also inadmissible since the experts had not been qualified as such, and any opinion that they offered would therefore be inadmissible. *Borden, Inc. v. Brower*, 17 N.C. App. 249, 193 S.E.2d 751 (affidavits or other material offered which sets forth inadmissible facts should not be considered for summary judgment), *rev'd on other grounds*, 284 N.C. 54, 199 S.E.2d 414 (1973). If the designation had not been stricken, therefore, plaintiffs would still have only unsupported allegations in the pleadings, an affidavit which repeated such assertions, and no specific facts showing the existence of a triable issue. Such unsupported, conclusory allegations are simply insufficient to create the existence of a genuine issue of material fact where the moving party has offered a proper evidentiary showing. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E.2d 363 (1982); *Moore v. Fieldcrest Mills, Inc.*, 36 N.C. App. 350, 244 S.E.2d 208 (1978), *aff'd*, 296 N.C. 467, 251 S.E.2d 419 (1979). The trial court also stated such, noting that

> [e]ven if the Court were to reverse its order striking plaintiff's [sic] tardy expert designation, plaintiffs would not be entitled to any relief from the order allowing defendants' motion for summary judgment because they would still have no competent evidence, as of May 1, 1996, to rebut defendants' properly supported motion. Thus, even if the Court were to find excusable neglect, plaintiffs would not be able to prevail on the record that existed on May 1, 1996, when the motion was heard.

We conclude, therefore, as the trial court did, that Rule 60(b)(1) affords no relief to plaintiff in regard to the trial court order granting summary judgment in favor of defendants since even if the expert witness designation had been considered in deciding summary judgment, plaintiffs would still not have a sufficient forecast of evidence to overcome the motion.

The next issue we must address is whether plaintiffs should be granted relief under Rule 60(b)(1), of the order striking their expert

witness designation under Rule 26(f1) when the order was imposed because of plaintiffs' attorney's failure to file the designation in a timely manner. Rule 26(f1) provides that

> [i]n a medical malpractice action . . . , the judge *shall,* within 30 days, direct the attorneys for the parties to appear for a discovery conference. At the conference the court . . . *shall:*
>
> . . . .
>
> (2) *Establish an appropriate schedule for designating expert witnesses . . . such that there is a deadline for designating all expert witnesses* within an appropriate time . . . .
>
> . . . .
>
> If a party fails to identify an expert witness as ordered, the court *shall,* upon motion by the moving party, impose an appropriate sanction, which may include dismissal of the action, entry of default against the defendant, or *exclusion of the testimony of the expert witness at trial.*

N.C.G.S. § 1A-1, Rule 26(f1) (1990) (emphasis added). This rule was adopted in 1987 to expedite discovery and provide for the prompt designation of expert witnesses. By its express language, it plainly mandates that the court impose mandatory sanctions if a party fails to comply with a deadline regarding the designation of experts. This is exactly what occurred in the instant case: plaintiffs were ordered to designate experts by 30 November 1995 and failed to do so. The sanction of excluding plaintiffs' expert witnesses from testifying was therefore proper under Rule 26(f1).

Plaintiffs assert that these sanctions should be lifted under Rule 60(b)(1) because their failure to file the expert witness designation was due to "excusable neglect." As previously explained, Rule 60(b)(1) permits a court to relieve a party from an order for "[m]istake, inadvertence, surprise, or excusable neglect." N.C.G.S. § 1A-1, Rule 60(b)(1). Interpreting this provision in the context of discovery sanctions is an issue of first impression. This provision, however, is almost indistinguishable from federal Rule 60(b)(1), which provides that a district court may grant relief from an order for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1); *see Sink v. Easter,* 288 N.C. 183, 196, 217 S.E.2d 532, 540 (1975). The "nearly identical provisions of our Rule 60(b) and Federal

Rule 60(b) point to the Federal decisions for interpretation and enlightenment." *Wiggins v. Bunch*, 280 N.C. 106, 110, 184 S.E.2d 879, 881 (1971).

Federal courts have held that although attorney error may, under certain conditions, qualify as a reason for granting relief under Rule 60(b)(1), "neither ignorance nor carelessness on the part of an attorney will provide grounds for 60(b) relief." *Hoffman v. Celebrezze*, 405 F.2d 833, 835 (8th Cir. 1969); *see Helm v. Resolution Trust Corp.*, 84 F.3d 874, 878 (7th Cir. 1996). "[T]ime and time again [it has been held] that inexcusable attorney negligence does not constitute proper grounds for relief under Rule 60(b)(1)." *Helm*, 84 F.3d at 878. "An attorney's negligent mistake, evincing a lack of due care, is not a proper ground for relief under Rule 60(b)," *Rodgers v. Wood*, 910 F.2d 444, 449 (7th Cir. 1990), and "[t]he mere fact that an attorney is busy with other matters does not excuse a neglect on his part" for the purposes of Rule 60(b). *McDermott v. Lehman*, 594 F. Supp. 1315, 1319 (D. Me. 1984). A showing of carelessness or negligence or ignorance of the rules of procedure also does not constitute "excusable neglect" within this rule. *In re Wright*, 247 F. Supp. 648, 659 (E.D. Mo. 1965). "Litigants whose lawyers fall asleep at crucial moments may seek relief from the somnolent agents; inexcusable inattention to the case . . . does not justify putting the adversary to the continued expense and uncertainty of litigation." *United States v. Golden Elevator, Inc.*, 27 F.3d 301, 303 (7th Cir. 1994).

[2] Clearly, an attorney's negligence in handling a case constitutes inexcusable neglect and should not be grounds for relief under the "excusable neglect" provision of Rule 60(b)(1). In enacting Rule 60(b)(1), the General Assembly did not intend to sanction an attorney's negligence by making it beneficial for the client and to thus provide an avenue for potential abuse. Allowing an attorney's negligence to be a basis for providing relief from orders would encourage such negligence and present a temptation for litigants to use the negligence as an excuse to avoid court- imposed rules and deadlines. Plaintiffs have argued that this Court should provide relief from an order if only the attorney, rather than the client, was negligent. Looking only to the attorney to assume responsibility for the client's case, however, leads to undesirable results. As one federal judge noted:

> "Holding the client responsible for the lawyer's deeds ensures that both clients and lawyers take care to comply. If the lawyer's

> neglect protected the client from ill consequences, neglect would become all too common. It would be a free good—the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either."

United States v. 7108 West Grand Ave., 15 F.3d 632, 634 (7th Cir.) (quoting *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986)) *cert. denied*, 512 U.S. 1212, 129 L. Ed. 2d 822 (1994). Thus, we hold that an attorney's negligent conduct is not "excusable neglect" under Rule 60(b)(1) and that in determining such, the court must look at the behavior of the attorney.

In determining whether to grant relief under Rule 60(b)(1), the trial court has sound discretion which will be disturbed only upon a showing that the trial court abused its discretion. *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983). The trial judge has the duty to make findings of fact, which are deemed conclusive on appeal if there is any evidence on which to base such findings. *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 903 (1978).

[3] In the instant case, the trial judge made several findings of fact in the order denying relief to plaintiffs under Rule 60(b)(1). The trial court found that "plaintiffs were required to file their expert witness designation on or before November 30, 1995," and that they "failed to designate any expert witnesses as required by the Rule 26(f1) order." The court found that "no extension of time was sought"; that plaintiffs "did not . . . offer any excuse for the late designation"; and that at the hearing, plaintiffs acknowledged that "the failure to designate was due to [their attorney's] negligence." Consequently, the court's finding that "the failure to designate experts was due to Ms. Young's unexcused negligence, rather than to any mistake," was clearly based on competent evidence.

The trial court's findings are thus deemed conclusive, since based on competent evidence, and this Court's review of the denial of the Rule 60(b)(1) motion is limited to a determination of whether an abuse of discretion occurred. An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985); *see also State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985). Such an abuse may not be established here, where there was ample evidence to support the trial court decision that plaintiffs' attorney's inexcusable negligence failed to constitute "excusable neglect" under Rule 60(b)(1). Accordingly,

the decision of the Court of Appeals is reversed, and the trial court's decision denying relief under Rule 60(b)(1) is reinstated.

REVERSED.

STATE OF NORTH CAROLINA v. JOHNATHON GREGORY HOFFMAN

No. 313A97

(Filed 9 July 1998)

Jury § 257 (NCI4th)— Batson challenge—prima facie showing—prosecutor's reasons stated—no finding—no opportunity for defendant to reply

A capital first-degree murder prosecution was remanded for a hearing on the *Batson* issue with regard to two prospective jurors where the victim was white and defendant black; eleven jurors, all white, had been seated; and every black juror who was not excused for cause had been peremptorily challenged by the State, for a total of three peremptory challenges, or one-quarter of the total number of seats in the jury. Step one of the *Batson* analysis, a prima facie showing of racial discrimination, is not intended to be a high hurdle for defendants to cross; rather the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons, which need not be persuasive or even plausible. The State's explanation will be deemed race-neutral unless a discriminatory intent is inherent in it. Although the trial court here had the State articulate a reason for its challenges for the record each time it ruled that defendant had failed to make a *prima facie* showing, the need for a remand is not obviated because the ruling as to whether the prosecutor intended to discriminate is a question of fact to be left to the trial court. The appellate court does not proceed to step two of the *Batson* analysis when the trial court has not done so. Finally, defendant must be given the opportunity to respond.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Helms (William H.), J., on 14 November 1996 in Superior Court, Union 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 was allowed 5 December 1997. Heard in the Supreme Court 26 May 1998.

Michael F. Easley, Attorney General, by Mary D. Winstead, Assistant Attorney General, for the State.

Center for Death Penalty Litigation, by Staples Hughes, Staff Attorney, for defendant-appellant.

WHICHARD, Justice.

The evidence presented at trial tended to show that between 3:30 and 4:00 p.m. on 27 November 1995, defendant entered a jewelry store in Marshville, North Carolina, wearing a ski mask and carrying a sawed-off shotgun. Danny Cook, the victim, was behind the store's display counter when he saw defendant enter. When defendant entered, the victim told two customers in the store to get down. Defendant shot the victim in the chest from a distance of about three feet. Defendant then broke three glass display cases and took various items of jewelry, including some gold rings and necklaces. Defendant also stole two pistols.

On 22 January 1996 defendant was indicted for the first-degree murder of Danny Cook and robbery with a dangerous weapon. Defendant was tried capitally, and the jury returned verdicts finding him guilty of robbery with a firearm and first-degree murder on the theory of premeditation and deliberation and under the felony murder rule. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. The trial court sentenced defendant accordingly and further sentenced him to 101 to 131 months' imprisonment for the robbery with a firearm conviction.

Defendant presents fourteen issues for review. Because we find *Batson* error in the selection of defendant's jury, we discuss only that issue.

Defendant argues the trial court erred by overruling his objections to the State's use of peremptory challenges to remove four black prospective jurors from the *venire*. Defendant argued to the trial court that the peremptory challenges were racially motivated in violation of the equal protection principles recognized in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

> A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. Third, the trial court must determine whether the defendant has proven purposeful discrimination.

State v. Cummings, 346 N.C. 291, 307-08, 488 S.E.2d 550, 560 (1997) (citations omitted), *cert. denied*, — U.S. —, 139 L. Ed. 2d 873 (1998). Here, each time defendant objected to the State's use of a peremptory challenge to remove a black prospective juror from the *venire*, the trial court ruled that defendant had not made a *prima facie* showing of discrimination. Therefore, the trial court did not proceed to either step two or step three of the *Batson* analysis. We must decide whether the trial court erred when it concluded that defendant had not made a *prima facie* showing of discrimination.

> Several factors are relevant to this determination.
>
> Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995). In addition "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87 (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 97 L. Ed. 1244, 1247-48 (1953)).

The first black prospective juror questioned by the State was Loma Mungo. She was excused for cause based on her opposition to the death penalty. Letitia Brown was the second. She was peremptorily challenged by the State. Defendant objected on *Batson* grounds, arguing that defendant was black, this prospective juror was black, and the victim was white. Defendant also pointed out that of the first

thirty *veniremen* to be called, only two were black, and both were excused—one for cause, and the other peremptorily. Defendant further argued that the State's questioning of prospective juror Brown differed from that of the other prospective jurors by focusing on her extended family.

The trial court ruled that defendant had not made a *prima facie* showing of racial discrimination. It stated that the questions concerning Brown's extended family were appropriate because she stated that she lived with her grandmother. The court also stated that no pattern of peremptory challenges against black prospective jurors had been established.

This Court has considered similar situations. In *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357 (1998), the Court noted that "[d]efendant has shown only that he is black and that the State peremptorily struck one black prospective juror." *Id.* at 462, 496 S.E.2d at 362. The Court held that "[t]his is insufficient to establish a *prima facie* case of racial discrimination." *Id.* Likewise, in *Quick* we held that the State's peremptory excusal of two of four black prospective jurors was insufficient to establish a *prima facie* case. *Quick*, 341 N.C. at 146, 462 S.E.2d at 189. This was so even though the defendant in *Quick* was black and the victims were white. *Id.* When prospective juror Brown was peremptorily challenged here, defendant had shown only that he was black, the victim was white, and the State had peremptorily challenged a single black prospective juror. As in *Smith* and *Quick*, this does not rise to the level of a *prima facie* case of discrimination. The trial court thus did not err with regard to prospective juror Brown.

Defendant argues that because the trial court also asked the State to articulate its reasons for excusing Brown for the record, step one of the *Batson* analysis became moot, and the trial court was required to determine whether the reasons offered by the State were race neutral. We disagree. This Court has explained:

> If the prosecutor volunteers his reasons for the peremptory challenges in question before the trial court rules whether the defendant has made a *prima facie* showing or if the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings

on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext.

> *That rule does not apply in this case because the trial court made a ruling that defendant failed to make a* prima facie *showing before the prosecutor articulated his reasons for the peremptory challenges. . . . Thus, our review is limited to whether the trial court erred in finding that defendant failed to make a* prima facie *showing.*

State v. Williams, 343 N.C. 345, 359, 471 S.E.2d 379, 386-87 (1996) (citations omitted) (emphasis added), *cert. denied*, — U.S. —, 136 L. Ed. 2d 618 (1997). Here, the trial court clearly ruled there had been no *prima facie* showing of discriminatory intent before the State articulated its reasons. Because we have concluded that the trial court's ruling was not erroneous, we do not consider whether the State offered proper, race-neutral reasons for its peremptory challenge.

The next black prospective juror to be questioned by the State was Josephine McLemire. After questioning, the State expressed its satisfaction with her and passed the panel to defendant for questioning. Before defendant finished questioning the prospective jurors in McLemire's panel, the court excused the prospective jurors and adjourned for the day. Defendant continued his questioning of these jurors the next day. When defendant asked McLemire how long she had held her belief in favor of the death penalty, she replied, "Well, I really don't believe in it. I slept on it last night and I'm still undecided." After a period of questioning by defendant, the State, and the trial court, McLemire, the third black prospective juror, was excused for cause.

The fourth black prospective juror, Anita Cox, was peremptorily challenged by the State. This was the State's second peremptory challenge of a black prospective juror. Defendant objected on *Batson* grounds, arguing that the peremptory excusal of two out of four black prospective jurors established a pattern tending to show discriminatory intent. The trial court ruled that defendant had failed to make a *prima facie* showing of discrimination in the State's use of its peremptory challenges. The court noted that no pattern had been established, the State's selection of jurors was being done in a racially neutral manner, and the State had previously passed a black prospective juror, McLemire, to defendant for questioning.

This situation is similar to *State v. Quick*, 341 N.C. 141, 462 S.E.2d 186, where two of four black prospective jurors were peremptorily excused by the State. The cases differ, however, because the two black prospective jurors passed by the State in *Quick* actually served, *id.* at 146, 462 S.E.2d at 189, while the two black prospective jurors not peremptorily challenged by the State here were excused for cause. In its consideration of defendant's arguments, the trial court here appropriately noted that the State had originally expressed its satisfaction with one of these prospective jurors by passing the panel to defendant for questioning. This prospective juror, Anita Cox, also stated that she had been represented by defendant's trial counsel on two previous occasions. Thus, the State may have feared a bias in favor of defendant. Taking all of these matters into consideration, we hold that the trial court did not err when it ruled that defendant had failed to make the requisite *prima facie* showing at this juncture.

In his brief, defendant states that "apparently" the fifth black prospective juror was excused for cause. The record is not clear as to whether this is an accurate statement. For purposes of our analysis, however, it is irrelevant.

The next black prospective juror to be peremptorily challenged by the State was James Rorie. At this point, eleven jurors, all white, had been seated. Defendant objected on *Batson* grounds, arguing that Rorie was the last black *veniremen* in the original pool and that the State had no reason to excuse him except race. The trial court observed that "[a]ll of the questions to all of the jurors exhibited primarily the same sorts and types of questions" and ruled that "[t]here's been no *prima facie* showing that the juror has been selected . . . in any other than a racially neutral manner." We disagree.

At this point eleven white jurors had been seated in a case involving a black defendant and a white victim. The State had peremptorily challenged every black juror who was not excused for cause, for a total of three peremptory challenges against black prospective jurors, or one-quarter of the total number of seats in the jury. Step one of the *Batson* analysis, a *prima facie* showing of racial discrimination, is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge. That too is not a heavy burden. The State's race-neutral explanation need not be persuasive or even plausible; it will be deemed race-neutral unless a discriminatory intent is inherent in it. *Purkett v. Elem*, 514 U.S. 765,

768, 131 L. Ed. 2d 834, 839 (1995). We therefore hold that the trial court erred as a matter of law when it ruled that defendant had failed to make a *prima facie* showing that the State's peremptory challenge of prospective juror Rorie was exercised on the basis of race.

The next black *venireman* to be considered was Lori Brace. She was peremptorily challenged by the State during the selection of the two alternate jurors. Again, defendant objected on *Batson* grounds, arguing that the State had excused every black prospective juror and that there were no racially neutral reasons for excluding this prospective juror. In response, the State contended that defendant had not made a *prima facie* showing. The trial court stated, "they're getting close," but ultimately ruled that defendant had failed to make a *prima facie* showing. For the reasons stated above, this too was error as a matter of law.

Each time the trial court ruled that defendant had failed to make a *prima facie* showing of racial discrimination, the court, in an attempt to facilitate appellate review, had the State articulate for the record its reasons for challenging the prospective juror. For reasons hereinafter stated, however, this does not obviate the need for a remand.

First, we have stated that "[w]hether the prosecutor intended to discriminate against the members of a race is a question of fact," and as a result "the trial court's ruling . . . must be accorded great deference by a reviewing court." *State v. Floyd*, 343 N.C. 101, 104, 468 S.E.2d 46, 48, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 170 (1996). This is 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." *Id.* Thus, we must leave this question of fact for the trial court. Second, we have held that when a trial court makes "a ruling that defendant failed to make a *prima facie* showing before the prosecutor articulated his reasons for the peremptory challenges . . .[,] our review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing." *Williams*, 343 N.C. at 359, 471 S.E.2d at 386-87. We do not proceed to step two of the *Batson* analysis when the trial court has not done so. Finally, although the State was given an opportunity to articulate its reasons for its peremptory challenges, defendant was not given an opportunity to respond. Defendant must be accorded this opportunity; we have held that "[t]he defendant . . . has a right of surrebuttal to show

that the explanations are pretextual." *State v. Peterson*, 344 N.C. 172, 176, 472 S.E.2d 730, 732 (1996).

Accordingly, we remand the case to the Superior Court, Union County, for a hearing on the *Batson* issue with regard to prospective jurors James Rorie and Lori Brace. The trial court is directed to hold this hearing, make findings of fact and conclusions of law, and certify its order to this Court within sixty days of the filing date of this opinion. We shall then pass upon defendant's other assignments of error if it remains necessary to do so.

REMANDED.

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
JOHNATHON GREGORY HOFFMAN)

No. 313A97

(Filed 9 July 1998)

IT APPEARING TO THE COURT that this case contains unresolved issues that may yet come before it for disposition, depending upon the trial court's resolution of the issue that is now the subject of a remand, the Clerk is hereby directed to withhold the issuance of a judgment and final mandate, pursuant to Rule 32 of the Rules of Appellate Procedure, until a final determination of the appeal.

IT IS FURTHER ORDERED that the Court's opinion filed 9 July 1998 shall be deemed effective as of said date of filing.

By order of the Court in Conference, this the 9th day of July 1998.

Orr, J.
For the Court

STATE OF NORTH CAROLINA v. MARK EDWARD FLY

No. 472A97

(Filed 9 July 1998)

1. Appeal and Error § 22 (NCI4th)— appeal based on dissent in Court of Appeals—sufficiency of evidence—reasoning of dissent—argument of additional reason

Where the dissent in the Court of Appeals was based on the premise that there was sufficient evidence to support defendant's conviction for indecent exposure, the State was not limited to arguing solely the reason stated in the dissent but could argue any reasoning in support of the proposition that the evidence was sufficient to support defendant's conviction. Therefore, although the reason stated in the dissent was that the buttocks are private parts, the State could make the additional argument on appeal that the evidence was sufficient to support defendant's conviction because it showed that, at the time defendant's buttocks were exposed, his genitals were also exposed.

2. Obscenity, Pornography, Indecency, or Profanity § 25 (NCI4th)— indecent exposure—private parts—organs of sex and excretion

The phrase "private parts" in the indecent exposure statute, N.C.G.S. § 14-190.9, includes the external organs of sex and excretion.

3. Obscenity, Pornography, Indecency, or Profanity § 25 (NCI4th)— indecent exposure—buttocks not private parts

The buttocks are not private parts within the meaning of the indecent exposure statute.

4. Obscenity, Pornography, Indecency, or Profanity § 25 (NCI4th)— indecent exposure—presence of member of opposite sex

The indecent exposure statute does not require the private parts to be exposed to a member of the opposite sex before a crime is committed, but rather that they be exposed "in the presence of" a member of the opposite sex. The statute does not go to what the victim saw but to what defendant exposed in the victim's presence without the victim's consent.

5. Obscenity, Pornography, Indecency, or Profanity § 25 (NCI4th)— indecent exposure—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of indecent exposure in that the jury could find from the evidence that defendant had willfully exposed private parts, either his anus, his genitals, or both, in the presence of the female victim where it tended to show that, when the victim rounded a turn in the steps of her condominium, she saw defendant "mooning" her; defendant was bent over at the waist, with his short pants pulled down to his ankles, and he was otherwise naked from his head to his feet; the victim saw what she described as defendant's "fanny" or "his buttocks, the crack of his buttocks"; and when the victim yelled at defendant, he pulled his pants up and ran.

On appeal pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, 127 N.C. App. 286, 488 S.E.2d 614 (1997), reversing a judgment entered by Helms, J., on 20 December 1995, in Superior Court, Mecklenburg County. Heard in the Supreme Court on 10 February 1998.

Michael F. Easley, Attorney General, by Amy R. Gillespie, Assistant Attorney General, for the State-appellant.

Isabel Scott Day, Public Defender, by Julie Ramseur Lewis, Assistant Public Defender, for defendant-appellee.

MITCHELL, Chief Justice.

The evidence at trial tended to show that at about 7:30 a.m. on 26 July 1995, Barbara Glover was walking up the steps of her condominium in Charlotte. She rounded a turn on the stairs and looked up to see defendant Mark Edward Fly, a twenty-eight-year-old male, "mooning" her. He was bent over at the waist, with his short pants pulled down to his ankles. He wore no other clothing, except a baseball cap, which was backwards on his head. He was otherwise naked from his head to his feet. Ms. Glover saw what she described as defendant's "fanny" or "his buttocks, the crack of his buttocks." When she yelled at defendant, he pulled his pants up and ran. Ms. Glover ran after defendant to get a description of his getaway vehicle—a bicycle, which she testified was "a real funky neon kind of color." The next morning, she saw him outside on the bicycle looking up at her condominium. She called the police, who later detained defendant for identification by Ms. Glover. After she identified him, he was arrested

by the police, without a warrant, for indecent exposure, in violation of N.C.G.S. § 14-190.9. A magistrate's order was issued pursuant to N.C.G.S. § 15A-511, finding probable cause to detain defendant without a warrant for his arrest on a charge of indecent exposure. Defendant was found guilty of that charge by the District Court, Mecklenburg County, and was sentenced to sixty days' imprisonment. He appealed to the Superior Court.

Defendant was tried *de novo* on 20 December 1995 in Superior Court, Mecklenburg County. At trial, defendant moved for dismissal of the charge against him on the ground that the evidence was insufficient to show that he had exposed his private parts. In particular, defendant argued that buttocks are not private parts within the meaning of the statute. The motion was denied, and the jury subsequently found defendant guilty. The trial court entered judgment sentencing defendant to sixty days' imprisonment.

Defendant appealed to the Court of Appeals. By a divided panel, the Court of Appeals reversed the trial court. The majority in the Court of Appeals concluded that under N.C.G.S. § 14-190.9, the term "private parts" includes only genital organs and, therefore, that the exposure of buttocks is not prohibited by the statute. *State v. Fly*, 127 N.C. App. 286, 288, 488 S.E.2d 614, 615 (1997) (citing N.C.G.S. § 14-190.9 (1993) (effective 1 January 1995)). Judge Walker stated in his dissent that he would give a broader interpretation to the statute to include buttocks within the definition of the phrase "private parts." *Id.* at 289, 488 S.E.2d at 616.

On 27 September 1997, the State gave notice of appeal as a matter of right to this Court based on Judge Walker's dissent in the Court of Appeals. Additionally, on 15 January 1998, the State filed a petition for writ of certiorari seeking to have this Court consider an additional argument, that defendant's private parts were exposed because the evidence tended to show that at the time defendant's buttocks were exposed, his genitals were also exposed. This reasoning was not advanced by the dissent in the Court of Appeals.

[1] Initially, we address whether the State can present an argument before this Court that was not the basis of the dissent below. In *State v. Kaley*, 343 N.C. 107, 468 S.E.2d 44 (1996), we said the "State can argue in this Court any evidence that supports [the dissent's] premise. It is not limited to arguing the reasons in the dissent as to why there was evidence to support the charge." *Id.* at 110, 468 S.E.2d at 46. Thus, because the dissent in this case was based on the premise that

there was sufficient evidence to support the charge of indecent exposure, the State should not be limited to arguing solely that buttocks are private parts. Accordingly, the State is free here to argue any reasoning it wishes in support of the proposition that the evidence was sufficient to support defendant's conviction, as that is the issue on appeal before this Court. Since no writ of certiorari is necessary to permit the State to make such arguments, its petition for writ of certiorari is hereby denied.

The question presented by the State's appeal is whether the Court of Appeals erred in reversing the trial court's order denying defendant's motion to dismiss the charge of indecent exposure for insufficiency of the evidence. The elements of the offense are (1) the willful exposure, (2) of private parts of one's person, (3) in a public place, (4) in the presence of one or more persons of the opposite sex. N.C.G.S. § 14-190.9. The majority in the Court of Appeals reversed the trial court on the basis that the evidence was insufficient to support defendant's conviction because buttocks are not private parts within the meaning of the statute.

The State's witness, Ms. Glover, testified that defendant was bent over and was naked from head to foot, although he was wearing a baseball cap and shorts that were around his ankles. During direct examination, the following colloquy took place:

> THE COURT: Now, exactly what parts of his anatomy did you see or experience?
>
> [MS. GLOVER:] His buttocks, the crack of his buttocks. He's real pasty white. He doesn't have a tan line at all.

Ms. Glover testified that defendant was about four feet in front of her and that "if I would have reached out, I probably could have touched him."

The State argues that the evidence was sufficient to survive defendant's motion to dismiss because it is undisputed that defendant was naked from head to foot and that by definition defendant's private parts were exposed, regardless of whether Ms. Glover actually saw them. We agree.

[2] It appears that in the present case, the Court of Appeals based its holding upon a misreading of *State v. Jones*, 7 N.C. App. 166, 171 S.E.2d 468 (1970). In *Jones*, the Court of Appeals discussed the meaning of the phrase "private parts" as used in another statute, N.C.G.S.

§ 14-190 (1969) (repealed 1971). It concluded that the phrase as used in that statute, since repealed, included only the genital organs. *Jones*, 7 N.C. App. at 169, 171 S.E.2d at 469. As a result, the court held in *Jones* that "the exposure by a female of her breasts to the public view in a public place is not an offense under [former] G.S. 14-190." *Id.* at 169-70, 171 S.E.2d at 469. The definition applied by the court in *Jones* is too narrow to be historically correct and complete. For example, *The American Heritage Dictionary* defines "private parts" as "[t]he external organs of sex and excretion." *The American Heritage Dictionary of the English Language* 1442 (3d ed. 1992). We agree and conclude that in common law and as used in former N.C.G.S. § 14-190, the phrase "private parts" included both the external organs of sex and of excretion.

In the present case, the Court of Appeals erroneously concluded that the legislature's use of the term "private parts" when it enacted "section 14-190.9 is particularly significant in the face of . . . [the Court of Appeals' prior] decision in *Jones* because it reflects a satisfaction with that Court's definition of 'private parts' as a person's 'genital organs.' " *Fly*, 127 N.C. App. at 288 n.1, 488 S.E.2d at 615 n.1. The majority in the Court of Appeals, however, failed to note that the legislature quickly reacted to the decision in *Jones* in the very act which repealed former N.C.G.S. § 14-190 and which first enacted N.C.G.S. § 14-190.9. There, the legislature expressly and unequivocally stated its intent that "[e]very word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit." Act of June 17, 1971, ch. 591, sec. 2, 1971 N.C. Sess. Laws 519 (adding new section 14-190.9 prohibiting indecent exposure and repealing N.C.G.S. § 14-190). However, the legislature later amended N.C.G.S. § 14-190.9 by adding subsection (b) providing that: "Notwithstanding any other provision of law, a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breast feeding." Act of 7 July 1993, ch. 301, sec. 1, 1993 N.C. Sess. Laws 586, 587. In footnote 1 of its opinion in the present case, the majority of the Court of Appeals simply misread the legislative history and the specifically expressed intent of the legislature which repealed the former statute and adopted N.C.G.S. § 14-190.9.

[3] We have already concluded that the phrase "private parts" includes the external organs of sex *and excretion*. On the facts of this

case, it is unnecessary for us to determine what, if any, other parts of the female or male anatomy may be included within the phrase "private parts," as used in N.C.G.S. § 14-190.9, in light of the legislature's expressed preference for an "expansive" interpretation. However, given the posture of this case, we think it wise to note our agreement with the conclusion of the majority below that buttocks are not private parts within the meaning of the statute. To hold that buttocks are private parts would make criminals of all North Carolinians who appear in public wearing "thong" or "g-string" bikinis or other such skimpy attire during our torrid summer months. Our beaches, lakes, and resort areas are often teeming with such scantily clad vacationers. We simply do not believe that our legislature sought to discourage a practice so commonly engaged in by so many of our people when it enacted N.C.G.S. § 14-190.9. To make such attire criminal by an *overly* expansive reading of the term "private parts" was not, we are convinced, the intent of our legislature. The difference, however, between defendant's conduct and someone wearing a bikini is that the former is a clear-cut violation of recognized boundaries of decency, which the statute was intended to address, whereas the latter is a matter of taste, which we do not believe our legislators intended to make criminal.

[4],[5] In the present case, the jury could reasonably find from the evidence that defendant had exposed private parts, either his anus, his genitals, or both. We held under former N.C.G.S. § 14-190 that " '[i]t is not essential to the crime of indecent exposure that someone shall have seen the exposure provided it was intentionally made in a public place and persons were present who could have seen if they had looked.' " *State v. King*, 268 N.C. 711, 712, 151 S.E.2d 566, 567 (1966) (quoting 33 Am. Jur. *Lewdness, Indecency and Obscenity* § 7, at 19 (1941)). Likewise, the current statute does not require that private parts be exposed *to* a member of the opposite sex before the crime is committed, but rather that they be exposed "*in the presence of*" a member of the opposite sex. N.C.G.S. § 14-190.9 (emphasis added). The statute does not go to what the victim saw but to what defendant exposed in her presence without her consent. Thus, the fact that Ms. Glover did not crane her neck or otherwise change her position in an attempt to see more of defendant's anatomy than he had already thrust before her face does not defeat the charge of indecent exposure. Defendant's exposure was indecent within the meaning of the statute and is among the acts the legislature intended to proscribe.

Furthermore, the willfulness of defendant's act distinguishes the exposure of his private parts from situations in which such exposure is unintended and incidental to a necessary activity. Here, defendant *willfully* exposed his private parts in the presence of a member of the opposite sex, apparently for the shock value of the act and its hoped-for effect on Ms. Glover. He succeeded in that endeavor. Even in a society where all boundaries of common decency seem frequently under assault, it is simply unacceptable for a person to harass others by *willfully* exposing in their presence "those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others." *State v. Galbreath*, 69 Wash. 2d 664, 668, 419 P.2d 800, 803 (1966).

For the foregoing reasons, we conclude that the evidence was sufficient to support defendant's conviction for indecent exposure and that the Court of Appeals erred in reversing the trial court. The decision of the Court of Appeals is reversed, and this case is remanded to that court for its further remand to the Superior Court, Mecklenburg County, for reinstatement of its judgment.

REVERSED AND REMANDED.

JOE F. ROBINSON, JR., JEANNE ROBINSON, FRANCES HOLLAR, ANN R. RAGLAND, G. SAM ROWE, JR., AND H. TOM ROWE v. CHARLES R. POWELL, SR., INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF FRANCES R. MARTINE, DECEASED

No. 334PA97

(Filed 9 July 1998)

1. Estates § 51 (NCI4th); Wills § 51 (NCI4th)— decedent's inter vivos transfers of property—alleged undue influence—not attack on codicil—jurisdiction of superior court

Plaintiff will beneficiaries' claims challenging on the ground of undue influence decedent's *inter vivos* transfers of stocks, bonds, bank accounts and other intangible investments to joint ownership with defendant with right of survivorship is not a collateral attack on a codicil that recognized the *inter vivos* transfers so as to deprive the superior court of jurisdiction, and the Court of Appeals erred by deciding that plaintiffs must file a caveat in order to attack the *inter vivos* transfers.

2. Duress, Coercion, and Undue Influence § 6 (NCI4th)— ratification—failure to plead

The issue of whether a codicil to decedent's will ratified her *inter vivos* transfers of intangible investments to joint ownership with defendant, her nephew, with right of survivorship was not before the court in plaintiffs' action to set aside the *inter vivos* transfers on the ground of undue influence where defendant failed to assert ratification as an affirmative defense in either his answer or his motion for summary judgment.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 125 N.C. App. 743, 483 S.E.2d 745 (1997), affirming an order granting defendant's motion for summary judgment entered by Beal, J., on 29 November 1995 in Superior Court, Catawba County. Heard in the Supreme Court 9 February 1998.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., and John J. Korzen; and Martin & Monroe Pannell, P.A., by Martin Pannell, for plaintiff-appellants.

James, McElroy & Diehl, P.A., by Bruce M. Simpson; and Corne, Corne & Grant, P.A., by Robert M. Grant, Jr., for defendant-appellee.

PARKER, Justice.

Plaintiffs are six of the seven nephews and nieces of decedent Frances Robinson Martine; defendant Charles R. Powell, Sr. is the seventh. Mrs. Martine died on 18 November 1991, leaving a last will and testament ("will") and a first codicil to the last will and testament ("codicil") which disposed of her approximately $1.4 million probate estate. This action concerns certain stocks, bonds, bank accounts, and other intangible investments worth over one million dollars that defendant received outside probate pursuant to joint ownership with right of survivorship. The codicil executed by Mrs. Martine on 16 March 1984 provides as follows:

> In consideration of the kindness, help and assistance given to me over the years in the management of my affairs and otherwise by Charles R. Powell, Sr., I have, from time to time, registered, listed and titled (or otherwise provided for evidence of ownership) certain stocks, bonds, securities, notes and other similar intangible personal property owned by me jointly in my name and

> the name of Charles Robert Powell, Sr. with right of survivorship. It was and is my intent and I do hereby provide for and declare contractually that any such personal property standing in the joint names of myself and Charles Robert Powell, Sr., shall pass to the said Charles Robert Powell, Sr. under a Right of Survivorship if he survives me.

The codicil then provides that the property shall pass to defendant's spouse in the event defendant predeceases Mrs. Martine.

Plaintiffs allege, *inter alia*, that beginning in 1982 and continuing until Mrs. Martine's death in 1991, defendant had a confidential relationship with Mrs. Martine and through undue influence over her caused Mrs. Martine's solely owned stocks, bonds, bank accounts, and other intangible investments to be transferred to the joint ownership of Mrs. Martine and defendant with right of survivorship. Upon Mrs. Martine's death defendant took unencumbered ownership of the property by right of survivorship. The trial court found that no dispute as to any material fact existed and granted defendant's motion for summary judgment on all claims.

The Court of Appeals affirmed. The Court of Appeals reasoned thusly:

> This codicil recognizes that Ms. Martine transferred certain intangible property to a joint tenancy with defendant and the codicil ratifies those transfers as consistent with Ms. Martine's intent and as in consideration for defendant's efforts in assisting her over the years. By challenging the transfers underlying this language in the codicil, plaintiffs in effect challenge the language of the codicil itself. At the very least, plaintiffs would have to attack the codicil to prove that the codicil was not an effective ratification of the questioned transfers to defendant. Accordingly, we conclude that plaintiffs must properly challenge the codicil here in order to challenge the transfers identified therein. *Casstevens v. Wagoner*, 99 N.C. App. 337, 338-39, 392 S.E.2d 776, 778 (1990).
>
> It is well-settled that an attack upon a will or codicil must be by duly initiated caveat. *Id.* Collateral attacks alone, such as plaintiffs have attempted here, are not permitted. *Id.* . . .
>
> . . . .
>
> We conclude that, absent a duly filed caveat, the trial court here is without jurisdiction to determine the merits of plaintiffs' claim.

Robinson v. Powell, 125 N.C. App. 743, 483 S.E.2d 745 (1997) (unpublished). For the reasons stated herein, we reverse.

[1] The sole issue before this Court is whether the Court of Appeals erred in holding that the trial court lacked jurisdiction over plaintiffs' claims challenging the *inter vivos* transfers of decedent's property. Plaintiffs argue that the Court of Appeals' reliance on *Casstevens v. Wagoner*, 99 N.C. App. 337, 392 S.E.2d 776 (1990), was misplaced. In *Casstevens* the plaintiffs filed a pleading denominated a "Complaint and Caveat." This pleading sought to set aside (i) the decedent's will executed in 1971 which devised all the decedent's real and personal property to Nellie Wagoner and (ii) a deed executed by the decedent in 1979 conveying 230 acres of realty to Nellie Wagoner. Under the will the plaintiffs had no legal interest in the decedent's estate and could not benefit from recision of the deed unless the will was set aside. Hence the action was an impermissible collateral attack on the decedent's will. *Id.* at 339, 392 S.E.2d at 778.

By contrast plaintiffs in the instant case are beneficiaries under decedent's will and have alleged in their complaint that "[i]n accordance with the terms of the will of Mrs. Martine the property . . . would become part of the residue of her estate were it turned over to her estate [de]void of any language or claim that the same was jointly held property of Mrs. Martine and the Defendant. As a consequence of the failure of the Defendant to turn over jointly held property to the estate, Plaintiffs and other residuary legatees are being deprived of a portion of their legacy." Plaintiffs, unlike the plaintiffs in *Casstevens*, are not challenging the validity of the will and codicil but rather are contending that but for the *inter vivos* transfers, allegedly obtained by undue influence, decedent would have been the sole owner of the property at her death and that the property would have been distributed as part of decedent's residual estate under her will.

Based on these allegations, *Casstevens* is not dispositive of this action. Although the codicil refers to the *inter vivos* transfers, plaintiffs' action challenging the *inter vivos* transfers is not a collateral attack on the codicil which deprives the superior court of jurisdiction. Further, we do not agree with the Court of Appeals' opinion that the language in the prayer for relief asking that "all terms and provisions providing for, or relating in any way to, joint ownership of property by Frances R. Martine and Charles R. Powell, Sr. be declared null and void" constitutes an attack on the codicil. The three subdivisions which follow this language in the prayer for relief clarify that plain-

tiffs are referring to ownership of the property, not to language in the codicil.

[2] In reaching its conclusion that plaintiffs must file a caveat to challenge the *inter vivos* transfers, the Court of Appeals also concluded that the codicil ratified the transfers and that "at the very least plaintiffs would have to attack the codicil to prove that the codicil was not an effective ratification of the questioned transfers to defendant." Defendant, however, did not raise ratification as a defense in this action and is procedurally barred from doing so.

Pursuant to the North Carolina Rules of Civil Procedure, a party shall affirmatively set forth any matter constituting an avoidance or affirmative defense. N.C.G.S. § 1A-1, Rule 8(c) (1990). Ratification is an affirmative defense which must be affirmatively pled. *See Hassett v. Dixie Furniture Co.*, 333 N.C. 307, 312, 425 S.E.2d 683, 685 (1993) ("[D]efendant also requested that the jury be instructed on the affirmative defenses of accord and satisfaction, compromise and settlement, estoppel, waiver and ratification."); *see also Pittman v. Barker*, 117 N.C. App. 580, 590-91, 452 S.E.2d 326, 332 (Plaintiff "asserted the affirmative defenses of the statute of limitations, estoppel, laches, ratification and waiver."), *disc. rev. denied*, 340 N.C. 261, 456 S.E.2d 833 (1995); *Moore v. Moore*, 108 N.C. App. 656, 657, 424 S.E.2d 673, 674 (Defendant "raised affirmative defenses of estoppel, waiver, and ratification."), *aff'd per curiam*, 334 N.C. 684, 485 S.E.2d 71 (1993). Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof. *See Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 598, 394 S.E.2d 643, 649 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

Under certain circumstances this Court has permitted affirmative defenses to be raised for the first time by a motion for summary judgment. In *Dickens v. Puryear*, 302 N.C. 437, 441, 276 S.E.2d 325, 328 (1981), this Court recognized the apparent tension between Rules of Civil Procedure 8(c) and 56. The defendant in *Dickens*, without filing an answer and prior to the time an answer was due, moved for summary judgment and in support of the motion raised the affirmative defense of the statute of limitations. *Id.* at 440, 276 S.E.2d at 328. This Court held that the defendant may properly raise the affirmative defense in this manner. *Id.* at 442, 276 S.E.2d at 329. This Court further stated that

> if an affirmative defense required to be raised by a responsive pleading is sought to be raised for the first time in a motion for

> summary judgment, the motion must ordinarily refer expressly to the affirmative defense relied upon. Only in exceptional circumstances where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence will movant's failure expressly to refer to the affirmative defense not be a bar to its consideration on summary judgment.

Id. at 443, 276 S.E.2d at 329; *see also Miller v. Talton*, 112 N.C. App. 484, 487, 435 S.E.2d 793, 796 (1993) (holding that in the absence of an express reference to the affirmative defense in the motion for summary judgment, the trial court may still grant the motion on that ground if the affirmative defense was clearly before the court). Defendant not having pled the affirmative defense of ratification in either his answer or his motion for summary judgment, the issue of ratification was not before the trial court. In fact, the Court of Appeals *sua sponte* raised the issue on appeal. Defendant's failure to assert ratification as an affirmative defense bars that issue being raised by him, or by the Court of Appeals, on appeal.

Finally, for clarification we note that the question whether defendant would be entitled to take all or any part of the property which is the subject of the *inter vivos* transfers by purchase under decedent's codicil if plaintiffs are successful in setting aside the *inter vivos* transfers is not before this Court, and this opinion is not intended in any way to pass on that issue.

In conclusion we hold that plaintiffs were not required to file a caveat to the codicil to maintain their action against defendant. Therefore, the trial court was well within its jurisdiction to determine the merits of plaintiffs' claim of undue influence over the *inter vivos* transfers by Mrs. Martine.

For the foregoing reasons we reverse the Court of Appeals' opinion and remand the case to that court for consideration on the merits of the remaining issues raised in the parties' briefs previously filed in that court.

REVERSED AND REMANDED.

RICHARD F. HARLOW AND JANE R. HARLOW v. VOYAGER COMMUNICATIONS V, CARL C. VENTERS AND JACK P. McCARTHY

No. 612PA97

(Filed 9 July 1998)

Judgments § 166 (NCI4th)— multiple defendants—joint and several liability—default judgment against one defendant

Final judgment on the merits may be made separately against one defendant who is in default when there are multiple defendants who are alleged to be jointly and severally liable. The principle stated in *Frow v. De La Vega*, 82 U.S. 552, should be applied only where the defendants have been alleged as jointly liable rather than jointly and severally liable.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 127 N.C. App. 623, 492 S.E.2d 45 (1997), vacating an order entered by Beal, J., on 10 June 1996 in Superior Court, Mecklenburg County. Heard in the Supreme Court 26 May 1998.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Thomas D. Myrick, and Maurice O. Green, for plaintiff-appellants.

Thomas W. Steed, Jr., for defendant-appellee Voyager Communications V.

ORR, Justice.

The issue in this case is whether the Court of Appeals erred in vacating the trial court's order entering a default against defendant Voyager Communications V (Voyager). Specifically, we must determine whether a final judgment on the merits can be made separately against one defendant who is in default when there are multiple defendants who are alleged to be jointly and severally liable. This is an issue of first impression for this Court.

This case initially arose out of a claim of fraud and breach of fiduciary duty brought by plaintiffs, Richard and Jane Harlow, against defendants, Voyager, Carl Venters, and Jack McCarthy. Plaintiff Richard Harlow was employed by defendant Voyager from 1983 to 1993. During that time, Harlow was granted options and purchased a considerable amount of stock in defendant Voyager. Plaintiffs allege

that defendants later made material misrepresentations concerning the value of defendant Voyager's stock which induced plaintiffs to sell their stock to defendants at a considerable loss and for substantially less than its actual value.

In the complaint, filed on 28 April 1995, plaintiffs alleged that defendants were jointly and severally liable for damages flowing from the fraud and breach of fiduciary duty. Defendants filed an answer on 28 June 1995 essentially denying the allegations of fraud and breach of fiduciary duty and claiming as defenses that plaintiffs failed to state a claim upon which relief could be granted and that they were estopped from bringing the action because plaintiff Richard Harlow, as an officer and director of defendant Voyager, knew or should have known of all circumstances and facts concerning the operations and financial condition of Voyager. Plaintiffs then filed a request for documents on 13 December 1995. While defendant Voyager did produce some of the requested documents, it failed to produce all requested documents essential to plaintiffs' claim. Subsequently, on 20 May 1996, plaintiffs moved to compel discovery, and the trial court responded by ordering defendant Voyager to produce all documents requested in discovery by 24 May 1996. However, once again, defendant Voyager failed to produce all the documents which plaintiff had requested.

On 31 May 1996, plaintiffs filed a motion to show cause for contempt and for sanctions. The motion was heard on 6 June 1996. Based upon the evidence presented at the hearing, the trial court entered the following conclusions of law:

1. The Court's Order Compelling Discovery set a deadline of May 24, 1996 at 5:00 p.m. for Voyager V to produce all documents responsive to the Requests, which deadline was not met;

2. The Court's Order Compelling Discovery authorized Plaintiff's [sic] to set the time and place for the taking of Voyager V's deposition, which time and place was set by Plaintiff and willfully not attended by Voyager V;

3. Voyager V's failures to comply with the Court's Order Compelling Discovery were each willful, without justification or excuse and constitute civil contempt;

4. Voyager V's failures to comply with this Court'[s] Order Compelling Discovery are also sanctionable under Rule 37 of the North Carolina Rules of Civil Procedure; and

5. This Court has, independently of prior orders, considered less harsh sanctions but finds that, given the course of willful conduct by Voyager V, the sanctions imposed hereby are necessary and appropriate; however, the Court finds it unnecessary to impose sanctions for contempt.

Based upon these conclusions of law, the trial court entered an order: (1) allowing plaintiffs' motion for contempt; (2) striking defendant Voyager's answer; (3) entering a default judgment against defendant Voyager; (4) ordering defendant Voyager to pay plaintiffs' costs in bringing the action for sanctions; and (5) ordering the clerk to "put this Action on for trial by jury to determine the amount of damage as to Voyager V, and all other issues as to the other Defendants." Subsequently, on 5 July 1996, plaintiffs filed a notice of voluntary dismissal as to the remaining defendants, Venters and McCarthy, leaving defendant Voyager as the lone defendant in default, with damages to be determined.

Defendant Voyager then appealed to the Court of Appeals, which, in a unanimous opinion, vacated and remanded the trial court's order of default. In the opinion below, the Court of Appeals held that "[u]nder North Carolina law, when a plaintiff alleges joint liability against multiple defendants of which only one defaults, a default judgment may not be entered against the defaulting defendant until after the court adjudicates the liability of the non-defaulting defendants." *Harlow v. Voyager Communications V*, 127 N.C. App. 623, 624, 492 S.E.2d 45, 46 (1997). Based upon this principle, the Court of Appeals determined that the trial court's order of default against defendant Voyager was premature because the liability of the other defendants had not been adjudicated. Thus, the Court of Appeals reversed the trial court.

In reaching its decision, the Court of Appeals relied on the case of *Moore v. Sullivan*, 123 N.C. App. 647, 473 S.E.2d 659 (1996), in which the court stated, "in a default judgment situation when a plaintiff has alleged joint liability, a default judgment should not be entered against the defaulting defendant if one or more of the defendants do not default." *Id.* at 650, 473 S.E.2d at 661. Instead, an entry of default should be entered against the defaulting defendant. Under this principle, the entry of default serves to cut off the defaulting defendant's right to participate in the trial on the merits of the other defendants. In effect, the defaulting defendant is locked out, and a

final judgment against him must await the outcome or judgment of the remaining defendants. *Id.*

This principle was enunciated by the United States Supreme Court in *Frow v. De La Vega*, 82 U.S. 552, 21 L. Ed. 60 (1872), as follows:

> The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all.

Id. at 554, 21 L. Ed. at 61.

While the Court of Appeals correctly stated the principle of *Frow*, the principle does not apply in the present case because defendants have not been alleged as jointly liable, but as *jointly and severally liable*. The *Frow* principle should be applied where the defendants have been alleged only as jointly liable. When two or more obligors are alleged jointly, it means that they are "undivided" and "must therefore be prosecuted in a joint action against them all." *Black's Law Dictionary* 837 (6th ed. 1990). Because the liability cannot be divided, the matter can be decided only in a like manner as to all defendants. Therefore, if one is liable, then all must be liable, and if one is not liable, then all are not liable.

Where the plaintiff has alleged the defendants to be jointly and severally liable, the *Frow* principle will not apply because the defendants are not so closely tied that the judgment against each must be consistent. "A liability is said to be joint and several when the creditor may demand payment or sue one or more of the parties to such liability separately, or all of them together at his option." *Id.* Thus, the matter can be decided individually against one defendant without implicating the liability of other defendants. This principle is further explained in *Moore's Federal Practice*, which provides:

> *Frow* also does not apply in cases involving the joint and several liability of multiple defendants for damages, because in such a case the liability of each defendant is not necessarily dependent upon the liability of any other defendant, and plaintiff may be made whole by a full recovery from any defendant.

10 James W. Moore et al., *Moore's Federal Practice* ¶ 55.25, at 55-46 (3d ed. 1997).

We note that several federal courts have limited the application of the *Frow* principle to joint liability. In *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980), the United States Court of Appeals for the Seventh Circuit stated:

> But to apply *Frow* to a claim of joint and several liability is to apply that venerable case to a context for which it was never intended, and ignores the several or independent aspects of the claim set forth in this complaint. The result in *Frow* was clearly mandated by the Court's desire to avoid logically inconsistent adjudications as to liability. However, when different results as to different parties are not logically inconsistent or contradictory, the rationale for the *Frow* rule is lacking. Such is this case involving joint and several liability.

Id. at 1257-58 (footnotes omitted).

Our North Carolina Court of Appeals has applied the *Frow* principle only in circumstances involving joint liability. For example, in *Leonard v. Pugh*, 86 N.C. App. 207, 356 S.E.2d 812 (1987), a case involving a landowner seeking to extinguish an easement against multiple defendants, the Court of Appeals stated:

> Where a complaint alleges a joint claim against more than one defendant, default judgment pursuant to G.S. 1A-1, Rule 55 should not be entered against a defaulting defendant until all defendants have defaulted; or if one or more do not default[,] then, generally, entry of default judgment should await an adjudication as to the liability of the non-defaulting defendants.

Id. at 210-11, 356 S.E.2d at 815.

As noted, in the present case, plaintiffs alleged defendants to be jointly and severally liable. Thus, the *Frow* principle, as it has been defined and applied in both federal and state law, is not applicable to the present case. At oral argument before this Court, counsel for defendant Voyager candidly and commendably acknowledged that

Frow did not control in this case. Accordingly, we hold that the Court of Appeals erred in applying the *Frow* principle to the present case.

Defendant Voyager, in its brief and at oral argument, has further sought to have this Court review the issues originally presented to the Court of Appeals involving whether the trial court properly imposed sanctions against defendant Voyager. This Court's grant of discretionary review was based only on the issue involving *Frow*, and thus we decline to consider the other issues. Instead, we remand to the Court of Appeals in order that the original issues brought forth on appeal may be addressed.

REVERSED AND REMANDED.

MARILYN JEAN BRITT, PETITIONER v. N.C. SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, RESPONDENT

No. 600PA97

(Filed 9 July 1998)

1. Administrative Law and Procedure § 65 (NCI4th)— interpretation of regulatory term—de novo review

When the issue on appeal is whether a state agency erred in interpreting a regulatory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. However, the interpretation of a regulation by an agency created to administer that regulation is traditionally accorded some deference by appellate courts.

2. Sheriffs, Police, and Other Law Enforcement Officers § 31 (NCI4th)— justice officer—class B misdemeanor—no contest plea—PJC—conviction—revocation of certification

A deputy sheriff's plea of no contest to the class B misdemeanor of obstruction of justice, followed by the trial court's entry of a prayer for judgment continued upon the payment of costs, constituted a "conviction" which permitted revocation of her certification under a regulation allowing revocation, suspension, or denial of a justice officer's certification when the officer has been convicted of a class B misdemeanor within the five-year period prior to the date of appointment. The regulation provided that a conviction includes the entry of a plea of no contest, and

the fact that the trial court issued a prayer for judgment continued does not alter the plain language of the regulation.

3. Sheriffs, Police, and Other Law Enforcement Officers § 31 (NCI4th)— justice officer—commission of class B misdemeanor—revocation of certification

A deputy sheriff's certification as a justice officer could properly be revoked on the ground that she "has committed" a class B misdemeanor irrespective of whether she was "convicted" when she entered a plea of no contest to a class B misdemeanor, followed by the trial court's entry of a prayer for judgment continued, where she does not contest that she in fact committed a class B misdemeanor.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 128 N.C. App. 81, 493 S.E.2d 86 (1997), affirming an order entered by Cobb, J., on 26 September 1996 in Superior Court, Onslow County, that reversed the final agency decision of the North Carolina Sheriffs' Education and Training Standards Commission revoking plaintiff's deputy sheriff's certification. Heard in the Supreme Court 27 May 1998.

Charles K. Medlin, Jr., for petitioner-appellee.

Michael F. Easley, Attorney General, by John J. Aldridge, III, Assistant Attorney General, for respondent-appellant.

WHICHARD, Justice.

The North Carolina Sheriffs' Education and Training Standards Commission (Commission) appeals from a decision of the Court of Appeals reviewing the Commission's interpretation and application of the North Carolina Administrative Code provisions governing the certification of justice officers in this state.

The facts giving rise to this appeal are not in dispute. In February 1990 Marilyn Jean Britt, petitioner, was indicted for felonious perjury based on her false testimony under oath in a divorce proceeding. On 10 April 1992, as part of a plea arrangement under which the State agreed to dismiss the felonious perjury charge, petitioner pled no contest to the misdemeanor offense of obstruction of justice. Petitioner understood that she could receive a maximum sentence of two years' imprisonment for this offense. After accepting petitioner's

plea of no contest, however, the superior court entered a prayer for judgment continued upon payment of the costs.

On 5 September 1994 petitioner was appointed to be a deputy with the Onslow County Sheriff's Department. Petitioner applied for and received certification as a Deputy Sheriff effective 14 September 1994. A subsequent background check by the Commission revealed petitioner's no-contest plea.

On 8 December 1994 the Commission notified petitioner that probable cause existed to revoke her certification as a justice officer based upon her conviction of the class B misdemeanor offense of obstruction of justice. Petitioner requested an administrative hearing pursuant to Chapter 150B of the North Carolina General Statutes. The Commission held a hearing and in its final agency decision ordered that petitioner's sheriff's certification be revoked pursuant to 12 NCAC 10B .0204(d)(2), the regulation authorizing revocation of a previously issued sheriff's certification. Petitioner appealed to the trial court pursuant to N.C.G.S. § 150B-43. The trial court reversed the Commission, concluding that petitioner had not been "convicted" of a class B misdemeanor within the meaning of that term as used in 12 NCAC 10B .0204(d)(2). On the Commission's appeal, the Court of Appeals affirmed, holding that a plea of no contest, followed by a prayer for judgment continued, was not a "conviction" under the North Carolina Administrative Code, and that the Commission improperly revoked petitioner's certification. *Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 128 N.C. App. 81, 83-84, 493 S.E.2d 86, 87 (1997).

The Commission contends that petitioner's plea of no contest was a "conviction" for purposes of petitioner's deputy sheriff's certification despite the trial court's entry of a prayer for judgment continued. We agree.

The Administrative Procedure Act (APA) governs this appeal and defines the scope of our review of the Commission's final agency decision. N.C.G.S. § 150B-51 provides that a court reviewing a final agency decision may

> reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1995). This appeal presents an issue under N.C.G.S. § 150B-51(b)(4): Was the Commission's interpretation of "conviction," as used in 12 NCAC 10B .0204(d)(2) (quoted in pertinent part below), affected by an error of law?

[1] When the issue on appeal is whether a state agency erred in interpreting a regulatory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. *See Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981). However, the interpretation of a regulation by an agency created to administer that regulation is traditionally accorded some deference by appellate courts. *See id.* at 581, 281 S.E.2d at 29.

[2] The Commission administers the North Carolina Administrative Code regulations at issue here. N.C.G.S. § 17E-4 (1997). These regulations provide that "[t]he Commission may revoke, suspend or deny the certification of a justice officer when the Commission finds that . . . the certified officer has *committed or been convicted of*: . . . a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor within the five-year period prior to the date of appointment." 12 NCAC 10B .0204(d)(2) (Nov. 1995) (emphasis added). They also explain that " 'Convicted' or 'Conviction' means and includes, for purposes of this Chapter, the entry of: . . . a plea of no contest." 12 NCAC 10B .0103(2)(c) (Nov. 1995).

These regulations are unambiguous. When the language of regulations is clear and unambiguous, there is no room for judicial construction, and courts must give the regulations their plain meaning. *See Correll v. Division of Social Serv.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). Applying the clear meaning of these regulations to the facts here, petitioner's plea of no contest to the class B misdemeanor offense of obstruction of justice was a "conviction" under 12 NCAC 10B .0103(2)(c), and the Commission, pursuant to 12 NCAC

10B .0204(d)(2), could revoke petitioner's certification as a justice officer based upon that conviction.

The fact that the trial court issued a prayer for judgment continued does not alter the plain language of these regulations. Nothing in the regulations suggests that "conviction" means and includes a plea of no contest only in those instances in which the trial court does not enter a prayer for judgment continued. Further, this Court and the General Assembly have recognized that a plea may amount to a "conviction" despite the issuance of a prayer for judgment continued. *See State v. Sidberry*, 337 N.C. 779, 781-82, 448 S.E.2d 798, 800-01 (1994) (holding that a guilty plea amounted to a "conviction" despite the fact that it was followed by the entry of a prayer for judgment continued); N.C.G.S. § 15A-1331(b) (1997) (recognizing that "a person has been convicted when he . . . has entered a plea of guilty or no contest," regardless of the judgment imposed).

We thus conclude that, in the context presented, the Commission properly interpreted "conviction" to include a plea of no contest followed by a prayer for judgment continued. We also conclude that the Commission properly revoked petitioner's deputy sheriff's certification under 12 NCAC 10B .0204(d)(2) based upon such a conviction.

[3] Alternatively, 12 NCAC 10B .0204(d)(2) permits the Commission to revoke, suspend, or deny the certification of a certified officer if that officer *has committed* a class B misdemeanor. Petitioner does not contest that she in fact committed a class B misdemeanor. Thus, the Commission could have revoked petitioner's certification under 12 NCAC 10B .0204(d)(2) without relying upon petitioner's conviction.

For the reasons stated, we reverse the decision of the Court of Appeals and remand the case to the Court of Appeals for further remand to the Commission for reinstatement of the Commission's final agency decision.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. BOBBY NEAL HELMS

No. 468PA97

(Filed 9 July 1998)

1. **Evidence and Witnesses § 2176 (NCI4th)— HGN test—necessity for qualified expert**

A horizontal gaze nystagmus (HGN) test does not measure behavior a lay person would commonly associate with intoxication, but rather represents specialized knowledge that must be presented to the jury by a qualified expert. Once the expert testifies as to the relationship between HGN test results and intoxication, he or she is then subject to cross-examination to test the validity and reliability of the HGN test.

2. **Evidence and Witnesses § 2176 (NCI4th)— impaired driving—HGN test—insufficient foundation—admission of results as prejudicial error**

The State failed to present a sufficient foundation for the admission in a DWI prosecution of testimony by the arresting officer as to the results of an HGN test administered to defendant where nothing in the record indicates that the trial court took judicial notice of the reliability of the HGN test, and the State presented no evidence and the court conducted no inquiry regarding the reliability of the HGN test. Until there is sufficient scientifically reliable evidence as to the correlation between intoxication and nystagmus, it is improper to permit a lay person to testify as to the meaning of HGN test results. Further, in light of the heightened credence juries tend to give to scientific evidence, there is a reasonable possibility that had evidence of the HGN test results not been erroneously admitted a different outcome would have been reached at trial so that the admission of this evidence was prejudicial error.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 127 N.C. App. 375, 490 S.E.2d 565 (1997), finding harmless error and affirming judgment entered by Greeson, J., on 24 April 1996 in Superior Court, Union County. Heard in the Supreme Court 9 March 1998.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Jonathan P. Babb, Assistant Attorney General, for the State-appellant and -appellee.

Shawna Davis Collins for defendant-appellant and -appellee.

FRYE, Justice.

Defendant appealed his conviction of driving while impaired in violation of N.C.G.S. § 20-138.1. He contended that the trial court erred by admitting into evidence the results of a horizontal gaze nystagmus (HGN) test without the establishment of a proper foundation. Defendant contended that the HGN test is a scientific test requiring expert testimony as to its reliability. The Court of Appeals agreed that the State failed to lay a proper foundation at trial for admission of the HGN test results. Nevertheless, the panel concluded that the error was harmless and upheld defendant's conviction. We agree with the Court of Appeals on the admissibility of the HGN test results but reverse on the issue of harmless error.

The Court of Appeals held that Monroe Public Safety Officer E.P. Bradley's testimony regarding the HGN test results was inadmissible and declined to take judicial notice of the validity of the test. Though it concluded that the admission of the HGN test results into evidence was improper, the court determined that the remaining testimony at trial overwhelmingly established defendant's guilt of driving while impaired. Thus, it held the error was harmless.

Nystagmus has been defined as a physiological condition that involves

> "an involuntary rapid movement of the eyeball, which may be horizontal, vertical, or rotary. An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN."

People v. Leahy, 8 Cal. 4th 587, 592, 882 P.2d 321, 323, 34 Cal. Rptr. 2d 663, 665 (1994) (quoting *People v. Ojeda*, 225 Cal. App. 3d 404, 406, 275 Cal. Rptr. 472, 472 (1990)) (citations omitted in original). In administering the HGN test,

> the subject is asked to cover one eye and then use the remaining eye to track the lateral progress of an object (usually a pen) as

> the officer moves the object at eye-level across the subject's field of vision. As the moving object travels toward the outside of the subject's vision, the officer watches the subject's eye for "nystagmus"—an involuntary jerking movement of the eyeball. If the person's eyeball exhibits nystagmus, and especially if the nystagmus occurs before the moving object has traveled 45 degrees from the center of the person's vision, this is taken as an indication that the person is intoxicated.

Ballard v. State, 955 P.2d 931, 933 (Alaska Ct. App. 1998).

This Court has not previously addressed the admissibility of HGN evidence. In now doing so, we look first to other jurisdictions which have addressed the issue. Some courts have held that the results of HGN tests are admissible without evidentiary foundation. They reason that the HGN test is simply another field sobriety test, such as the finger-to-nose, sway, and walk-and-turn tests, admitted as evidence of intoxication. *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993); *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990); *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994); *State v. Nagel*, 30 Ohio App. 3d 80, 506 N.E.2d 285 (1986); *State v. Sullivan*, 310 S.C. 311, 426 S.E.2d 766 (1993). The Ohio Court of Appeals, for example, noted that

> [t]he gaze nystagmus test, as do the other commonly used field sobriety tests, requires only the personal observation of the officer administering it. It is objective in nature and does not require expert interpretation. . . .
>
> It should be remembered that the [HGN] test was one of a number of field sobriety tests administered by the officer to assist him in assessing [defendant's] physical condition. Taken together, they were strongly suggestive of intoxication. It does not require an expert to make such objective determinations.

Nagel, 30 Ohio App. 3d at 80-81, 506 N.E.2d at 286.

A majority of those jurisdictions addressing the admissibility of HGN evidence, however, have concluded the HGN test is a scientific test requiring a proper foundation to be admissible. *See, e.g., Ballard v. State*, 955 P.2d 931 (Alaska Ct. App.); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986); *State v. Meador*, 674 So. 2d 826 (Fla. Dist. Ct. App.), *disc. rev. denied*, 686 So. 2d 580 (Fla. 1996); *Commonwealth v. Sands*, 424 Mass. 184, 675 N.E.2d 370 (1997); *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App.), *cert. denied*, 513

U.S. 931, 130 L. Ed. 2d 284 (1994). The courts which hold that HGN tests are scientific tests note that the HGN test is based on an underlying scientific assumption that a strong correlation exists between intoxication and nystagmus. Because that assumption is not within the common experience of jurors, these courts hold that before HGN evidence may be heard by a jury there must be testimony as to the techniques used by the police officer and the officer's qualifications to administer and interpret the test.

A subset of those courts which hold that HGN tests are scientific in nature also hold that expert testimony is required to establish that the scientific principles upon which the HGN test is based are generally accepted by the scientific community. According to these cases, unless a police officer has special training or adequate knowledge qualifying him as an expert to explain the correlation between intoxication and nystagmus, his testimony is not adequate foundation for the admission of HGN test results. *People v. Leahy*, 8 Cal. 4th 587, 882 P.2d 321, 34 Cal. Rptr. 663; *State v. Ruthardt*, 680 A.2d 349 (Del. Super. Ct. 1996); *Schultz v. State*, 106 Md. App. 145, 664 A.2d 60 (1995); *Hulse v. State*, — Mont. —, — P.2d —, 1998 WL 239615 (May 5, 1998) (No.96-541); *Commonwealth v. Miller*, 367 Pa. Super. 359, 532 A.2d 1186 (1987); *State v. Cissne*, 72 Wash. App. 677, 865 P.2d 564, *disc. rev. denied*, 124 Wash. 2d 1006, 877 P.2d 1288 (1994).

[1] In the instant case, the Court of Appeals held, in accord with the majority view, that the HGN test does not measure behavior a lay person would commonly associate with intoxication, but rather represents specialized knowledge that must be presented to the jury by a qualified expert. We agree. Once the expert testifies as to the relationship between HGN test results and intoxication, he or she is then subject to cross-examination to test the validity and reliability of the HGN test. Appropriate questions on cross-examination might be whether eye twitching or nystagmus could also be caused by nervousness, certain diseases, lack of sleep, or certain medications rather than alcohol intoxication. *See Schultz*, 106 Md. App. at 180-81, 664 A.2d at 77 (listing thirty-eight causes of nystagmus other than alcohol intoxication).

[2] Under the North Carolina Rules of Evidence, "new scientific method[s] of proof [are] admissible at trial if the method is sufficiently reliable." *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990); *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995) (special agent's testimony on bloodstain pattern interpretation admissible

after voir dire testimony showing reliability). This Court has stated that, " '[i]n general, when no specific precedent exists, scientifically accepted reliability justifies admission of the testimony of qualified witnesses, and such reliability may be found either by judicial notice or from the testimony of scientists who are expert in the subject matter, or by a combination of the two.' " *State v. Bullard*, 312 N.C. 129, 148, 322 S.E.2d 370, 381 (1984) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 86, at 323 (2d ed. 1982)). We find nothing in the record of the case before us to indicate that the trial court took judicial notice of the reliability of the HGN test. Further, while Officer Bradley testified that he had taken a forty-hour training course in the use of the HGN test, the State presented no evidence and the court conducted no inquiry regarding reliability of the HGN test. Until there is sufficient scientifically reliable evidence as to the correlation between intoxication and nystagmus, it is improper to permit a lay person to testify as to the meaning of HGN test results. Accordingly, in this case the admission of Bradley's testimony regarding the results of the HGN test administered to defendant was error.

Notwithstanding its conclusion that the admission of the HGN test results was improper, the Court of Appeals held that receipt of the evidence constituted harmless error because the remaining evidence presented at trial overwhelmingly established defendant's guilt of the crime of driving while impaired. The remaining evidence against defendant presented by the State is as follows: (1) Bradley testified that defendant's car weaved from its lane of travel and struck the right curb with its right front tire before coming back into its lane; (2) after Bradley activated his blue light, defendant's car made a wide right turn onto a side street, veering into the opposite lane before stopping; (3) Bradley noticed a strong odor of alcohol coming from the car when defendant rolled down the driver's side window; (4) defendant was unsteady on his feet; (5) defendant's eyes were bloodshot and his clothes were disheveled; (6) there was an odor of alcohol coming from defendant; (7) defendant's speech was "mumbled;" and (8) defendant failed other field sobriety tests. The following additional evidence was elicited on cross-examination: (1) Bradley admitted that the layout of Hill Street requires a wide turn and that no dividing line exists on the street; (2) Bradley admitted that alcohol itself has no odor, but the flavorings of the beverage cause it to smell like an alcoholic beverage; (3) there was no evidence in the record that defendant had been drinking an alcoholic beverage and not a nonalcoholic beverage with similar flavorings; (4) there are

many different reasons which could cause a person's eyes to be red other than the use of alcohol; and (5) Bradley could not say for sure that defendant's speech was abnormal on the night in question because he had never heard defendant speak before.

The evidence presented at trial was clearly sufficient to send the case to the jury and to support a jury finding of guilty of driving while impaired. However, that is not the question before us. The question is not one of sufficiency of the evidence to support the jury verdict. In order to establish prejudicial error in the erroneous admission of the HGN evidence, defendant must show only that had the error in question not been committed, a reasonable possibility exists that a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1997). We conclude that, in light of the heightened credence juries tend to give scientific evidence, there is a reasonable possibility that had evidence of the HGN test results not been erroneously admitted a different outcome would have been reached at trial.

Accordingly, and for the reasons stated herein, we reverse the Court of Appeals on the issue of prejudicial error and remand to that court for further remand to the trial court for a new trial.

REVERSED AND REMANDED.

DKH CORPORATION, A NORTH CAROLINA CORPORATION v. RANKIN-PATTERSON OIL COMPANY, INC., A NORTH CAROLINA CORPORATION

No. 353PA97

(Filed 9 July 1998)

Appeal and Error § 92 (NCI4th)— lease agreement—multiple claims—summary judgment as to one—certification of no just reason for delay—appealable

The Court of Appeals erred by dismissing as interlocutory an appeal from a summary judgment on one claim arising from a lease dispute where the trial court certified that there was no just reason for delay. In addition to appeals pursuant to N.C.G.S. § 1-277 and N.C.G.S. § 7A-27(d), N.C.G.S. § 1A-1, Rule 54(b) provides that in an action with multiple parties or multiple claims, if the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay, the judgment is immediately appealable.

On discretionary review pursuant to N.C.G.S. § 7A-31(a) of a unanimous unpublished decision of the Court of Appeals, 126 N.C. App. 634, 487 S.E.2d 588 (1997), dismissing the plaintiff's appeal from an amended order allowing defendant's motion for summary judgment entered by Winner, J., on 7 October 1996 in Superior Court, Buncombe County. Heard in the Supreme Court 10 February 1998.

This case arises out of a dispute in regard to a lease agreement. The plaintiff, DKH Corporation, purchased from the defendant, Rankin-Patterson Oil Company, Inc., real property in Buncombe County containing a convenience store with gas pumps and tanks in June of 1990. On 1 July 1990, the two parties entered into a lease agreement under which the plaintiff agreed to operate the convenience store and gas station, while the defendant supplied the gasoline. A dispute arose between the parties, and the plaintiff filed this action asserting claims for: (1) unfair and deceptive practices in violation of N.C.G.S. § 75-5(b)(2), (2) breach of contract, (3) breach of fiduciary duty, (4) an accounting, (5) a declaratory judgment, and (6) injunctive relief.

The superior court granted the defendant partial summary judgment dismissing the plaintiff's unfair practice claim. The court certified "that there is no just reason for delay in entering this Order or the appeal therefrom."

The plaintiff appealed to the Court of Appeals, which dismissed the appeal as interlocutory. We granted the plaintiff's petition for discretionary review.

Kelly & Rowe, P.A., by E. Glenn Kelly and James Gary Rowe, for plaintiff-appellant.

Roberts & Stevens, P.A., by Isaac N. Northup, Jr. and Christopher Z. Campbell, for defendant-appellee.

WEBB, Justice.

The order of the superior court granting the defendant's motion for summary judgment did not dispose of all the claims in the case, making it interlocutory. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). This case brings to the Court a question as to the effect of N.C.G.S. § 1A-1, Rule 54(b) on an otherwise interlocutory appeal. This rule was adopted by the General Assembly pur-

suant to its power under Article IV, Section 12(2) of the Constitution of North Carolina, which provides that the General Assembly shall prescribe the appellate jurisdiction of the Court of Appeals. This rule provides:

> *Judgment upon multiple claims or involving multiple parties.*— When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

N.C.G.S. § 1A-1, Rule 54(b) (1990).

We have interpreted the effect of Rule 54(b) in several cases, *see Tridyn Indus., Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 490-91, 251 S.E.2d 443, 447 (1979); *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 109, 229 S.E.2d 297, 299 (1976); *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 125-26, 225 S.E.2d 797, 802-03 (1976). We have held that N.C.G.S. § 1-277 and N.C.G.S. § 7A-27(d) allow an appeal to be taken from an interlocutory order which affects a substantial right although the appeal may be interlocutory. In addition to the appeals pursuant to N.C.G.S. § 1-277 and N.C.G.S. § 7A-27(d), Rule 54(b) provides that in an action with multiple parties or multiple claims, if the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay, the judgment is immediately appealable. The rule provides, "Such judgment shall then be subject to review by appeal . . . ." N.C.G.S. § 1A-1, Rule 54(b). We believe this language requires the appellate court to hear the appeal. It was error for the Court of Appeals not to do so.

We reverse the order of the Court of Appeals dismissing the appeal and remand to that court to decide the case on its merits.

REVERSED AND REMANDED.

NARESH K. FARMAH AND SURJEET K. FARMAH v. RAM L. FARMAH AND SHEELA DEVI FARMAH

No. 280PA97

(Filed 9 July 1998)

Judgments § 652 (NCI4th)— interest—date of accrual—quasi-contract action

The Court of Appeals erred by upholding an award of interest under N.C.G.S. § 24-5(a) from the date of a breach of contract rather than from the date the action was filed under N.C.G.S. § 24-5(b). Plaintiffs' claims were grounded in the equitable principles of quasi-contract, which are different from the legal principles of contract law.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 126 N.C. App. 210, 484 S.E.2d 96 (1997), affirming judgment entered by Payne, J., on 15 December 1995 in District Court, Wake County. Heard in the Supreme Court 17 December 1997.

Allen W. Powell for plaintiff-appellees.

Allen & Pinnix, P.A., by D. James Jones, Jr., for defendant-appellants.

FRYE, Justice.

We allowed defendants' petition for discretionary review in order to consider the following two questions:

I. Did the trial court err in converting the plaintiffs' equitable interest in real property into a money judgment against the defendants?

II. Did the trial court err in assessing interest on the judgment from 26 August 1988, rather than from 2 February 1993, the date the action was instituted?

After careful consideration of the record, briefs, and oral argument, we conclude that discretionary review as to the first issue was improvidently allowed.

The Court of Appeals dealt with the second issue as follows:

> Defendants argue that the trial court erred by assessing interest on the judgment from the date of the exchange of the Lee County property rather than from the date the action was instituted. . . . Defendants assert that because this case did not involve an action in contract, interest should have been awarded only from the date plaintiffs filed suit.
>
> This argument is feckless. Plaintiffs' claims for damages and the trial judge's subsequent order were grounded in the equitable principles of restitution or quasi-contract as opposed to the legal principles of contract law.
>
> . . . .
>
> In this case, the law imposed a contract between the parties where none existed. Therefore, the trial judge's award of interest from the date of the transfer of the Lee County property was in accord with the statutory requirement that interest is awarded from the date of the breach of contract. N.C.G.S. § 24-5(a) [(1991)].

Farmah v. Farmah, 126 N.C. App. 210, 211-212, 484 S.E.2d 96, 97 (1997).

The date from which interest is awarded in contract and other actions is determined by statute. N.C.G.S. § 25-4 provides, in pertinent part, as follows:

> (a) Contracts.—In an action for breach of contract . . . the amount awarded on the contract bears interest from the date of breach. . . .
>
> (b) Other Actions.—In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied.

In the interpretation of this statute, we are guided by well-settled principles. This Court has held:

> In the construction of statutes, our primary task is to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.

Turlington v. McLeod, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988) (*citing Housing Authority v. Farabee*, 284 N.C. 242, 200 S.E.2d 12 (1973)). In the context of this case we find nothing to suggest that the legislature meant anything other than as stated, and we give the statute its natural and ordinary meaning.

Defendants argue essentially that this is not a contract action governed by N.C.G.S. § 24-5(a), that N.C.G.S. § 24-5(b) applies, and that interest should have been awarded only from the date the action was instituted. We agree. Plaintiffs' claims were grounded in the equitable principles of quasi-contract which are different from the legal principles of contract law. The instant action is not one for breach of contract; it is an action other than contract. Therefore the awarding of interest is controlled by N.C.G.S. § 24-5(b) rather than (a).

Accordingly, we must reverse the Court of Appeals as to this issue and remand to that court for further remand to the trial court to amend the judgment to award interest from the date the action was instituted until the judgment is satisfied.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART; REVERSED AND REMANDED IN PART.

STATE OF NORTH CAROLINA v. ANDRE DEMETRIUS GREEN

No. 519A96

(Filed 30 July 1998)

1. Constitutional Law § 162 (NCI4th)— first-degree sexual offense—thirteen-year-old defendant—transfer for trial as adult—statute not unconstitutionally vague

N.C.G.S. § 7A-610 provides sufficient guidance to juvenile court judges in making transfer decisions and does not on its face violate due process principles embodied in the United States or North Carolina Constitutions. The first prong of the vagueness standard is met because the statute clearly puts citizens of ordinary intelligence on notice that thirteen-year-old offenders either will have their cases transferred to superior court or are in jeopardy of having their cases transferred if the juvenile court deems it warranted. The second prong is satisfied in that the statute, when examined in the light of related statutes and the circum-

stances surrounding enactment, provides juvenile court judges with sufficient guidance and criteria by which to make discretionary transfer rulings. The judge seeks to develop a disposition that takes into account the facts of the case, such as the seriousness of the crime, the viciousness of the attack, the injury caused and the strength of the State's case, and is guided by the needs and limitations of the juvenile as well as the strengths and weaknesses of the juvenile's family, and takes into account the protection of public safety and the legislature's growing concern with serious youthful offenders and increasing dissatisfaction with the ability of the juvenile system to provide either adequate public protection or rehabilitative service to the juvenile given the usual short period between conviction and release from the juvenile system.

2. Infants or Minors § 99 (NCI4th)— transfer of juvenile cases to superior court—Kent factors—not constitutionally required—included in statute

N.C.G.S. § 7A-610, which deals with the transfer of juvenile cases to superior court, is not constitutionally infirm without the factors set forth in the appendix to *Kent v. United States*, 383 U.S. 541. The *Kent* Court was merely exercising its supervisory role over the inferior court created by Congress for the District of Columbia. Moreover, all of the factors enunciated in *Kent* are already subjects of consideration by juvenile court judges and specifically appending the *Kent* factors would be duplicative and might unintentionally serve to limit the possible factors considered by juvenile court judges.

3. Infants or Minors § 99 (NCI4th)— first-degree sexual offense—thirteen year old defendant—transfer to superior court—within statutory guidelines

A juvenile court judge acted within the statutory guidelines of N.C.G.S. § 7A-610(c) in transferring to superior court a thirteen-year-old defendant accused of first-degree sexual offense and other crimes where the judge included in her transfer order as bases for her decision the seriousness of the offenses, that the victim was a stranger, the community's need to be aware of and protected from such serious crimes, defendant's history of assaultive behavior, defendant's acknowledgment of difficulty controlling his temper, and strong evidence of defendant's guilt considering his confession.

4. Constitutional Law § 376 (NCI4th)— juvenile transferred to superior court—Equal Protection claim—no prima facie showing of discrimination

A juvenile defendant failed to establish a *prima facie* showing of discrimination under the Equal Protection Clause in the transfer of juvenile offenders to superior court under N.C.G.S. § 7A-610, either on its face or as applied.

5. Constitutional Law § 374 (NCI4th)— first-degree sexual offense—thirteen-year-old defendant—life sentence—not cruel and unusual

Committing a thirteen-year-old defendant to a term of life imprisonment for first-degree sexual offense does not constitute cruel and unusual punishment for purposes of the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 27 of the North Carolina Constitution. It has repeatedly been held that a mandatory life sentence for first-degree sexual offense is not cruel and unusual punishment, so that the issue is whether sentencing a thirteen-year-old to life imprisonment for first-degree sexual offense complies with evolving standards of decency. Examination of recent legislative history establishes that the legislature's reduction of the transfer age from fourteen to thirteen years was a reasonable reaction to a genuine public concern over the increase in violent juvenile offenders such as defendant. At this time, protection of law-abiding citizens from predators, regardless of ages, is on the ascendancy and it is the general consensus that serious youthful offenders must be dealt with more severely than has recently been the case in the juvenile system. An examination of defendant's punishment in this case indicates it clearly comports with the "evolving standards of decency" in society.

6. Constitutional Law § 374 (NCI4th)— first-degree sexual offense—thirteen-year-old defendant—life sentence—not grossly disproportionate

A sentence of life imprisonment for first-degree sexual offense for a defendant who was thirteen years old at the time of the crime was not grossly disproportionate to the crime committed. A criminal sentence fixed by the legislature must be proportionate to the crime committed, but the prohibition against cruel and unusual punishment does not require strict proportionality between crime and sentence and forbids only extreme sentences

that are grossly disproportionate to the crime. An examination of the crime committed by this defendant reveals it is not the type attributable to or characteristic of a "child," nor is it one for which the special considerations due children under the criminal justice system are appropriate. The circumstances of the crime show purpose and culpability rising far above that normally attributable to a thirteen-year-old juvenile and the cruelty of the attack, its predatory nature toward an essential stranger, defendant's refusal to accept full responsibility, his difficulty controlling his temper, his previous record and his unsupportive family situation all suggest he is not particularly suited to the purpose and type of rehabilitation dominant in the juvenile system. Moreover, defendant would have been subject to release only four years after his conviction, when he reached eighteen.

7. Constitutional Law § 374 (NCI4th)— first-degree sexual offense—thirteen-year-old defendant—life sentence—penological theory—General Assembly determination

A sentence of life imprisonment for first-degree sexual offense for a defendant who was thirteen years old when the crime was committed was not constitutionally excessive in that it was without penological justification. Although defendant contends that minor offenders should be treated rather than punished, the prohibition against cruel and unusual punishment does not mandate adoption of any one penological theory, and the General Assembly has determined that the adult justice system, with its primary goals of incapacitation and retribution, is the appropriate place for violent youthful offenders, such as defendant. It is not for the Supreme Court to second-guess that determination.

8. Constitutional Law § 374 (NCI4th)— first-degree sexual offense—changing statutes—thirteen-year-old defendant to receive life sentence—not cruel and unusual

A sentence of life imprisonment for first-degree sexual offense for a defendant who was thirteen years old when the crime was committed was not cruel and unusual because this is the only thirteen-year-old offender who will be sentenced to a mandatory life sentence for first-degree sexual offense as a result of lowering the minimum transfer age to thirteen effective 1 May and changing the prescribed mandatory life sentence for first-degree sexual offense effective 1 October. The North Carolina and United States Supreme Courts have not afforded separate

treatment to the words cruel and unusual, but have looked only to whether a particular punishment involves basic inhuman treatment. The fact that defendant was the only thirteen-year-old who chose to commit this heinous offense and thereby suffer the otherwise uniform and acceptable punishment prescribed is due to his own timing and nothing more than happenstance.

Justice FRYE concurring in part and dissenting in part.

Justices WHICHARD and PARKER join in this concurring and dissenting opinion.

On review of a substantial constitutional question, pursuant to N.C.G.S. § 7A-30(1), of a unanimous decision of the Court of Appeals, 124 N.C. App. 269, 477 S.E.2d 182 (1996), affirming judgments entered upon defendant's convictions of first-degree sexual offense, attempted first-degree rape, and first-degree burglary by Cashwell, J., on 26 January 1995 in Superior Court, Wake County. Heard in the Supreme Court 11 September 1997.

Michael F. Easley, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

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

Smith Follin & James, by Seth R. Cohen; and Deborah K. Ross and Sandy S. Ma on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

LAKE, Justice.

This appeal presents for determination two separate but interrelated questions: first, whether the procedures by which juvenile court judges transfer cases to superior court are adequately protective of the due process rights of juveniles; and, if so, whether the sentencing of a thirteen-year-old, after such transfer and conviction, to a mandatory term of life imprisonment for first-degree sexual offense constitutes cruel and unusual punishment.

The defendant, Andre Demetrius Green, was thirteen years old on the date the crimes in this case were committed. On 28 July 1994, defendant was charged in juvenile petitions with first-degree rape and first-degree burglary, and on 9 August 1994, defendant was

charged in a juvenile petition with first-degree sexual offense. Upon the State's motion to transfer the charges to superior court, District Court Judge Joyce A. Hamilton held a probable-cause hearing on 18 August 1994 pursuant to N.C.G.S. §§ 7A-608 to -612 and determined that probable cause existed and granted the State's motion for transfer. Defendant filed a notice of appeal and a petition for writ of mandamus to the Court of Appeals. The State submitted a motion to dismiss the appeal as interlocutory. On 24 January 1995, the Court of Appeals dismissed the appeal as interlocutory and denied defendant's petition.

At the probable-cause hearing, a juvenile court psychologist who examined the defendant prior to the hearing testified defendant came from a home where his father was an alcoholic and cocaine abuser who provided no support for the family and had little contact with defendant as a child. Defendant's father also viewed pornographic material in the home, although there was no stated knowledge whether defendant had been exposed to it. Defendant had a history of assaultive behavior during both the past year and throughout his childhood. This was often a reaction to teasing he received about his speech impediment. The psychologist testified defendant had underlying neurological problems that made him more impulsive than other juveniles his age. Defendant admitted to the psychologist that he had a "very bad temper." However, defendant denied to the psychologist having assaulted the victim, notwithstanding being confronted with contradictions in his story.

In her order for transfer, the district court judge cited the following as reasons for adjudging that the best interests of the juvenile and the State would be served by transfer to superior court:

> -[The] serious nature of the offenses;
>
> -[The] victim [was] essentially a stranger to the juvenile;
>
> -[The] community's need to be aware of & protected from this serious type of criminal activity;
>
> -[The] juvenile has a history of assaultive behavior (fights in school) & juvenile acknowledges he had a very bad temper;
>
> -strong evidence of probable cause presented based on testimony from victim and juvenile's confession to law enforcement.

Defendant was indicted on 13 September 1994 for all of the offenses alleged in the juvenile petitions. He was tried to a jury at the

24 January 1995 Criminal Session of Superior Court, Wake County, Judge Narley L. Cashwell presiding. The jury found defendant guilty of attempted first-degree rape, first-degree burglary, and first-degree sexual offense. The trial court sentenced defendant as a repeat offender and entered sentences of life imprisonment for first-degree sexual offense, six years' imprisonment for attempted first-degree rape to run concurrently with the life sentence, and fifteen years' imprisonment for first-degree burglary to run consecutively following the life sentence.

Defendant appealed to the Court of Appeals. In a unanimous opinion, the Court of Appeals found no error. Defendant is before this Court on a notice of appeal of a constitutional question. His petition for discretionary review as to additional issues was denied on 6 March 1997, as was the State's motion to dismiss the appeal.

The evidence at trial tended to show that for approximately six weeks prior to the night of 27 July 1994, the victim experienced repeated harassment from someone ringing her doorbell and banging on her doors and windows. The victim, a twenty-three-year-old mother of one, lived with her twenty-month-old son in an apartment in Fuquay-Varina. She kept a golf club beside her bed as a weapon due to the recent harassment.

On the night of 27 July 1994, the victim and her son were asleep in the same bed when a banging at the back door awakened her. She immediately called 911 for help and was on the phone with the 911 operator when she heard glass break on the back door. Defendant entered the victim's bedroom brandishing the handle from a mop and knocked the telephone from her hand. Defendant and the victim swung their respective weapons simultaneously. Both the golf club and the mop handle broke upon impact. Defendant then pulled the phone cord from the wall and knocked the victim onto the bed. He slapped her and told her, "shut up, b—h."

As the victim pleaded with defendant not to hurt her son, defendant told her he was going to "f— [her]," and he pulled down her panties and forced her to the floor. Defendant pulled the victim's hair, slapped her several times and told her to spread her legs as he attempted to remove her shirt. Defendant then placed himself on top of the victim. During the assault, defendant fondled the victim's breasts, performed oral sex upon her, penetrated her vagina with his penis once or twice and inserted a finger in her vagina and anus. In the process, defendant told the victim he was going to "rip her insides

out." Defendant only ceased his attack when the victim told him she thought she heard the police. As the police were entering the back door, defendant escaped through the front door. In addition to the sexual assault, the victim suffered bruises and blood clots in her eyes as well as a scar on her face where she was cut.

Two witnesses, one who gave a description matching defendant's characteristics and one who knew defendant, saw defendant emerge from the victim's apartment after the arrival of the police. The victim picked defendant's picture out of a possible suspects book containing over one hundred photographs and identified defendant in open court as her assailant. Further, defendant gave a statement to police admitting to his sexual assault of the victim.

I. Due Process

[1] In his first assignment of error, defendant contends that N.C.G.S. § 7A-610 violates his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Defendant asserts section 7A-610 is unconstitutionally vague because it provides no meaningful guidance to juvenile court judges, resulting in arbitrary and discriminatory decisions regarding which juveniles to transfer to superior court. We find defendant's argument to be without merit.

Section 7A-610 provides in applicable part:

> (a) If probable cause is found and transfer to superior court is not required by G.S. 7A-608, the prosecutor or the juvenile may move that the case be transferred to the superior court for trial as in the case of adults. *The judge may proceed to determine whether the needs of the juvenile or the best interest of the State will be served by transfer of the case to superior court for trial as in the case of adults.* When the case is transferred to superior court, the superior court has jurisdiction over that felony, any offense based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan of that felony, and any greater or lesser included offense of that felony.

N.C.G.S. § 7A-610(a) (1995) (emphasis added). The decision to transfer a juvenile's case to superior court lies solely within the sound discretion of the juvenile court judge and is not subject to review absent a showing of gross abuse of discretion. *In re Bunn*, 34 N.C. App. 614, 615-16, 239 S.E.2d 483, 484 (1977).

It is an essential element of due process of law that statutes contain sufficiently definite criteria to govern a court's exercise of discretion. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 227-28 (1972). As stated by the Supreme Court, "[d]iscretion without a criterion for its exercise is authorization of arbitrariness." *Brown v. Allen*, 344 U.S. 443, 496, 97 L. Ed. 469, 509 (1953). In construing whether a statute contains sufficient criteria to avoid being unconstitutionally vague, this Court applies well-established rules of statutory construction:

> In passing upon the constitutionality of the statute, we begin with the presumption that it is constitutional and must be so held unless it is in conflict with some constitutional provision of the State or Federal Constitutions. A well recognized rule in this State is that, where a statute is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality.
>
> Criminal statutes must be strictly construed. But, while a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. The intent of the legislature controls the interpretation of a statute. When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein. But when a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent. As this Court said in *State v. Partlow*, 91 N.C. 550[, 552] (1884), the legislative intent ". . . is to be ascertained by appropriate means and *indicia, such as the purposes appearing from the statute taken as a whole*, the phraseology, the words ordinary or technical, *the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia*, the preamble, the title, *and other like means. . . .*" Other *indicia* considered by this Court in determining legislative intent are the legislative history of an act and *the circumstances surrounding its adoption*, earlier statutes on the same subject, the common law as it was understood at the time of the enactment of the statute, and previous interpretations of the same or similar statutes.

In re Banks, 295 N.C. 236, 239-40, 244 S.E.2d 386, 388-89 (1978) (citations omitted) (emphasis added); *see also Taylor v. Taylor*, 343 N.C. 50, 56, 468 S.E.2d 33, 37 (1996); *State ex rel. Thornburg v. House and Lot Located at 532 B Street, Bridgeton*, 334 N.C. 290, 298, 432 S.E.2d 684, 688-89 (1993); *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215, 388 S.E.2d 134, 140 (1990); *North Carolina Baptist Hosps., Inc. v. Mitchell*, 323 N.C. 528, 532, 374 S.E.2d 844, 846 (1988).

Under a challenge for vagueness, the Supreme Court has held that a statute is unconstitutionally vague if it either: (1) fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"; or (2) fails to "provide explicit standards for those who apply [the law]." *Grayned*, 408 U.S. at 108, 33 L. Ed. 2d at 227. This Court expressed an almost identical standard in the case of *In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd sub nom. Mckeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971), where we stated:

> It is settled law that a statute may be void for vagueness and uncertainty. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." [16 Am. Jur. 2d *Constitutional Law* § 552 (1964)]; *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L. Ed. 2d 285 [(1961)]; *State v. Hales*, 256 N.C. 27, 122 S.E.2d 768 [(1961)]. Even so, impossible standards of statutory clarity are not required by the constitution. *When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.* [*United States v. Petrillo*, 332 U.S. 1, 91 L. Ed. 1877 (1947)].

In re Burrus, 275 N.C. at 531, 169 S.E.2d at 888 (emphasis added). In the instant case, defendant does not challenge the validity of the transfer statute on the first prong of the vagueness standard, the "notice" requirement. Nonetheless, an examination of the transfer statute reveals it provides adequate notice of its application. Because section 7A-610 appears in article 49 of the Juvenile Code, titled "Transfer to Superior Court," and because this section references section 7A-608, section 7A-610 must be read in light of section 7A-608. Section 7A-608 provides that, after notice, hearing, and a finding of probable cause, the juvenile court *may* transfer jurisdiction over a

juvenile to superior court if (1) the juvenile was at least thirteen years old at the time of the alleged offense, and (2) the offense would be a felony if committed by an adult. N.C.G.S. § 7A-608 (1995). Furthermore, section 7A-608 *requires* the juvenile court to transfer a juvenile to superior court if the alleged offense is a class A felony. *Id.* Section 7A-610 provides that for offenses *other* than class A felonies, the juvenile court may determine whether "the needs of the juvenile or the best interest of the State will be served by transfer of the case to superior court." N.C.G.S. § 7A-610(a). Thus, this statute clearly puts citizens of ordinary intelligence on notice that thirteen-year-old offenders either will have their cases transferred to superior court or are in jeopardy of having their cases transferred if the juvenile court deems it warranted. The first prong of the vagueness standard is plainly met.

Regarding the second prong of the vagueness test, the "guidance" component, examination of section 7A-610 in light of the entire juvenile and criminal codes establishes that the statute provides juvenile court judges with sufficient guidance and criteria by which to make discretionary transfer rulings. As noted above, the rules of statutory construction provide, where the language of a statute is arguably ambiguous, that courts must give effect to legislative intent by reference *inter alia* to statutes *in pari materia*, those having a common purpose. Thus, we should not look, as defendant would have us do, solely to N.C.G.S. § 7A-610 of article 49 of the North Carolina Juvenile Code (subchapter XI of chapter 7A) to determine whether juvenile court judges are provided with adequate guidance for transfer decisions.

Section 7A-610 is part of the larger Juvenile Code which seeks to rehabilitate juveniles and to transform them into productive, law-abiding members of society. *See State v. Dellinger*, 343 N.C. 93, 96, 468 S.E.2d 218, 221 (1996). The Juvenile Code is similarly intertwined with the Criminal Procedure Act, chapter 15A of the General Statutes, and the Criminal Law, chapter 14 of the General Statutes, as the Juvenile Code is the source of original jurisdiction and procedure regarding the adjudication of crimes committed by juveniles. *See* N.C.G.S. § 7A-523 (1995). Hence, when a juvenile court judge seeks to determine whether "the needs of the juvenile or the best interest of the State will be served by transfer," in accord with section 7A-610(a), he or she does so within the structure of the entire criminal justice system. Examination, therefore, must be made with reference to this

larger statutory construct in deciding whether the guidance provided to juvenile court judges passes constitutional muster.

N.C.G.S. § 7A-516(3) provides that the purpose of the Code as it applies to juveniles is

> [t]o develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety.

N.C.G.S. § 7A-516(3) (1995). Article 52 of the Code governs "Dispositions," and it (1) states the goal of dispositions in juvenile cases and (2) identifies dispositional alternatives for the juvenile court. N.C.G.S. §§ 7A-646 to -661 (1995). In considering possible dispositions, the juvenile court is to consider "the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile." N.C.G.S. § 7A-646.

The circumstances surrounding the enactment of the transfer statute and related statutes also provide insight into the legislature's provision of guidance for juvenile court transfer decisions. N.C.G.S. § 7A-608 provides that juveniles accused of the class A felony of first-degree murder *must* be transferred to superior court. N.C.G.S. § 7A-608. Moreover, section 7A-608 was recently amended to reduce the age at which juveniles either must or may be transferred to superior court from fourteen to thirteen years of age. Crime Control Act of 1994, ch. 22, sec. 25, 1993 N.C. Sess. Laws (Extra Session 1994) 62, 75 (effective May 1, 1994, for offenses committed on or after that date). These circumstances as developed recently and over a longer period provide the juvenile court judge with two important considerations for deciding whether to transfer a juvenile case: (1) the seriousness of the offense; and (2) the evolving standards and will of the majority in society, as expressed through the legislature, reflecting concern that the rapid increase in the commission of serious, violent crimes by younger and younger offenders must be dealt with more stringently than was previously being done in the juvenile system.

When examined in the light of related statutes and the circumstances surrounding enactment, the standard by which juvenile court judges must adjudge transfers is anything but vague. When a juvenile court judge decides transfer meets "the needs of the juvenile or [serves] the best interest of the State," N.C.G.S. § 7A-610(a), he or she

does so with full knowledge of the dispositional alternatives in the juvenile and adult systems. The juvenile court judge seeks to develop a disposition that takes into account the facts of the case, such as the seriousness of the crime, the viciousness of the attack, the injury caused and the strength of the State's case. The juvenile court judge's decision is also guided by the needs and limitations of the juvenile, as well as the strengths and weaknesses of the juvenile's family. Moreover, the juvenile court judge takes into account the protection of public safety and the legislature's growing concern with serious youthful offenders and increasing dissatisfaction with the ability of the juvenile system to provide either adequate public protection or rehabilitative service to the juvenile given the usual short period of time between conviction and release from the juvenile system. We thus conclude that N.C.G.S. § 7A-610, in light of the entire Juvenile Code, provides sufficient guidance to juvenile court judges in making transfer decisions and does not on its face violate due process principles embodied in the United States Constitution or the North Carolina Constitution.

[2] Additionally, defendant maintains that section 7A-610 is infirm without the "*Kent* factors" set forth in the appendix to the Supreme Court's decision in *Kent v. United States*, 383 U.S. 541, 16 L. Ed. 2d 84 (1966), and urges this Court to adopt the factors as the standard by which juvenile court judges must make transfer determinations. In *Kent*, the Supreme Court enunciated a list of factors for the Juvenile Court of the District of Columbia to consider in making transfer decisions. The factors on the list consist of the following:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
>
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment . . . .
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime . . . .

6. The sophistication and maturity of the [j]uvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Kent, 383 U.S. at 566-67, 16 L. Ed. 2d at 100-01.

As an initial matter, it is important to note that the Supreme Court nowhere stated in *Kent* that the above factors were constitutionally required. In appending this list of factors to its opinion, the *Kent* Court was merely exercising its supervisory role over the inferior court created by Congress for the District of Columbia. Thus, the factors in the Appendix to *Kent* have no binding effect on this Court.

Moreover, examination of section 7A-610 in conjunction with the statutes *in pari materia* reveals that substantially all of the factors enunciated by the Supreme Court in *Kent* are already subjects of consideration by our juvenile court judges in transfer determinations. Specifically appending the factors set forth in *Kent* to a statutory scheme already protective of due process considerations would be needlessly duplicative. In fact, doing so might in the future unintentionally serve to limit the universe of possible factors considered by juvenile court judges in making a decision that, of necessity, requires discretionary balancing of innumerable weights, including those that are presently unforeseeable to this or any other court.

[3] We now must decide whether the juvenile court judge in the case *sub judice* acted within the above statutory guidelines. Any order of transfer must contain the reasons underlying the decision to transfer. N.C.G.S. § 7A-610(c). However, the decision to transfer a juvenile's case to superior court lies solely within the sound discretion of the hearing judge. *In re Bunn*, 34 N.C. App. at 615-16, 239 S.E.2d at 484. Here, the juvenile court judge included in her transfer order the following bases for her decision: the seriousness of the offenses, the

fact that the victim was a stranger to the juvenile, the community's need to be aware of and protected from such serious crimes, defendant's history of assaultive behavior, defendant's acknowledgment of difficulty controlling his temper, and the strong evidence of defendant's guilt considering his confession. These findings are supported by evidence on the record from the transfer hearing. This serves as sufficient support for the juvenile court judge's discretionary transfer decision within the adequate due process guidelines of this state's statutory framework. Moreover, even if this Court were to adopt the *Kent* factors, which it does not, the juvenile court judge's decision substantially includes consideration of all the *Kent* factors relevant to this case. This assignment of error is overruled.

[4] In a related assignment of error, defendant maintains that section 7A-610 violates equal protection of the law in a racially discriminatory manner because it operates to transfer disproportionate numbers of black juvenile offenders to the superior court. Defendant makes no argument that the statute, as applied, operated to discriminate against him on a racial basis. Defendant merely presents statistics showing that a significant portion of the juveniles transferred to superior court are black. Defendant does not, however, present any statistics showing how this relates to the percentage of crimes committed by black juveniles as a whole, or the seriousness of those crimes as compared to those attributable to individuals of other racial groups. Without such comparison, defendant's statistics are meaningless. Defendant presents no other evidence suggesting that section 7A-610 is discriminatory. As such, defendant has failed to establish a *prima facie* showing of discrimination under the Equal Protection Clause, either on its face or as it is applied, and this assignment of error is overruled.

II. Cruel and Unusual Punishment

[5] In his next assignment of error, defendant contends that committing a thirteen-year-old defendant to a term of life imprisonment for first-degree sexual offense constitutes cruel and unusual punishment for purposes of the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 27 of the North Carolina Constitution. Defendant's argument is threefold: first, sentencing a thirteen-year-old to life imprisonment does not comport with current societal standards of decency; second, defendant's sentence is disproportionate to the crime committed and without penological justification; and third, defendant's sentence is cruel and

unusual because defendant is the only thirteen-year-old who will be sentenced to a mandatory life sentence for first-degree sexual offense. We find defendant's contentions to be without merit.

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" U.S. Const. amend. VIII (emphasis added). Article I, Section 27 of the North Carolina Constitution mirrors the language of the Eighth Amendment, except Section 27 prohibits "cruel *or* unusual punishments." N.C. Const. art. I, § 27 (emphasis added). However, this Court historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions.[1] *See, e.g., State v. Bronson*, 333 N.C. 67, 423 S.E.2d 772 (1992); *State v. Rogers*, 323 N.C. 658, 374 S.E.2d 852 (1989); *State v. Peek*, 313 N.C. 266, 328 S.E.2d 249 (1985); *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985); *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). As the Supreme Court stated in *Trop v. Dulles*, 356 U.S. 86, 2 L. Ed. 2d 630 (1958):

> Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual."

Id. at 100 n.32, 2 L. Ed. 2d at 642 n.32 (citations omitted). Thus, we examine each of defendant's contentions in light of the general principles enunciated by this Court and the Supreme Court guiding cruel and unusual punishment analysis.

Defendant first argues that his sentence contravenes current standards of decency. This argument finds its origin in *Trop v. Dulles*, one of the classic cases on the Eighth Amendment. There, the

1. In *Medley v. N.C. Dep't of Correction*, 330 N.C. 837, 412 S.E.2d 654 (1992), Justice Martin suggested in his lone concurrence that the protection afforded under the state Constitution might be broader than that provided by the Eighth Amendment, stating, "The disjunctive term 'or' in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment." *Id.* at 846-47, 412 S.E.2d at 660 (Martin, J., concurring). However, research reveals neither subsequent movement toward such a position by either this Court or the Court of Appeals nor any compelling reason to adopt such a position.

Supreme Court traced the historic foundations of the Eighth Amendment and stated: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100, 2 L. Ed. 2d at 642. Noting that "the words of the Amendment are not precise, and that their scope is not static[,] [t]he Amendment must draw its meaning from the *evolving standards of decency that mark the progress of a maturing society.*" *Id.* at 100-01, 2 L. Ed. 2d at 642 (emphasis added). The Court expounded upon this principle in *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859 (1976). In *Gregg*, the Court counseled that since the prohibition against cruel and unusual punishment is not a static concept, courts should look to objective indications of society's current values in determining whether the punishment in question complies with such "evolving standards." *Id.* at 173, 49 L. Ed. 2d at 874. In so doing, however, the *Gregg* Court warned, "we may not act as judges as we might as legislators," *id.* at 174, 49 L. Ed. 2d at 875, and quoted Justice Frankfurter in setting forth the rationale for such caution:

> "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."

Id. at 175, 49 L. Ed. 2d at 875 (quoting *Dennis v. United States*, 341 U.S. 494, 525, 95 L. Ed. 1137, 1160-61 (1951) (Frankfurter, J., concurring in affirmance of judgment)). The *Gregg* Court went on to explain:

> Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
>
> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the

> legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."

Id. at 175, 49 L. Ed. 2d at 876 (quoting *Furman v. Georgia*, 408 U.S. 238, 383, 33 L. Ed. 2d 346, 432 (1972) (Burger, C.J., dissenting)). As the Supreme Court more recently reiterated, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331, 106 L. Ed. 2d 256, 286 (1989); *see also Stanford v. Kentucky*, 492 U.S. 361, 370, 106 L. Ed. 2d 306, 318 (1989) (" 'First' among the ' "objective indicia that reflect the public attitude toward a given sanction" ' are statutes passed by society's elected representatives.").

This Court similarly has recognized that substantial deference is to be afforded the legislature because it is the role of the legislature and not the courts to decide the proper punishment for individuals convicted of a crime. *Higginbottom*, 312 N.C. at 763-64, 324 S.E.2d at 837; *State v. Cradle*, 281 N.C. 198, 209, 188 S.E.2d 296, 303, *cert. denied*, 409 U.S. 1047, 34 L. Ed. 2d 499 (1972).

An examination of defendant's punishment in this case indicates it clearly comports with the "evolving standards of decency" in society. Effective 1 May 1994, the General Assembly lowered the age of possible transfer to superior court from fourteen to thirteen years of age. Ch. 22, secs. 25-27, 1993 N.C. Sess. Laws (Extra Session 1994) at 75. Prior to 1 October 1994, individuals convicted of first-degree sexual offense were subject to a mandatory term of life imprisonment. N.C.G.S. § 14-1.1 (1986) (superseded by N.C.G.S. § 15A-1340.17 (1997) (making life imprisonment mandatory only for first-degree murder)). Defendant committed the crimes for which he was convicted on 27 July 1994. Once he was transferred to superior court and found guilty of first-degree sexual offense, defendant was sentenced to the mandatory punishment of life imprisonment. Our State's appellate courts repeatedly have held that a mandatory life sentence for first-degree sexual offense is not cruel and unusual punishment under either the state or federal Constitutions. *State v. Holley*, 326 N.C. 259, 262, 388 S.E.2d 110, 111 (1990); *State v. Cooke*, 318 N.C. 674, 679, 351 S.E.2d 290, 293 (1987); *Higginbottom*, 312 N.C. at 764, 324 S.E.2d at 837. Therefore, the issue is whether sentencing a *thirteen-year-old* to life imprisonment for first-degree sexual offense complies with evolv-

ing standards of decency so as not to be cruel and unusual punishment.

Examination of recent legislative history establishes that the legislature's reduction of the transfer age from fourteen to thirteen years was a reasonable reaction to a genuine public concern over the increase in violent juvenile offenders such as defendant. In 1993, 1,070 juveniles under the age of *fifteen* were arrested for violent crimes, an increase of over *249%* from 1984. State of North Carolina Uniform Crime Report 1994, at 155, 157, State Bureau of Investigation, Raleigh, N.C. (July 1995). This reflected an overall increase in juvenile arrests, which increased 191% from 1984 to 1993. *Id.* at 157. Public concern over rising crime served as the impetus for the Governor to call the General Assembly into an extra session in 1994 devoted exclusively to crime. In the proclamation establishing the extra session, the Governor pronounced, "Crime is the most urgent issue facing our State." Proclamation by Governor James B. Hunt, Feb. 8, 1994, Raleigh, N.C., *printed in* N.C. House Journal 9, Extra Session 1994. Noting the state was facing a "crisis in crime," the Governor convened the General Assembly "for the purpose of considering legislation to . . . toughen punishment for youthful offenders." *Id.* at 10.

At legislative hearings, city and county officials, prosecutors, judges, educators, juvenile social service providers, police officers, crime victims and many others voiced their concerns and suggestions about stemming rising crime rates. Verbatim Transcript, Public Hearings before the Senate of the N.C. General Assembly Sitting as a Committee of the Whole in Extra Session on Crime, Feb. 8-9, 1994, Raleigh, N.C., *printed in* N.C. Senate Journal, Extra Session 1994. Chief among the concerns, especially among city and county leaders, was the growing number of younger and younger violent offenders. *Id.* at 245-46, 249. Pasquotank County Commissioner Zee Lamb noted, "School and juvenile violence . . . has our citizens up in arms." *Id.* at 251. Giving several examples of violent youthful offenders, District Court Judge Margaret Sharpe testified, "It's not unusual to see 11-12-13-year-olds committing rape and other serious sexual assaults." *Id.* at 328. In discussing how to deal with these juveniles, High Point Mayor Rebecca Smothers, stated that "[t]he current juvenile code is hopelessly outdated," *id.* at 249, and District Attorney for the First Judicial District H.P. Williams explained, "in our juvenile system . . . there are no consequences, and as a result of there being no consequences, there's no reason [for juveniles] to behave," *id.* at

264. As a result of deficiencies in the juvenile system, Chief District Court Judge for the Fifth Judicial District Jacqueline Morris-Goodson testified, "by the time that we are getting these young people, many of them are in open rebellion against all authority. We ask [as district court judges] that you give us some means to detain them. You have basically taken away the opportunity that we have to say to young people when they come to us, that the court means business about what we say to you, and that we will back it up." *Id.* at 291.

These concerns and suggestions resulted in numerous pieces of legislation affecting juvenile offenders during the crime session. In addition to lowering the minimum transfer age, the legislature passed laws permitting the use of juvenile records in the guilt phase of later adult trials, prohibiting the expunction of juvenile records for certain severe offenses, requiring probable-cause hearings in all potential transfer cases, mandating notification of a minor's parents when a minor is charged with an offense and establishing numerous crime-prevention programs for juveniles. North Carolina Legislation 1994, at 157-60 (Inst. of Gov't, Univ. of N.C. at Chapel Hill, John L. Sanders ed. 1995). During the 1994 extra crime session of the legislature, the general consensus of the people through their elected representatives was that violent youthful offenders were a substantial threat to the security and well-being of society, and they must be dealt with in a more severe manner. Such sentiment found expression through the legislature's reduction of the minimum transfer age from fourteen to thirteen years of age.

To paraphrase the Supreme Court: "These and other facts and reports detailing the pernicious effects of [juvenile crime] in this [state] do not establish that [our state's] penalty scheme is correct or the most just in any abstract sense. But they do demonstrate that the [North Carolina] Legislature could with reason conclude that the threat posed to the individual and society by [juvenile crime] . . . is momentous enough to warrant the deterrence and retribution of [lowering the transfer age from fourteen to thirteen years of age]." *Harmelin v. Michigan*, 501 U.S. 957, 1003, 115 L. Ed. 2d 836, 870 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

Moreover, North Carolina is far from alone in its treatment of youthful offenders for serious crimes such as first-degree sexual offense. Of at least eighteen other states permitting waiver or transfer of offenders thirteen or under to adult court: Georgia, Illinois and

Mississippi also have thirteen years as a minimum age, Ga. Code Ann. § 15-11-39 (1994), 705 Ill. Comp. Stat. 405/5-4 (West Supp. 1998), Miss. Code Ann. § 43-21-157 (Supp. 1997); Colorado, Missouri and Montana have twelve as a minimum age, Colo. Rev. Stat. § 19-2-518 (1997), Mo. Ann. Stat. § 211.071 (West 1996), Mont. Code Ann. § 41-5-206 (1997); Vermont permits transfer at age ten for sexual assault, Vt. Stat. Ann. tit. 33, § 5506(a)(10) (1991); and Alaska, Arizona, Delaware, Idaho, Maine, Nebraska, New Hampshire, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, and Wyoming have no minimum age for trial as an adult for sexual offense, Alaska Stat. § 47.12.100 (Michie 1996), Ariz. Rev. Stat. R. Juv. Ct. Pro. 12, 14 (1998), Del. Code Ann. tit. 10, §§ 937, 938 (rev. 1974), Idaho Code §§ 20-508, 20-509 (1997), Me. Rev. Stat. Ann. tit. 15, § 3101 (West Supp. 1997), Neb. Rev. Stat. §§ 43-261, 43-276 (1993), N.H. Rev. Stat. Ann. § 169-B:24 (Supp. 1997), Okla. Stat. Ann. tit. 10, § 7303-4.3 (West 1998), Or. Rev. Stat. §§ 419C.349, 419.352 (1997), R.I. Gen. Laws §§ 14-1-7, 14-1-7.2 (1994), S.D. Codified Laws §§ 26-11-1, 26-11-4 (Michie 1998), Tenn. Code Ann. § 37-1-134 (1996), Wyo. Stat. Ann. § 14-6-237 (Michie 1997). Although this state's possible life-imprisonment punishment of thirteen-year-olds for a first-degree sexual offense would not be *per se* unconstitutional even were it the only state to do so, *Harmelin*, 501 U.S. at 1000, 115 L. Ed. 2d at 868 (Kennedy, J., concurring in part and concurring in the judgment), the growing minority of states allowing such punishment is indicative of the public sentiment toward violent youthful offenders.

While this circumstance may indeed be a sad commentary on the state of our youth and the general decline of values in our society and a truly grievous fact, it is not of necessity and by virtue thereof unconstitutional. "Evolving standards of decency" are not fixed in time and place, nor are they always focused solely on the rights of criminals. At this time, protection of law-abiding citizens from their predators, regardless of the predators' ages, is on the ascendancy in our state and nation. Similarly, it is the general consensus that serious youthful offenders must be dealt with more severely than has recently been the case in the juvenile system. These tides of thought may ebb in the future, but for now, they predominate in the arena of ideas. Thus, we conclude that sentencing a thirteen-year-old defendant to mandatory life imprisonment for commission of a first-degree sexual offense is within the bounds of society's current and evolving standards of decency.

[6] Having found defendant's sentence to be within evolving standards of decency, we must nonetheless examine whether it is otherwise excessive in a constitutional sense. *E.g.*, *Gregg*, 428 U.S. at 173, 49 L. Ed. 2d at 874-75 (noting that public standards of decency are not always conclusive and that punishment must neither inflict unnecessary pain nor be grossly disproportionate to the crime). Defendant maintains his punishment is excessive because it is disproportionate to the crime committed. This is based on the assertion that mandatory life imprisonment is a penalty too harsh for a thirteen-year-old "child" convicted of first-degree sexual offense. We do not agree.

It is well established that punishment within the maximum fixed by the legislature through statute is not cruel and unusual unless the punishment provisions of the statute itself are unconstitutional. *State v. Williams*, 295 N.C. 655, 679, 249 S.E.2d 709, 725 (1978). This Court has frequently enunciated the principle that a criminal sentence fixed by the legislature must be proportionate to the crime committed. *E.g.*, *Peek*, 313 N.C. at 275, 328 S.E.2d at 255; *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 440 (1983). However, in *Harmelin*, 501 U.S. 957, 115 L. Ed. 2d 836, the United States Supreme Court held that outside of the capital context, there is no general proportionality principle inherent in the prohibition against cruel and unusual punishment. *Id.* at 992-94, 115 L. Ed. 2d at 863-64; *see also Bronson*, 333 N.C. at 81, 423 S.E.2d at 780. Indeed, the prohibition against cruel and unusual punishment "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001, 115 L. Ed. 2d at 869 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 288, 77 L. Ed. 2d 637, 647 (1983)); *see also Rummel v. Estelle*, 445 U.S. 263, 271, 63 L. Ed. 2d 382, 389 (1980) ("grossly disproportionate"); *Coker v. Georgia*, 433 U.S. 584, 592, 53 L. Ed. 2d 982, 989 (1977) ("grossly out of proportion" sentences prohibited); *Weems v. United States*, 217 U.S. 349, 371, 54 L. Ed. 793, 800 (1910) ("greatly disproportioned" sentences prohibited). Only in exceedingly rare noncapital cases will sentences imposed be so grossly disproportionate as to be considered cruel or unusual. *Rummel*, 445 U.S. at 272, 63 L. Ed. 2d at 389; *Peek*, 313 N.C. at 276, 328 S.E.2d at 255.

Defendant claims his sentence of life imprisonment is grossly disproportionate because of his young age. While the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime, the

Court's review is not limited to this factor. The Court may look at other factors, including the severity of the crime and defendant's eligibility for parole. Moreover, as in capital sentencing proceedings, the number of years a defendant has spent on this planet is not solely determinative of his "age." *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983). Due to factors such as life experience, knowledge level, psychological development, criminal familiarity, and sophistication and severity of the crime charged, a criminal defendant may be deemed to possess the wisdom and age of individuals considerably older than his chronological age. *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986).

An examination of the crime committed by defendant in this case reveals it is not the type attributable to or characteristic of a "child," nor is it one for which the special considerations due children under the criminal justice system are appropriate. Defendant apparently stalked and harassed his victim for several weeks. He forcefully broke into the victim's apartment and attacked her with a weapon. With full knowledge that the police had been alerted, defendant proceeded to sexually assault the victim, in a variety of ways, in her own bedroom in front of her child in a humiliating and highly vicious manner. Defendant yielded his attack only when the police arrived, and he waited literally until the last moment possible, escaping out the front door as police entered through the rear. These circumstances show purpose and culpability on defendant's part rising far above that normally attributable to a thirteen-year-old juvenile. The cruelty of the attack, its predatory nature toward an essential stranger, defendant's refusal to accept full responsibility, his difficulty controlling his temper, his previous record and his unsupportive family situation all suggest defendant is not particularly suited to the purpose and type of rehabilitation dominant in the juvenile system. Moreover, defendant would have been subject to release only four years after his conviction, at the time he achieved eighteen years of age. Considering these factors, we hold that defendant's sentence within the adult system is plainly not grossly disproportionate to the crime he committed.

[7] Defendant also claims his punishment is excessive because it is "so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg*, 428 U.S. at 183, 49 L. Ed. 2d at 880. This is based on defendant's assertion that minor offenders should be "treated" instead of "punished." However, the prohibition against cruel and unusual punishment "does not mandate adoption of any one penological theory." *Harmelin*, 501 U.S. at 999, 115 L. Ed. 2d

at 867 (Kennedy, J., concurring in part and concurring in the judgment). As with criminal sentences, the theories underlying those sentences change over time. *Payne v. Tennessee*, 501 U.S. 808, 819-20, 115 L. Ed. 2d 720, 731-32 (1991). "[S]tate criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Harmelin*, 501 U.S. at 999, 115 L. Ed. 2d at 867-68 (Kennedy, J., concurring in part and concurring in the judgment). The General Assembly has determined that the adult justice system, with its primary goals of incapacitation and retribution, is the appropriate place for violent youthful offenders, such as defendant. It is not for this Court to second-guess this determination. As Justice Blackmun noted in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346:

> We should not allow our personal preferences as to the wisdom of legislative . . . action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great.

Id. at 411, 33 L. Ed. 2d at 448-49 (Blackmun, J., dissenting). We properly resist any such temptation, and hold defendant's argument to be without merit.

[8] In his final argument, defendant contends his punishment is cruel and unusual because he is the only thirteen-year-old offender who will be sentenced to a mandatory life sentence for first-degree sexual offense. The legislature lowered the minimum transfer age from fourteen to thirteen years of age effective 1 May 1994. At that time, the prescribed punishment for first-degree sexual offense was a mandatory term of life imprisonment under the old Fair Sentencing Act. N.C.G.S. § 14-1.1 (1986) (repealed 1994). With implementation of the Structured Sentencing Act, mandatory life imprisonment was abolished for first-degree sexual offense on 1 October 1994. N.C.G.S. § 15A-1340.17 (1997). As a result, there was a four-month "window" of opportunity wherein a thirteen-year-old first-degree sexual offender could potentially face mandatory life imprisonment for conviction. Since defendant was the only thirteen-year-old to commit first-degree sexual offense during this "window," to have his case subsequently transferred to superior court, and to be convicted of the crime, he is the only thirteen-year-old who will be sentenced to a mandatory term of life imprisonment under this statutory scheme as it existed. Defendant contends this result is so unusual that it rises to the level of being unconstitutional. We disagree.

The fact that a particular punishment is "unusual," in the sense that few defendants fall within its purview, is largely irrelevant to our inquiry. As noted above, this Court and the United States Supreme Court traditionally have not afforded separate treatment to the words "cruel" and "unusual," but have looked only to whether a particular punishment involves basic inhuman treatment. In the few cases where punishments have been held unconstitutional due to their apparent "unusualness," the punishments involved treatment so far-removed from accepted forms of punishment in this society that they amounted to basic inhumanity or cruelty. *See Rummel*, 445 U.S. at 274-75, 63 L. Ed. 2d at 391 (punishment "unique" only if it is a form different from "more traditional forms . . . imposed under the Anglo-Saxon system"); *Weems*, 217 U.S. at 364-82, 54 L. Ed. at 797-805 (Philippine court sentence of "cadena temporal," hard and painful labor in permanent chains, held cruel and unusual due to unfamiliarity with Anglo-American punishment tradition). Defendant's punishment of ordinary imprisonment in no way approaches such a level.

Defendant makes much of the fact that he is the only thirteen-year-old who will be or was sentenced under the statute that specified *mandatory* life imprisonment for first-degree sexual offense. However, the fact that defendant is the only criminal to suffer such punishment is nothing more than coincidence. Had two, or two hundred, thirteen-year-olds committed first-degree sexual offenses during the four-month "window" of possible punishment, the law as then written would have applied to all equally. The fact that defendant was the only thirteen-year-old who chose to commit this heinous offense and thereby suffer the otherwise uniform and acceptable punishment prescribed is due to his own timing and nothing more than happenstance. The suggestion that an equally applicable punishment is rendered unconstitutional by virtue of the fact that few choose to commit the crime underlying it, or that only one of many who commit such crime is the one caught and convicted, does not fall within the bounds of any reasonable constitutional discourse.

In conclusion, defendant's punishment in this case "is severe but is not cruel or unusual in the constitutional sense." *Fulcher*, 294 N.C. at 525, 243 S.E.2d at 352. Accordingly, this assignment of error is overruled.

We conclude that defendant's transfer, trial and sentence were constitutional and free of error. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice FRYE concurring in part and dissenting in part.

In this case, the majority decides two issues. I agree with its decision on the first issue, that the procedures by which juvenile court judges transfer cases to superior court are adequately protective of the due process rights of juveniles. I disagree with the majority's conclusion that the sentencing of this thirteen-year-old juvenile, after such transfer and conviction, to a mandatory term of life imprisonment for first-degree sexual offense does not constitute cruel or unusual punishment under the North Carolina Constitution. Accordingly, I must dissent as to that portion of the opinion.

This case presents a singular situation arising because of the interaction of two separate enactments of the General Assembly, which resulted in a thirteen-year-old, borderline mentally retarded juvenile with no prior criminal record being tried as an adult and subjected to a *mandatory* sentence of life imprisonment for the crime of first-degree sexual offense[2]. In this state, prior to 1 May 1994, neither defendant nor any other thirteen-year-old was subject to a mandatory life sentence for the crime of first-degree sexual offense. After 1 October 1994, and continuing to the present time, no defendant, adult or juvenile, is subject to a mandatory life sentence for that crime. Therefore, a mandatory life sentence was possible for a thirteen-year-old juvenile in North Carolina only during a five-month period.

The majority cites some eighteen jurisdictions which allow the transfer of thirteen-year-old offenders to adult court, and it further notes that a growing minority of states permit a sentence of life imprisonment for sexual offense. However, defendant cites thirty-one jurisdictions where a life sentence is not available for sexual offense, noting that only two states, Arizona and Iowa, have mandatory life sentences for sexual offense, and that in Iowa, thirteen-year-olds are not eligible for trial as adults. Thus, it appears that Arizona is the only state in the nation today where a thirteen-year-old juvenile, upon conviction for sexual offense, will be subject to a mandatory term of life imprisonment.

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2. As the majority opinion notes, defendant was also sentenced to six years' imprisonment for attempted first-degree rape and fifteen years' imprisonment for first-degree burglary. He thus should remain incarcerated for a considerable period of time even if his mandatory life sentence for first-degree sexual offense is stricken as unconstitutional for the reasons set forth herein.

I believe the narrow legal question presented by this case is whether defendant's mandatory life sentence under these circumstances constitutes cruel or unusual punishment under Article I, Section 27 of the North Carolina Constitution.

This Court has said, "[i]t is within the province of the General Assembly of North Carolina and not the judiciary to determine the extent of punishment which may be imposed on those convicted of crime." *State v. Cradle*, 281 N.C. 198, 209, 188 S.E.2d 296, 303, *cert. denied*, 409 U.S. 1047, 34 L. Ed. 2d 499 (1972). This reliance on legislative judgment assumes that the General Assembly acted intentionally and with full knowledge of the effect of its enactments. Thus, great deference is due decisions of that branch of government as the representative of the people. Occasionally, however, cases come before this Court which raise the question of whether the General Assembly envisioned the potential result of the interrelation of its various legislative enactments, including sentencing statutes.

During the 1994 Special Session, the General Assembly changed the method of punishment for crime in North Carolina by repealing the Fair Sentencing Act and adopting structured sentencing. As a part of those statutory changes, the General Assembly eliminated mandatory sentences for all crimes except first-degree murder. At that same session, the General Assembly also reduced the age at which a juvenile could be tried as an adult, from fourteen to thirteen years of age. While the effective dates of the two enactments were different, it is at least doubtful that the legislature considered, or was aware, that it was creating a five-month period during which thirteen-year-old juveniles would be subject to a mandatory life sentence for offenses other than murder.

The majority correctly points out that this Court has held that a mandatory life sentence for first-degree sexual offense does not constitute cruel or unusual punishment. Suffice it to say that none of those cases involved a thirteen-year-old juvenile tried as an adult. The majority notes that whether a specific punishment is cruel and unusual is evaluated in the context of society's "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 642 (1958). Assuming that this is also the proper standard under the North Carolina Constitution, the General Assembly's repeal of mandatory life imprisonment for first-degree sexual offense must be considered "reliable[,] objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331, 106 L. Ed. 2d 256, 286 (1989). By elimi-

nating the mandatory life sentence for *all* defendants convicted of this crime, the legislature cannot realistically be deemed to have specifically intended that thirteen-year-old juveniles be suddenly subject to mandatory life terms during the five-month period of 1 May to 1 October 1994.

Defendant, Andre Demetrius Green, a thirteen-year-old, borderline mentally retarded juvenile, was charged with the crime of first-degree sexual offense in August 1994 and was transferred to superior court for trial as an adult. Upon the jury verdict of guilty of first-degree sexual offense, the trial judge had no discretion but to sentence defendant to the mandatory term of life imprisonment. The judge could not consider or weigh any mitigating factors in determining whether a sentence less than life imprisonment was the appropriate penalty. Nor could the judge, in determining a proper sentence, consider defendant's age or prior record level as he could have if the Structured Sentencing Act had been in effect. Defendant's mandatory life sentence was both excessive and unique in its severity. His punishment was, and is, an anomaly in contemporary North Carolina case law, inconsistent with this State's own evolving standards of decency as evidenced by the replacement of mandatory sentencing with the Structured Sentencing Act.

While this Court has often used the same analysis for the state and federal constitutions in terms of whether the prescribed punishment is cruel *and* unusual, the North Carolina Constitution since 1868 has prohibited punishments that are cruel *or* unusual. Clearly, defendant's punishment, under the state of the law as it existed at the time of his commission of the offense, was unusual within the meaning of Article I, Section 27 of the North Carolina Constitution. Therefore, as to the portion of the majority opinion which holds otherwise, I respectfully dissent.

Justice WHICHARD and Justice PARKER join in this concurring and dissenting opinion.

CAROL J. PULLIAM v. FREDERICK J. SMITH

No. 499PA96

(Filed 30 July 1998)

1. Divorce and Separation § 359 (NCI4th)— child custody—motion to modify—change of circumstances—adversity

The Court of Appeals erred by concluding that the party seeking modification of child custody based upon changed circumstances must show that the change in circumstances has had or will have an adverse effect on the child. Courts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both those which will have salutary effects upon the child and those which will have adverse effects; either may support a modification of custody on the ground of a change in circumstances. A statement in *Thomas v. Thomas*, 259 N.C. 461, referring to a change of circumstances adversely affecting the children, merely reflected the facts in that case and was *obiter dictum*, and the Court of Appeals' decisions in *Rothman* v. *Rothman*, 6 N.C. App. 401 and subsequent cases are disapproved to the extent they require a showing of adversity. However, it must always be remembered that a decree of custody is entitled to such stability as would end vicious litigation.

2. Divorce and Separation § 370 (NCI4th)— change of child custody—homosexual cohabitation—findings sufficient

The Court of Appeals erred by holding that there was insufficient evidence to support the trial court's finding of a substantial change of circumstances affecting the welfare of two minor children which would warrant a change of custody where defendant-father had been granted physical custody in California pursuant to a consent decree; his homosexual partner, Tim Tipton, moved into defendant's home with the children in North Carolina several years later; and the trial court ordered that plaintiff-mother be awarded the exclusive care, custody and control of the two minor children, with defendant having visitation. The Court of Appeals did not afford sufficient weight and deference to the well-established law which limits appellate court review of custody orders; absent a total lack of substantial evidence to support the trial court's findings, such findings will not be disturbed on appeal, and "substantial evidence" has been defined as such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion. Here, most of the trial court's findings are uncontested and the remaining are supported by substantial evidence. Activities such as the regular commission of sexual acts in the home by unmarried people, failing and refusing to counsel the children against such conduct while acknowledging this conduct to them, allowing the children to see unmarried persons known by the children to be sexual partners in bed together, keeping admittedly improper sexual material in the home, and the partner taking the children out of the home without their father knowing their whereabouts support the trial court's findings of improper influences which are detrimental to the best interests and welfare of the children. Moreover, the trial court could reasonably find that defendant's activity will likely create emotional difficulties for the two minor children from substantial evidence that one of the children became emotionally distraught when told of his father's activity, that he cried, grasped his mother, and asked her to get him out of defendant's home, that he told his stepfather that he wanted his mother to come and get him, and that he had expressed confusion over defendant's homosexual relationship. The trial court did not rely on the mere fact that defendant is a homosexual or a practicing homosexual, and the Supreme Court does not hold that the mere homosexual status of a parent is sufficient to deny such parent custody.

Justice ORR concurring in the result.

Justice WEBB dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 124 N.C. App. 144, 476 S.E.2d 446 (1996), reversing a judgment entered by Burgin, J., on 30 June 1995 in District Court, Henderson County. Heard in the Supreme Court 14 May 1997.

Jackson & Jackson, by Phillip T. Jackson, for plaintiff-appellant.

Lambda Legal Defense and Education Fund, Inc., by Beatrice Dohrn; and N.C. Gay and Lesbian Attorneys, by Ellen W. Gerber and Sharon A. Thompson, for defendant-appellee.

Stam, Fordham & Danchi, P.A., by Paul Stam, Jr.; and James F. Lovett, Jr., on behalf of North Carolina Family Policy Council, amicus curiae.

Michael P. Adams and Tharrington Smith, by Jaye Meyer, on behalf of American Civil Liberties Union; and Deborah Ross on behalf of ACLU of North Carolina Legal Foundation, amici curiae.

Myrna Ann Miller on behalf of National Association of Social Workers, North Carolina Chapter, and National Association of Social Workers, amici curiae.

MITCHELL, Chief Justice.

The overriding question presented for review is whether there was sufficient evidence to support the trial court's finding of a substantial change of circumstances affecting the welfare of two minor children which would warrant a change of custody. The Court of Appeals held that there was not. Since we conclude that the trial court's judgment modifying a prior order placing custody of the children with their father is supported by adequate findings of fact based on substantial evidence, we also conclude that the trial court's judgment was free of error. We therefore reverse the decision of the Court of Appeals.

[1] As a preliminary matter, we address that portion of the Court of Appeals' decision which concluded that the party seeking modification of custody must show "that the change [in circumstances] has had an *adverse* effect on the child or will likely or probably have such an effect unless custody is altered." *Pulliam v. Smith*, 124 N.C. App. 144, 147, 476 S.E.2d 446, 449 (1996) (emphasis added). This Court has never required the party moving for a modification of custody to show that the change in circumstances has had or will have an *adverse* consequence upon the child's well-being, and we decline to do so now.

The controlling statute provides that, when an order for custody of a minor child has been entered by a court of another state, a court of this state may, upon a showing of changed circumstances, enter a new order for custody. N.C.G.S. § 50-13.7(b) (1995). In *Blackley v. Blackley*, 285 N.C. 358, 204 S.E.2d 678 (1974), we interpreted N.C.G.S. § 50-13.7(b) which mandates a "showing of changed circumstances." In that decision, we held:

> [T]he modification of a custody decree must be supported by findings of fact based on competent evidence that there has been

> a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances.

Id. at 362, 204 S.E.2d at 681. In *Blackley*, we held that the trial court erred in modifying a prior order awarding custody because the evidence was insufficient to show a substantial change of circumstances affecting the welfare of the child; we neither held nor implied that to establish a change of circumstances which would justify a modification of custody, it must always be shown that the change of circumstances adversely affects or will adversely affect the child.

The welfare of the child has always been the polar star which guides the courts in awarding custody. *Shepherd v. Shepherd*, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968). In reviewing a request for modification of custody, courts may not limit the inquiry as to what constitutes the best interests of the child solely to a consideration of those changes in circumstances which it has found to exist and which may *adversely* affect that child. It is true that we have stated in one case that, "We cannot forecast the future, but if there should be a change of circumstances adversely affecting the welfare of these children, the court is empowered to act . . . ." *Thomas v. Thomas*, 259 N.C. 461, 467, 130 S.E.2d 871, 876 (1963). However, this statement in the form of *obiter dictum* should not be read to indicate that a court's consideration of changed circumstances should be limited to those having adverse consequences for the child. The facts in *Thomas* involved a situation in which the children were affected adversely if at all, and our statement there merely reflected those facts. Further, our statement that a change of circumstances adversely affecting children would empower the court to act is not equal to, and should not be read as, a holding that a court could not change custody where a substantial change of circumstances had occurred which would beneficially affect the child if custody should be modified. Rather, courts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances.

In *Rothman v. Rothman*, 6 N.C. App. 401, 170 S.E.2d 140 (1969), the Court of Appeals wrote, "Professor Lee points out in his treatise on North Carolina Family Law that there must generally be a sub-

stantial change of circumstances before an order of custody is changed." *Id.* at 406, 170 S.E.2d at 144. The Court of Appeals then incorrectly held, "It must be shown that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified." *Id.* The Court of Appeals' decision in *Rothman*, insofar as it mandates that the changed circumstances analysis be limited to a showing of *adverse* effects on the child, is contrary to N.C.G.S. § 50-13.7(b) and is disapproved. We also disapprove of subsequent Court of Appeals cases to the extent they require a showing of adversity to the child as a result of changed circumstances to justify a change of custody.[1]

We emphasize that an adverse effect upon a child as the result of a change in circumstances is and remains an acceptable factor for the courts to consider and will support a modification of a prior custody order. However, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody. We conclude this analysis by noting that, in either situation, it must always be remembered that

> [a] decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

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1. *E.g.*, *Wiggs v. Wiggs*, 128 N.C. App. 512, 495 S.E.2d 401 (1998); *Pulliam v. Smith*, 124 N.C. App. 144, 476 S.E.2d 446; *MacLagan v. Klein*, 123 N.C. App. 557, 473 S.E.2d 778 (1996), *disc. rev. denied*, 345 N.C. 343, 483 S.E.2d 170 (1997); *Speaks v. Fanek*, 122 N.C. App. 389, 470 S.E.2d 82 (1996); *Garrett v. Garrett*, 121 N.C. App. 192, 464 S.E.2d 716 (1995); *Benedict v. Coe*, 117 N.C. App. 369, 451 S.E.2d 320 (1994); *Dobos v. Dobos*, 111 N.C. App. 222, 431 S.E.2d 861 (1993); *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992); *Perdue v. Perdue*, 76 N.C. App. 600, 334 S.E.2d 86 (1985); *Wehlau v. Witek*, 75 N.C. App. 596, 331 S.E.2d 223 (1985); *O'Briant v. O'Briant*, 70 N.C. App. 360, 320 S.E.2d 277, *disc. rev. denied*, 312 N.C. 623, 323 S.E.2d 923 (1984), *rev'd in part on other grounds*, 313 N.C. 432, 329 S.E.2d 370 (1985); *Barnes v. Barnes*, 55 N.C. App. 670, 286 S.E.2d 586 (1982); *Gordon v. Gordon*, 46 N.C. App. 495, 265 S.E.2d 425 (1980); *Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E.2d 429, *disc. rev. denied*, 301 N.C. 87 (1980); *Pritchard v. Pritchard*, 45 N.C. App. 189, 262 S.E.2d 836 (1980); *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E.2d 819 (1978); *Searl v. Searl*, 34 N.C. App. 583, 239 S.E.2d 305 (1977).

Shepherd, 273 N.C. at 75, 159 S.E.2d at 361. Having resolved the foregoing questions of law, we turn to the evidence presented and the issue raised by the parties in this case.

[2] Uncontroverted evidence before the trial court tended to show that plaintiff Carol J. Pulliam and defendant Frederick J. Smith are the mother and father of two boys, Frederick Joseph Smith, II (Joey) and Kenneth August Smith (Kenny). Plaintiff-mother and defendant-father were married in California in November 1982. They separated in 1990 when plaintiff went to live in Kansas with William Pulliam. Plaintiff and defendant were divorced in November 1991. At that time, Joey was six years old, and Kenny was three years old. The parties entered into a consent decree regarding the custody of the children. Pursuant to the decree, the parties had joint legal custody, and defendant-father had physical custody of the children. Until August 1994, the children lived with defendant and his grandmother in North Carolina. In February 1993, plaintiff married Mr. Pulliam, and they have since resided in Wichita, Kansas. Plaintiff-mother had the boys with her for two months during the summer and at Christmas each year. In August 1994, Tim Tipton moved into defendant's home, and defendant's grandmother moved out a month later. Defendant-father and Mr. Tipton are homosexuals.

The trial court made findings of fact supported by evidence, which included, *inter alia*, the following:

> 27. That Tim Tipton first moved into the home located on 9 Roberts Street in Fletcher, North Carolina around March of 1994.
>
> 28. That Tim Tipton and the Defendant often kiss on the check [sic] and sometimes on the lips in front of the two minor children. That Tim Tipton and the Defendant would often hold hands in front of the two minor children.
>
> 29. Tim Tipton and the Defendant both testified that they engaged in oral sex, in that Tim Tipton would about once a week place his mouth on the penis of the Defendant. The Defendant would also place his mouth on the penis of Tim Tipton. The Court accordingly makes this as a finding of fact.
>
> . . . .
>
> 32. That Tim Tipton and the Defendant engaged in the acts described in paragraph 29 above while the minor children

were present in the home. That the minor children share the same bedroom and the said bedroom of the minor children is directly across the hall from the bedroom occupied by the Defendant and Tipton. That the Defendant and Tipton would engage in the acts described in paragraph 29 above while the children were a short distance away.

33. The Defendant and Mr. Tipton on at least one (1) occasion had a party for homosexuals at the home located at 9 Roberts Road in Fletcher, North Carolina. That the occasion was an anniversary party marking the first year since the Defendant and Tim Tipton meet [sic] at a homosexual bar in Asheville, North Carolina.

34. The Defendant and Mr. Tipton on at least three (3) occasions since first meeting have gone to an establishment that caters to homosexuals.

35. Mr. Tipton keeps in the bedroom he shares with the Defendant pictures of "drag queens". These are pictures of men dressed like women. These pictures are not under a lock, and it is possible for the children to gain access to the pictures.

36. Mr. Tipton testified that these materials (photographs of "drag queens") were not something that a child should be subjected to, and the Court finds this as a fact.

37. That the minor child Joey on one or more occasions observed the Defendant and Tipton in bed together.

38. That the two minor children never have friends stay over night while they are residing with the Defendant.

. . . .

43. Uncontroverted evidence was presented that on at least two (2) occasions the Defendant struck the minor child Joey on or about the head, and accordingly the Court makes this as a finding of fact.

44. That on the 27th day of February, 1993, the Plaintiff married William Pulliam.

45. That evidence was presented which indicated that the two minor children have friends in Wichita, Kansas as well as friends in Henderson County, accordingly the Court makes this as a finding of fact.

46. The children spend about two (2) months every summer with the Plaintiff in Wichita, Kansas since the entry of the California Judgment.

47. At the house in Henderson County the children had separate beds in the same bedroom. That the two minor children have separate beds in the same bedroom at the Plaintiff's home in Wichita, Kansas. Furthermore, the Plaintiff's residence in Wichita, Kansas is of ample size for the two minor children.

48. The Plaintiff has in the past during the summer visitations taken more than adequate care of the two minor children.

49. That from the evidence presented the Court would find that the Defendant's conduct is not fit and proper and will expose the (2) minor male children to unfit and improper influences.

. . . .

53. The activity of the Defendant will likely create emotional difficulties for the two minor children. That evidence was presented that the minor child Joey cried when he was told by the Defendant that he (Defendant) was homosexual. This evidence leads the Court to find that the minor child Joey may already be experiencing emotional difficulties because of the active homosexuality of the Defendant. Furthermore the Court finds that it is likely that the minor child Kenny will also experience emotional difficulties because of the active homosexuality of the Defendant.

54. That the active homosexuality of the Defendant and his involvement with Tim Tipton by bringing Tim Tipton into the home of the two minor children is detrimental to the best interest and welfare of the two minor children.

55. The Plaintiff is presently in a position to provide an environment more suitable to the two minor children's physical and emotional needs.

Based on such findings of fact, the trial court entered conclusions of law which included, *inter alia*, the following:

2. That since the entry of the California Judgment the Defendant is exposing the two minor children to conduct which is not fit and proper.

3. That since the California Judgment the Defendant is not providing a fit and proper environment in which to rear the two minor children.

4. That there has been a substantial change of circumstances since the entry of the California Judgment adversely affecting the two minor children or that will likely or probably adversely affect the two minor children.

5. That Plaintiff is a fit and proper person to exercise the exclusive care, custody, and control of the said two minor children. That it is in the minor children's best interest that the Plaintiff have exclusive[] care, custody and control of the minor children, subject to reasonable visitation privileges being awarded to the Defendant as hereinafter set out.

Based upon its findings of fact and conclusions of law, the trial court ordered that plaintiff-mother be awarded the exclusive care, custody and control of the two minor children. Defendant-father was granted one month of visitation during the summers and was directed by the trial court not to allow the boys to live in the same house with Mr. Tipton.

Defendant-father appealed to the Court of Appeals, which held that the findings upon which the trial court based its determination that there had been a change in circumstances adversely affecting the welfare of the children were either speculative or not supported by evidence in the record. The Court of Appeals reversed the trial court. For the reasons stated herein, we reverse the decision of the Court of Appeals.

Since this is a case involving modification of a custody order entered with the consent of both parties by a court in California, the controlling statute is N.C.G.S. § 50-13.7. That statute provides in pertinent part:

> [W]hen an order for custody of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and a showing of changed circumstances, enter a new order for custody which modifies or supersedes such order for custody.

N.C.G.S. § 50-13.7(b) (1995).

It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody. *In re Custody of Peal*, 305

N.C. 640, 645, 290 S.E.2d 664, 667 (1982). The Court of Appeals correctly explained the rationale for this rule when it stated:

> "[The trial court] has the opportunity to see the parties in person and to hear the witnesses, and [its] decision ought not be upset on appeal absent a clear showing of abuse of discretion." *Falls v. Falls*, 52 N.C. App. 203, 209, 278 S.E.2d 546, 551, *[disc. rev.] denied*, 304 N.C. 390, 285 S.E.2d 831 (1981). "[The trial court] can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979).

Surles v. Surles, 113 N.C. App. 32, 36-37, 437 S.E.2d 661, 663 (1993) (first and third alterations in original). As a result, we have held that the trial court's "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975).

The basis for the Court of Appeals' reversal of the trial court's judgment ordering a change of custody was its conclusion that the evidence presented did not support some of the trial court's findings. It is the duty of the reviewing court to examine all of the competent evidence in the record supporting the trial court's findings and to then decide if it is substantial. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977). However, in this case, the Court of Appeals did not afford sufficient weight and deference to the well-established law which severely limits appellate court review of custody orders, especially in the area of fact-finding. The Court of Appeals also failed to note competent, substantial, and critical evidence in the record tending to support the trial court's findings, conclusions, and order.

Where, as here, a case is tried without a jury, the fact-finding responsibility rests with the trial court. Absent a total lack of substantial evidence to support the trial court's findings, such findings will not be disturbed on appeal. The essential ingredient here is "substantial" evidence. The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined "substantial evidence" as " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Hill*, 347 N.C. 275, 301, 493 S.E.2d 264, 279 (1997) (quoting *State v.*

Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)); *accord Thompson*, 292 N.C. at 414, 233 S.E.2d at 544.

Most of the trial court's findings of fact are uncontested. The remaining findings of the trial court are supported by substantial evidence.

With regard to findings of fact 49 and 54, uncontroverted evidence was presented that defendant-father and Mr. Tipton engaged in oral sex approximately once a week in the home with the children present. Defendant-father and Mr. Tipton intended to continue such homosexual activity in the home. Defendant-father saw nothing wrong with such conduct and would not counsel the two minor children that such conduct was improper.

Evidence was also presented tending to show that the children had seen the two men demonstrate physical affection, including kissing each other on the lips. This activity took place in the home in front of the children as the "provider" of this couple prepared to leave for work. The minor child Joey had observed his father and Mr. Tipton in bed together.

The evidence further tended to show that the door of the bedroom occupied by defendant-father and Mr. Tipton was directly across the hall and approximately three feet from the door to the children's bedroom. Defendant-father and Mr. Tipton testified that both their bedroom door and the children's bedroom door were open at all times, except when the two men engaged in sexual activity. Further, testimony tended to show that the children went in and out of the two men's bedroom at will, often during the night when the two men were in bed together.

Defendant testified that he had told the children that society was not accepting of such a homosexual relationship. There was also evidence that Mr. Tipton kept photographs of "drag queens" in the home, despite his admission that the children should not be exposed to such material. Further, evidence was presented that Mr. Tipton had, on at least one occasion, taken the children away from the home without defendant's knowledge of their whereabouts.

The foregoing evidence was admitted by the trial court and was not disputed by defendant. This evidence was substantial evidence and clearly supports findings of fact 49 and 54. We conclude that activities such as the regular commission of sexual acts in the home

by unmarried people, failing and refusing to counsel the children against such conduct while acknowledging this conduct to them, allowing the children to see unmarried persons known by the children to be sexual partners in bed together, keeping admittedly improper sexual material in the home, and Mr. Tipton's taking the children out of the home without their father's knowledge of their whereabouts support the trial court's findings of "improper influences" which are "detrimental to the best interest and welfare of the two minor children."

We do not agree with the conclusion of Justice Webb's dissent that the only basis upon which the trial court changed custody was that the defendant is a "practicing homosexual." Instead, we conclude that the trial court could and did order a change in custody *based in part* on proper findings of fact to the effect that defendant-father was regularly engaging in sexual acts with Mr. Tipton in the home while the children were present and upon other improper conduct by these two men. The trial court did not rely on the mere fact that defendant is a homosexual or a "practicing homosexual." Nor does this Court hold that the mere homosexual status of a parent is sufficient, taken alone, to support denying such parent custody of his or her child or children. That question is not presented by the facts of this case. Although the trial court might have worded findings 49 and 54 better or more fully, they are nonetheless supported by substantial uncontroverted evidence. Therefore, they were binding on the Court of Appeals and are binding on this Court.

With regard to finding of fact 53, evidence was presented that when Joey was told that defendant-father was involved in a homosexual relationship, Joey was emotionally distraught, covering his face with his hands and running into the bathroom. Later, Joey cried, grasped onto his mother, and asked his mother to get him out of defendant's home. Evidence was also presented that sometime thereafter, Joey told his stepfather, William Pulliam, that he wanted his mother to come and get him and take him to Wichita where she lived. Further, evidence was presented that Joey expressed confusion over defendant's homosexual relationship with Mr. Tipton by asking Mr. Tipton if he was Joey's stepfather.

The trial court could reasonably find from this substantial evidence, as well as the other evidence discussed above, that "[t]he activity of the Defendant will likely create emotional difficulties for

the two minor children." Although the trial court might have worded finding of fact 53 differently, it is nonetheless supported by substantial evidence and is binding on the Court of Appeals and this Court.

Substantial evidence supports all of the above-quoted findings of the trial court. Because these findings are sufficient to support the trial court's conclusions, which in turn justify a change of custody, we conclude that the trial court did not err.

The judgment of the trial court was proper, and the decision of the Court of Appeals to the contrary was in error. The decision of the Court of Appeals must be and is reversed, and this case is remanded to that court for its further remand to the District Court, Henderson County, for reinstatement of the judgment of the trial court.

REVERSED AND REMANDED.

Justice WEBB dissenting.

I dissent. I do not believe the evidence supports a finding that there had been a substantial change in circumstances affecting the welfare of the children so that the custody could be changed.

The majority begins its opinion by saying this Court has never required a party seeking a change in custody to show there has been a change in circumstances adversely affecting the child. The majority then overrules *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871 (1963), and eighteen Court of Appeals cases which hold otherwise. We may want to change the law as to the showing necessary to change custody, but if we do so I suggest we do it forthrightly. I note that in this case the majority relies on a change in circumstances which adversely affects the children to affirm the change in custody.

The majority relies first on findings of fact 49 and 54 to hold that the district court found facts sufficient to justify a change in custody. In these two findings, the district court found only that the defendant is a practicing homosexual and this creates an unfit and improper environment for the children. I do not believe the fact, standing alone, that defendant is a practicing homosexual, is sufficient to support a conclusion that this shows an improper environment which justifies a change in custody.

The majority also relies on finding of fact 53, in which the district court speculated on the possibility that their father's homosexuality

will likely create emotional difficulties for the two children. The only evidence that the children actually suffered emotional difficulties was testimony that the older child, when he was told his father was homosexual, cried and asked his mother to remove him from his father's home. This child said at the hearing that he had no preference as to which of the parties was given custody. All the evidence showed the children were well adjusted. They had good attendance records in school and maintained average to above average grades. There was not substantial evidence to support a finding of fact that the defendant's homosexuality will likely create emotional difficulties for the two children.

The difficulty with the majority opinion for me is that it recites actions by the defendant which the majority considers to be distasteful, immoral, or even illegal and says this evidence supports findings of fact which allow a change in custody. There is virtually no showing that these acts by the defendant have adversely affected the two children. The test should be how the action affects the children and not whether we approve of it. I believe the evidence shows only that the defendant is a practicing homosexual without showing any harm has been inflicted on the children by this practice. I do not believe we should allow a change in custody on evidence which shows only that the defendant is a practicing homosexual.

Justice ORR concurring in the result.

N.C.G.S. § 50-13.7(b) provides that "when an order for custody of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, *and a showing of changed circumstances*, enter a new order for custody which modifies or supersedes such order for custody." N.C.G.S. § 50-13.7(b) (1995) (emphasis added). The statutory language does not use the word "substantial" in describing change of circumstances nor does the statute use the phrase "affecting the child's welfare." Both "substantial" and "affecting the child's welfare" have been added by judicial decisions and represent a commonsense interpretation of the legislative intent.

As I read the intent of the legislature in its passage of N.C.G.S. § 50-13.7(b), the trial court would first determine whether a change of circumstances had occurred since the entry of the original custody order and then determine whether the change of circumstances is

substantial and has some rational relationship to the polar star issue in all custody determinations, i.e., the welfare of the child.[2]

In other words, the first factor to be considered in evaluating a change of circumstances is whether it is substantial. By this, we mean not inconsequential or minor but instead a change that is significant. Next, the trial court should evaluate whether the change "affects the welfare of the child." By this, we mean that the changes are of the type which normally or usually affect a child's well-being—not a change that either does not affect the child or only tangentially affects the child's welfare.

It is unnecessary at this stage to determine the quantitative or qualitative degree of effect on a child's welfare. As a practical matter, it may be difficult, if not impossible, to determine how a significant change of circumstances is currently or in the long-term going to affect a child's welfare. Upon determining that the requirement of N.C.G.S. § 50-13.7(b) has been met, the trial court would then be required to consider modification of custody by applying the best interest of the child test.

Here, there is little, if any, dispute that the father's acknowledgment that he is homosexual and that his companion and admitted lover's moving into the home with the boys constitutes a substantial change of circumstances as envisioned by N.C.G.S. § 50-13.7(b). Obviously, conditions in the home are dramatically different from when the original custody order was entered. Once the trial court reaches the conclusion that there has been a substantial change of circumstances, it is not necessary, as the Court of Appeals believed, for the trial court to make findings as to adverse (or beneficial) effects, but only that the substantial change affects the welfare of the child. Here, there seems little room for argument that the new living arrangement and the father's new lifestyle will have some effect on the boys and their well-being. It was erroneous to require a showing of harm to the children in reaching such a conclusion. Since there was evidence in the record from which the trial court could find that the change of circumstances was substantial and affected the boys' welfare, the trial court then was required to reopen the custody issue and determine what was in the best interest of the boys.

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2. I would disavow the test first set forth in *Rothman v. Rothman*, 6 N.C. App. 401, 406, 170 S.E.2d 140, 144 (1969), and followed in *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678-79 (1992), that "[i]n order for a change in circumstances to be substantial, '[i]t must be shown that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified.' "

As to the ultimate disposition of this case, there is evidence in the record from which the trial court could find and ultimately conclude that it was in the best interest of the children to change custody. "[T]he trial judge's findings of fact in custody Orders are binding on the appellate courts *if supported by competent evidence.*" *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974).

> In determining the best interest of the child, the trial court should consider a number of factors, too numerous to be named here. . . .
>
> Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony.

In re Shue, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984).

> However, there is no burden of proof on either party on the "best interest" question. Although the parties have an obligation to provide the court with any pertinent evidence relating to the "best interest" question, the trial court has the ultimate responsibility of requiring production of any evidence that may be competent and relevant on the issue. The "best interest" question is thus more inquisitorial in nature than adversarial.

Ramirez-Barker, 107 N.C. App. at 78, 418 S.E.2d at 679 (citation omitted). In applying the best-interest test, the trial court is vested with broad discretion, and its decision cannot be overturned absent a showing of an abuse of discretion. *In re Custody of Peal*, 305 N.C. 640, 645-46, 290 S.E.2d 664, 667 (1982). Here, despite conclusory aspects of the trial court's order which were unnecessary, I cannot say that the trial court's decision that it was in the best interest of these young boys to now live with their mother and stepfather was an abuse of discretion.

I acknowledge that our case law has emphasized the importance of stability in custody cases and that continual reopening of the issue is harmful to the child. However, I am convinced that the test articulated in this concurring opinion does not substantially create a problem, and, if so, it must be balanced against the Court's ultimate responsibility to do what is in the child's best interest. *Shepherd v. Shepherd*, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968). The party moving for modification of the original custody order must demonstrate

that a *substantial* change in circumstances has occurred that affects the child's welfare. Obviously, this burden is necessary to promote stability in custody orders and discourage frequent petitions for modification of custody decrees. I believe this test will still serve to protect the custodial parent from harassment by repeated litigation and protect the child from being in the midst of ongoing custody battles.

As Justice Ervin said almost fifty years ago: "It may be well to observe, in closing, that the law is realistic and takes cognizance of the ever changing conditions of fortune and society. While a decree making a judicial award of the custody of a child determines the present rights of the parties to the contest, it is not permanent in its nature, and may be modified by the court in the future as subsequent events and the welfare of the child may require." *Hardee v. Mitchell*, 230 N.C. 40, 42, 51 S.E.2d 884, 885-86 (1949).

SMITH CHAPEL BAPTIST CHURCH; FELLOWSHIP BAPTIST CHURCH, INC.; LAYMAN'S CHAPEL BAPTIST CHURCH; AND CALVARY BAPTIST CHURCH OF DURHAM, NORTH CAROLINA v. CITY OF DURHAM, A NORTH CAROLINA MUNICIPAL CORPORATION

No. 250PA97

(Filed 30 July 1998)

1. Municipal Corporations § 258 (NCI4th)— stormwater program—landowner fees—no statutory authority

N.C.G.S. §§ 160A-311 and -314 do not authorize a city to finance its entire stormwater program with fees assessed against landowners.

2. Municipal Corporations § 258 (NCI4th)— stormwater program—landowner fees—constitutional authority

Article XIV, Section 5 of the North Carolina Constitution authorizes cities to regulate waters, and cities have the supplementary power reasonably necessary to do so. It was reasonably necessary for a city to assess fees against landowners to finance the city's stormwater program to comply with the federal Water Quality Act, and the city could base the amount of fees on the amount landowners contributed to the stormwater problem measured by the impervious area of each developed lot. N.C. Const. art. XIV, § 5, para. 1.

3. Municipal Corporations § 258 (NCI4th)— stormwater program—landowner fees—consideration of statutes

Although a city was given the authority outside the parameters of N.C.G.S. § 160A-311 and -314 to impose fees to support its stormwater program, the appellate court will be guided by those two statutes in questions of the administration of the program.

4. Municipal Corporations § 258 (NCI4th)— stormwater program—landowner fees—impervious area method—statutory authority

A city was authorized by N.C.G.S. § 160A-314(a1) to use the impervious area method in setting stormwater program fees, and the fees were not unlawful on grounds that there was no showing of benefit to landowners, or that this method of calculating fees does not reasonably relate to the stormwater runoff of individual properties.

5. Municipal Corporations § 258 (NCI4th)— stormwater program—landowner fees not discriminatory

Fees set by a city to finance its stormwater program in order to receive an NPDES permit were not discriminatory because the city cleans the city's streets but does not clean paved parking lots and private roads of landowners since there is a distinction between city owned property and privately owned property that supports this different treatment. Nor are the rates discriminatory because the city is not required to pay an amount that covers the cost of cleaning its own streets since the fees are set under the impervious area method based on the amount of pollution caused by each lot rather than on how much it costs to clean each lot.

6. Municipal Corporations § 258 (NCI4th)— stormwater program—landowner fees—exemptions—not equal protection violation

A city's stormwater plan is not arbitrary and does not deprive owners of developed property of equal protection because the plan exempts undeveloped land, commercial property with less than 1200 square feet of impervious area, golf courses, state roads, and railroad corridors and tracks, or because the maximum charge for residential property is $3.25 per month, since each of the exemptions was justified, and there was no showing that the fees collected from residential property were substantially less because of the $3.25 limit.

Justice FRYE concurs in the result.

Justice LAKE dissenting.

Justice ORR joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of a judgment entered by Manning, J., on 11 October 1996 and an amended judgment entered on 3 January 1997 in Superior Court, Durham County. Heard in the Supreme Court 19 November 1997.

In this case, the plaintiffs contest a program established by the City of Durham to comply with the Water Quality Act (WQA) adopted by the United States Congress. The WQA required that cities of 100,000 or more in population obtain a National Pollutant Discharge Elimination System (NPDES) permit to discharge stormwater into the waters of the state. Stormwater is that portion of rain that does not evaporate or penetrate the ground but remains on the surface and travels over natural and developed surfaces. In order to receive a NPDES permit, a city must develop a comprehensive stormwater quality program.

To comply with the federal requirements, the City of Durham adopted an ordinance creating a city department called the Stormwater Services Division to operate the stormwater program. The program was to be financed by charging fees for all developed land in the City. Fees were based on the impervious areas of the assessed land. The Durham Stormwater Utility (Utility) was created to receive the fees and to pay the expenses of the Stormwater Services Division.

The plaintiffs brought this action for a declaratory judgment alleging that the City of Durham did not have the authority to impose fees to operate its stormwater program. After a trial without a jury, the superior court held that the City did not have the statutory authority to use fees to fund more than the cost of a stormwater and drainage system and that it had exceeded its authority by imposing fees to fund other parts of its stormwater program.

The defendant appealed, and we allowed discretionary review prior to determination by the Court of Appeals.

Stam, Fordham & Danchi, P.A., by Paul Stam, Jr., and Henry C. Fordham, Jr., for plaintiff-appellees.

Office of the City Attorney, by Karen A. Sindelar, Assistant City Attorney, for defendant-appellant.

North Carolina League of Municipalities, by Andrew L. Romanet, Jr., General Counsel, amicus curiae.

WEBB, Justice.

[1] The defendant contends that two sections of the General Statutes give the City of Durham the authority to assess fees to operate its stormwater program, although a large part of the program expenditures do not involve the physical assets of the program.

N.C.G.S. § 160A-311 provides in part:

As used in this Article, the term "public enterprise" includes:

. . . .

(10) Structural and natural stormwater and drainage systems of all types.

N.C.G.S. § 160A-311 (1994).

N.C.G.S. § 160A-314(a1) provides in part:

> The fees established under this subsection must be made applicable throughout the area of the city. Schedules of rates, fees, charges, and penalties for providing structural and natural stormwater and drainage system service may vary according to whether the property served is residential, commercial, or industrial property, the property's use, the size of the property, the area of impervious surfaces on the property, the quantity and quality of the runoff from the property, the characteristics of the watershed into which stormwater from the property drains, and other factors that affect the stormwater drainage system. Rates, fees, and charges imposed under this subsection may not exceed the city's cost of providing a stormwater and drainage system.

N.C.G.S. § 160A-314(a1), para. 2 (1994). The defendant argues that the adoption of these two sections was in response to the requirements of the WQA, which shows that the fees for which N.C.G.S. § 160A-314(a1) provides were intended to finance its entire stormwater program. The plaintiffs contend that the City is limited to collect-

ing fees which will finance only the structural and natural stormwater and drainage systems component part of the stormwater program. We agree with the plaintiffs that the statutes alone do not authorize the ordinance.

When the language of a statute is clear, there is no need for judicial interpretation. We give the statute its plain meaning. *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996). In this case, the words "structural and natural stormwater and drainage system" have a plain meaning. In the ordinance establishing the stormwater program, a stormwater system is defined as "the system of natural and constructed devices for collecting and transporting storm water." Durham, N.C., Code ch. 23, art. VIII, § 23-201 (1994). We can only hold N.C.G.S. §§ 160A-311 and -314 do not authorize the City to finance its entire stormwater program with fees assessed against landowners.

[2] We must next determine whether the City has the authority from any other source to impose fees to finance the stormwater program. We believe that it has such authority. Article XIV, Section 5 of the Constitution of North Carolina provides in part:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to . . . control and limit the pollution of our air and water . . . and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

N.C. Const. art. XIV, § 5, para. 1.

We believe this section of the Constitution gives our cities the authority to regulate our waters. If the City has this power, we believe we should follow the rule of *Homebuilders Ass'n of Charlotte v. City of Charlotte*, 336 N.C. 37, 45, 442 S.E.2d 45, 50-51 (1994), that when a city has the power to regulate activities, it has a supplementary power reasonably necessary to carry the program into effect. *See* N.C.G.S. § 160A-4 (1987).

In this case, it was reasonably necessary for the City of Durham to assess fees against landowners to finance the stormwater program to comply with the WQA. The City could base the amount of fees on the amount landowners contributed to the stormwater problem. In

this case, the contribution to the problem is measured by the impervious area of each lot.

[3] Although we have held that the City has the authority outside the parameters of N.C.G.S. §§ 160A-311 and -314 to impose fees to support the program, we shall be guided by those two sections in questions of the administration of the program.

[4] The plaintiffs contend that the method by which fees are calculated for use of the stormwater system is unlawful. The fees are based on the impervious areas of each lot. An impervious area is that part of a lot in which surface water cannot penetrate the soil, and each lot is assessed based on the size of the impervious area.

The plaintiffs argue that a fee for utility service must be commensurate with the services rendered, and the evidence showed there was virtually no benefit to them. In this case, the fees are not based on service to the landowners. N.C.G.S. § 160A-314(a1) provides several methods for setting fees. One method is based on "the area of impervious surfaces on the property." The statute does not require that there be a showing of benefit to the landowners, and the plaintiffs have not questioned the constitutionality of the statute.

The plaintiffs next contend that the impervious-area method of calculating fees does not reasonably relate to the stormwater runoff of individual properties. They argue that several other methods better measure the quantity and quality of the runoff and that it was unreasonable for the City to use this method. The best answer to this argument is that the City is authorized by statute to use the impervious-area method in setting runoff fees. There is substantial evidence in the record that consultants hired by the City considered several different methods before recommending the impervious-area method. There was plenary evidence that the impervious-area method for calculating fees is the best method. This supports the selection of the impervious-area method for setting fees.

[5] The plaintiffs next argue that the rates set by the City are discriminatory. They base this argument on the way the cost of street cleaning is handled under the plan. The City was required, as part of its plan to receive an NPDES permit, to clean its streets. The costs to the Utility to clean the streets was $1,820,087, but the fee charged to the City was only $1,280,000. The plaintiffs say first that it is discriminatory for the Utility to clean the City's streets but refuse to clean the paved parking lots and private roads of its customers. The plaintiffs

say next that it is discriminatory to charge the City an amount which does not cover the cost of the City's pollution.

The City has produced a plan as it was required to do to receive its NPDES permit. The plan does not provide that the City clean private property. There is a distinction between city owned property and privately owned property that supports this different treatment.

The argument that it is discriminatory not to require the City to pay an amount that covers the costs of removing its own pollution is answered by an understanding of the impervious-area method of calculating fees. These fees are set based on the amount of pollution caused by each lot, not on how much it costs to clean each lot. We have no doubt pollution in the streets is caused in part by drainage from the surrounding land.

The plaintiffs next contend that the Stormwater Quality Management Program contains many features which serve to benefit the public but are of no particular benefit to the persons who are assessed to pay for it. They say this makes the program arbitrary and capricious. We disagree. It is not arbitrary and capricious to promulgate a plan for the amelioration of a stormwater problem and require those who caused the problem to pay for it. There is no need to show a particular benefit to a landowner. It is the public which benefits from this program.

The plaintiffs next argue that the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States has been violated because the City of Durham's stormwater charges are not reasonably related to services provided. We have held that fees based on the amount of impervious area are valid and reasonable. On that basis, we reject this argument.

[6] Finally, the plaintiffs argue that the City's stormwater plan violates the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 19 of the Constitution of North Carolina. They say this is so because of certain exemptions from the plan. There are 45,304 acres in the City of Durham, of which 23,720 acres are in undeveloped land. These undeveloped acres are exempt from the plan. Commercial property with less than 1,200 square feet of impervious area is also exempt, as are golf courses, state roads, and railroad corridors and tracks. Furthermore, the maximum charge for residential property is $3.25 per month.

The plaintiffs contend that these exemptions are arbitrary and deprive them of the equal protection of the law. We believe each of the exemptions can be justified. First, undeveloped land and golf courses do not produce as much runoff as do impervious areas. Second, commercial property with 1,200 square feet of impervious area produces a *de minimus* amount of stormwater runoff. Third, it would be difficult for a city to assess the State for land owned by the State as state roads. Next, railroad corridors and tracks have very little impervious area, and thus it is not unreasonable to exempt them from the program. Finally, residential property is distinguishable from nonresidential property. There was not a showing in this case that the fees collected from residential property were substantially less because of the $3.25 limit.

For the reasons stated in this opinion, we reverse the decision of the Superior Court, Durham County, and remand for the entry of a judgment for the defendant.

REVERSED AND REMANDED.

Justice FRYE concurs in the result.

Justice LAKE dissenting.

I must respectfully dissent because the statutes governing the operation of public enterprises for municipal corporations clearly invalidate the enabling ordinance at issue in this case, as well as the actions taken by the "utility" established thereunder.

It is undisputed that, for reasons of expediency, the City of Durham *chose* to establish a utility as the mechanism by which it would comply with the unfunded mandates of the 1987 Water Quality Act related to stormwater runoff. Municipalities are authorized to establish and to operate public enterprises like utilities only as provided by statute. Having chosen this method, therefore, the City must abide by the statutory requirements of N.C.G.S. § 160A-311 and N.C.G.S. § 160A-314, which govern such public enterprises. These statutes read in relevant part:

§ 160A-311. Public enterprise defined.

As used in this Article, the term "public enterprise" includes:

. . . .

(10) *Structural and natural* stormwater and drainage *systems* of all types.

N.C.G.S. § 160A-311 (1994) (emphasis added).

§ 160A-314. Authority to fix and enforce rates.

(a) A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise. Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city.

(a1) . . . .

The fees established under this subsection must be made applicable throughout the area of the city. Schedules of rates, fees, charges, and penalties for providing *structural and natural* stormwater and drainage system service may vary according to whether the *property served* is residential, commercial, or industrial property, the property's use, the size of the property, the area of impervious surfaces on the property, the quantity and quality of the runoff from the property, the characteristics of the watershed into which stormwater from the property drains, and other factors that affect the stormwater drainage system. Rates, fees, and charges imposed under this subsection *may not exceed the city's cost* of providing a stormwater and drainage system.

N.C.G.S. § 160A-314(a), (a1) (Supp. 1997) (emphasis added).

In deciding whether the City's public enterprise complies with the above statutes, we first must look to the plain language of the statutes themselves. *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996). "Ordinary rules of grammar apply when ascertaining the meaning of a statute." *Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992). When the language of a statute is clear, there is no need for judicial interpretation, and the court should give the statute its plain meaning. *Dellinger*, 343 N.C. at 95, 468 S.E.2d at 220.

In the case *sub judice*, the language of the above statutes is clear. N.C.G.S. § 160A-311 defines "public enterprises" as "structural and natural stormwater and drainage systems." The word "systems" is limited by the adjectival phrases "structural and natural" and "stormwater and drainage." Thus, the plain meaning is that the public

enterprises authorized by the statute applicable here are expressly limited to those which oversee systems of physical infrastructure, structural or natural, for servicing stormwater. N.C.G.S. § 160A-314 reinforces this understanding of the statutory construct. That statute provides that the City may establish fees "for the *use of* or the *services furnished*" and that fees may vary for "structural and natural stormwater and drainage system service" according to the type and size of "property served." N.C.G.S. § 160A-314(a), (a1) (emphasis added). This plain language contemplates only the collection of fees for the "use of" or "furnishing of" stormwater services by the utility. The statute further modifies the setting of fees by tying their computation to the particular "property served." Thus, the plain meaning of these statutes is that, in order to operate as an authorized public enterprise for the purposes of stormwater control, the utility in question is limited to the establishment and maintenance of physical systems directly related to stormwater removal and drainage of property.

Even though the plain language of the statute is sufficient to determine its meaning in this case, it is also clear the legislature intended for public enterprises of this type to operate actual drainage systems, not broad pollution protection programs. In ascertaining the intent of the legislature, the title of an act should be considered as a guide. *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992). The act that added the statutory provisions regarding stormwater was titled:

> AN ACT TO AUTHORIZE LOCAL GOVERNMENTS TO CONSTRUCT AND OPERATE STORM DRAINAGE SYSTEMS AS PUBLIC ENTERPRISES AND TO PROVIDE LOCAL GOVERNMENTS WITH FUNDING AND TAXING AUTHORITY TO FINANCE THE CONSTRUCTION AND OPERATION OF STORM DRAINAGE SYSTEMS.

Act of July 15, 1989, ch. 643, 1989 N.C. Sess. Laws 1763. The title's focus on "construction and operation" of storm drainage "systems" indicates the legislature did not intend for such public enterprises to be used as general programmatic bodies, but rather as organizations charged merely with the supervision of physical drainage systems.

When determining the intent of the legislature, it is also significant if the General Assembly adopts provisions which differ from those suggested by a study commission. *Black v. Littlejohn*, 312 N.C. 626, 634, 325 S.E.2d 469, 475-76 (1985). The study commission proposal did not contain language that tied stormwater charges to services provided to properties. Proposed Legislation: Study Commission

Report to 1991 N.C. General Assembly 44-45. Conversely, the adopted statute linked the charges for stormwater services to the character of property served. This is indicative of the legislature's intent that stormwater utilities limit their activities to physical systems for the removal of stormwater from property.

Examination of the City's ordinance establishing the utility, as well as the actual operation of the utility, reveals the City to have exceeded the authority conferred upon it by the plain language of the statutes. The ordinance creates a stormwater utility "to develop and operate the stormwater management program." The "program" is defined by the ordinance to include not just a stormwater system, but also "the development of ordinances, policies, technical materials, inspections, monitoring, outreach, and other activities related to the control of stormwater quantity and quality." Durham, N.C., Code ch. 23, art. VIII, § 23-201 (1994). Similarly, the ordinance provides that "all developed land . . . shall be subject to a stormwater charge," *id.*, not just property served by the system. Thus, the ordinance on its face exceeds the express limitations in the plain meaning of the statute. Moreover, the operation of the utility exceeds statutory authority. All funds collected by the utility are placed in one fund, and this fund pays for the City's entire stormwater quality program. The City concedes the utility's activities substantially exceed the providing of stormwater infrastructure. Over half of the funds go to general programmatic elements involving water quality, such as general education programs for commercial and residential areas, programs related to discharge and disposal of hazardous materials, inspection and training for industrial sites, and construction-site runoff consultation. It is clear the ordinance and its application through the utility exceed the express limitations imposed by the plain language of N.C.G.S. §§ 160A-311 and -314.

Moreover, N.C.G.S. § 160A-314 expressly mandates that "[r]ates, fees, and charges imposed under this subsection *may not exceed the city's cost* of providing a stormwater and drainage system." N.C.G.S. § 160A-314(a1) (emphasis added). The uncontroverted evidence establishes the City spent only a fraction of the money collected by the utility on the cost of constructing the stormwater and drainage infrastructure. The vast majority of the fees were spent on general programmatic pollution reduction efforts. This exceeds the authority conferred by the plain meaning of the statutes. Even assuming *arguendo* that the majority's expansive interpretation is correct, the evidence still shows the utility to have exceeded its authority. The

City admits substantial sums of money collected for the purposes of operating the stormwater "utility" were transferred to other city uses, including the sewer and landfill funds, and even the general fund. The evidence establishes the City transferred over $1.8 million to the general fund alone. Leaving aside the question of whether this amounts to an illegal or unconstitutional taxation of these churches *via* the utility strawman, which is not raised on appeal, it clearly exceeds any reasonable interpretation of N.C.G.S. § 160A-314, which requires that fees not exceed costs.

Additionally, the defendant's unreasoned, blanket exclusion of all undeveloped land (which is approximately 50% of the area producing the stormwater the ordinance purports to address), defendant's like exemption of certain types of commercially developed properties, and its diversion of very substantial portions of the funds generated from the assessed "user fees" to programs unrelated either to cost of service in providing stormwater infrastructure or any benefit received or burden generated by the plaintiff churches, if not violative of equal protection, seem clearly to be "so arbitrary and unreasonable as to amount to a deprivation of the plaintiff[s'] liberty or property, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States or the similar Law of the Land Clause of Art. I, § 19, of the Constitution of North Carolina." *Guthrie v. Taylor*, 279 N.C. 703, 713, 185 S.E.2d 193, 200 (1971). *See also United States v. Sperry Corporation*, 493 U.S. 52, 63, 107 L. Ed. 2d 290, 303 (1989).

In light of the fact that the ordinance at issue, as well as its application, exceeds the express limitations established by the plain meaning of N.C.G.S. §§ 160A-311 and -314 and is, I believe, violative of equal protection and due process, I vote to uphold the determination of the trial court.

Justice ORR joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. ELIZABETH WASHINGTON JACKSON

No. 244PA97

(Filed 30 July 1998)

1. **Constitutional Law § 6 (NCI4th)— parallel provisions of state and federal Constitutions—interpretation of state Constitution**

The North Carolina Supreme Court may interpret our state Constitution differently than the United States Supreme Court interprets even identical provisions of the federal Constitution. Nevertheless, because the federal Constitution is binding on the states, the rights it guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how the state Constitution is construed. For all practical purposes, therefore, the only significant issue for the North Carolina Supreme Court when interpreting a provision of our state Constitution paralleling a provision of the federal Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision.

2. **Evidence and Witnesses § 927 (NCI4th)— hearsay— Confrontation Clause—necessity and trustworthiness— inferences in prior decisions disapproved**

Any possible inferences from prior decisions that the Confrontation Clause of the North Carolina Constitution requires that no hearsay evidence be admitted unless the prosecution has complied with a two-prong test by establishing (1) necessity and (2) reliability or trustworthiness were mere *dicta* and are disapproved.

3. **Constitutional Law § 340 (NCI4th)— N.C. Constitution— Confrontation Clause—application of decisions construing U.S. Constitution**

The North Carolina Supreme Court finds the reasoning of the United States Supreme Court when construing the Confrontation Clause of the Sixth Amendment persuasive and adopts and shall apply that reasoning for purposes of resolving issues arising under the Confrontation Clause of the North Carolina Constitution.

4. Evidence and Witnesses § 927 (NCI4th)— hearsay—firmly rooted exception—no violation of Confrontation Clause

Where hearsay proffered by the prosecution comes within a firmly rooted exception to the hearsay rule, the Confrontation Clause of the North Carolina Constitution is not violated by its admission even though no particularized showing is made as to the necessity for using such hearsay or as to its reliability or trustworthiness. N.C. Const. art. I, § 23.

5. Evidence and Witnesses §§ 876, 927 (NCI4th)— hearsay—state of mind exception—no violation of Confrontation Clause

The admission of testimony by an assault victim's mother under the firmly rooted state of mind exception to the hearsay rule without a showing of necessity and trustworthiness did not violate the Confrontation Clause of the North Carolina Constitution. N.C.G.S. § 8C-1, Rule 803(3).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 126 N.C. App. 129, 484 S.E.2d 405 (1997), setting aside a judgment entered by Martin (Jerry Cash), J., on 16 November 1995 in Superior Court, Forsyth County, and awarding defendant a new trial. Heard in the Supreme Court 17 December 1997.

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

The Law Offices of J. Darren Byers, P.A., by J. Darren Byers and Guy B. Oldaker III, for defendant-appellee.

MITCHELL, Chief Justice.

On 24 April 1995, defendant was indicted by a Forsyth County grand jury for assault with a deadly weapon with intent to kill inflicting serious injury in violation of N.C.G.S. § 14-32(a). She was tried at the 13 November 1995 Criminal Session of Superior Court, Forsyth County. The jury found defendant guilty as charged. On 16 November 1995, after making findings in aggravation and mitigation, the trial court entered judgment sentencing defendant to a term of from 108 to 139 months' imprisonment. Defendant appealed to the Court of Appeals. The Court of Appeals concluded that the trial court had erred by admitting hearsay evidence under the state of mind exception to the hearsay rule in violation of the Confrontation Clause of the

North Carolina Constitution and ordered a new trial. This Court allowed the State's petition for discretionary review.

The evidence at trial tended to show *inter alia* that on the morning of 31 October 1994, defendant Elizabeth Jackson shot her husband General Jackson five times with a .25-caliber pistol. The shooting occurred at the Evergreen Cemetery. The victim, who survived the shooting, was later found by a cemetery employee. A police officer who arrived at the scene identified the victim, determined that he had been shot in the head and chest, and found five spent cartridges on the ground nearby.

At no time after shooting her husband did defendant call an ambulance or attempt to get help for him. Following the shooting, defendant, carrying her child, walked out of the cemetery. She left her wounded husband lying in some weeds in a wooded area of the cemetery and their car stuck in the mud. Defendant got a ride home and called her mother. Defendant said that the victim had tried to kill her and that she had shot him. Defendant then called her friend Tanzia to pick her up to take her to retrieve the car. When Tanzia arrived, defendant had a shovel and told Tanzia that her car was stuck at the cemetery. They looked for a wrecker to pull her out of the mud but were unable to find one.

Failing to find a wrecker, Tanzia drove past the cemetery while returning to defendant's home. Tanzia and defendant saw numerous emergency vehicles at the cemetery as they drove by. Defendant then "started crying," "saying she shot [her husband], she killed him," and had Tanzia take her to a magistrate. Defendant was hysterical and crying at the magistrate's office, where she surrendered a .25-caliber Raven pistol and stated that she had killed a man. It was later determined that the five spent cartridges found at the cemetery were fired from the pistol that defendant brought to the magistrate's office.

The victim was taken to Baptist Hospital where he stayed for about two months. He had suffered bullet wounds to the head, the right jaw, the left side of his neck, the left side of his chest, and the left lower back. The victim's injuries left him with impaired communication abilities. At the time of the trial, he was unable to speak in complete sentences. He responded to questions requiring "yes" or "no" answers inconsistently in that he gave inappropriate responses half of the time. However, on *voir dire*, the trial court ruled that the victim was "competent to testify in this matter as a witness." The victim was present for the trial but was not called as a witness by either party.

The State called the victim's mother, Lillian Jackson, to testify about a conversation she had with her son on 30 October 1994, the day before the shooting. The trial court conducted a *voir dire* and concluded that her testimony was hearsay but relevant and admissible under the state of mind exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1992). The trial court further concluded under Rule 403 of the North Carolina Rules of Evidence that the probative value of her testimony outweighed any danger of unfair prejudicial effect. N.C.G.S. § 8C-1, Rule 403 (1992).

Lillian Jackson testified at trial that her son, the victim General Jackson, had told her that late on the night of 29 October 1994, he and defendant had an argument. Later, in the early morning hours of 30 October 1994, he saw defendant's car in a church parking lot and stopped to speak with her. Defendant put a gun to his head and asked if that was "what he wanted." She then put the gun to her head and asked "or is this what you want." The victim then left the church parking lot, went to his mother's house, and told her what had just happened. The victim told her that defendant was "serious about hurting him and breaking up with him" and that "she had scared him so bad" that he was going downtown to file for divorce the next day.

In support of its assignment of error, the State argues that North Carolina's Confrontation Clause does not afford a defendant more protection than its federal counterpart. Therefore, the State contends that the Court of Appeals erred by awarding defendant a new trial.

Defendant argues that the Court of Appeals was correct in holding that admission of Lillian Jackson's testimony under the state of mind exception violated the Confrontation Clause of the North Carolina Constitution and required that defendant have a new trial. N.C. Const. art. I, § 23. In making this argument, defendant contends that North Carolina's Confrontation Clause requires that the trial court make a finding of necessity before hearsay can be admitted against a defendant in a criminal trial, even if the hearsay falls within a firmly rooted exception to the hearsay rule. Therefore, defendant contends, the Confrontation Clause of the North Carolina Constitution is more protective of an individual's rights in this regard than its federal counterpart. The Court of Appeals agreed with defendant on this point and ordered a new trial. For the reasons that follow, we hold that the Confrontation Clause of the North Carolina Constitution does not require a showing or finding of necessity before hearsay testimony may properly be admitted under a *firmly rooted* exception to the hearsay rule.

[1] Questions concerning the proper construction and application of the North Carolina Constitution can be answered with finality only by this Court. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989); *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). We have said that even where provisions of the state and federal Constitutions are identical, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). Strictly speaking, however, a state may still construe a provision of its constitution as providing less rights than are guaranteed by a parallel federal provision. Nevertheless, because the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state Constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision. In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.

States remain free to interpret their own constitutions in any way they see fit, including constructions which grant a citizen rights where none exist under the federal Constitution. *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985). In construing the North Carolina Constitution, this Court is not bound by the decisions of federal courts, including the United States Supreme Court. *Preston*, 325 N.C. at 449-50, 385 S.E.2d at 479. However, we give the most serious consideration to those decisions, and "in our discretion we may conclude that the reasoning of such decisions is persuasive." *Id.* at 450, 385 S.E.2d at 479. In such cases, we will follow the reasoning of the federal court and apply it in construing our state constitutional provision. Bearing these principles in mind, we turn to a review of the decisions of the United States Supreme Court construing the Confrontation Clause of the Sixth Amendment to the United States Constitution.

United States Constitution

The relationship between exceptions to the hearsay rule and the Confrontation Clause has been the subject of considerable discourse. While the Confrontation Clause and rules of hearsay may protect similar values, it would be an erroneous simplification to conclude that the Confrontation Clause is merely a codification of hearsay rules. *California v. Green*, 399 U.S. 149, 155, 26 L. Ed. 2d 489, 495 (1970). Evidence admitted under an exception to the hearsay rule may still violate the Confrontation Clause. *Id.* at 155-56, 26 L. Ed. 2d at 495-96. The Confrontation Clause has its roots in the English common law practice of trying prisoners using the affidavits and sworn statements of witnesses or "accusers" rather than having the witnesses brought before the court to testify in the presence of the accused. *Id.* at 156-57, 26 L. Ed. 2d at 496. Sir Walter Raleigh was tried for and convicted of treason in this fashion. *Id.* at 156-57 n.10, 26 L. Ed. 2d at 496 n.10. The Confrontation Clause seems to have been adopted in part to protect against this practice. *Id.* at 157-58, 26 L. Ed. 2d at 496-97.

In 1980, the United States Supreme Court decided *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980). It was frequently read as adopting a rule that the Confrontation Clause of the Sixth Amendment established two requirements for the admission of any hearsay evidence. First, "[i]n the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65, 65 L. Ed. 2d at 607. Second, the hearsay sought to be introduced must be marked with such trustworthiness that there is no material departure from the reason for the general rule that the defendant have an opportunity to confront the witnesses against him. *Id.* The Court did expressly state, however, that such trustworthiness or reliability "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 66, 65 L. Ed. 2d at 608.

Six years later, the Supreme Court attempted to clarify its statement of the law in *Roberts* with regard to the Confrontation Clause. *United States v. Inadi*, 475 U.S. 387, 89 L. Ed. 2d 390 (1986). In response to an inferior federal court's conclusion in *Inadi* that *Roberts* had established a "clear constitutional rule" requiring a showing of unavailability of a nontestifying declarant before any out-of-court statement by the defendant could be admitted, the Supreme Court said that *Roberts* "does not stand for such a wholesale revision of the law of evidence, nor does it support such a broad interpreta-

tion of the Confrontation Clause." *Id.* at 392, 89 L. Ed. 2d at 396. The Court pointed out that in the *Roberts* opinion, it had "disclaimed any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay." *Id.* The Court also cited several instances of limiting language in the *Roberts* opinion which it said showed that

> *Roberts* should not be read as an abstract answer to questions not presented in that case, but rather as a resolution of the issue the Court said it was examining: "the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial."

Id. at 392-93, 89 L. Ed. 2d at 397 (quoting *Roberts*, 448 U.S. at 58, 65 L. Ed. 2d at 602). The Court went on to say that *Roberts* had reaffirmed the long-standing unavailability requirement *as applied to former sworn testimony* but did not support the proposition that the requirement's reach had been extended to all hearsay. *Id.* at 393-94, 89 L. Ed. 2d at 397-98.

The Court then proceeded to distinguish its application of the unavailability requirement to former testimony in *Roberts* from the application of that requirement to co-conspirators' out-of-court prior statements, the issue before it in *Inadi*. *Id.* at 394, 89 L. Ed. 2d at 398. The Court reasoned that former sworn testimony

> seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.

Id. The Court reasoned in *Inadi* that the principle that in-court testimony is the best evidence and should be favored does not apply to co-conspirator statements, because the statements of co-conspirators illuminate the nature and context of the conspiracy and therefore cannot be reproduced by in-court testimony. *Id.* at 395, 89 L. Ed. 2d at 398. Also, at trial, the co-conspirators are no longer partners in crime with a common goal. As defendants, they may even

have conflicting interests which render their in-court testimony less reliable than their out-of-court statements made in furtherance of the conspiracy. *Id.* at 395, 89 L. Ed. 2d at 398-99. Therefore, the unavailability requirement is of little benefit in ensuring that the better evidence is admitted in the context of co-conspirator statements. *Id.* at 396, 89 L. Ed. 2d at 399. Ultimately, the application of the unavailability requirement to co-conspirator statements would yield few benefits and would impose significant burdens. *Id.* at 398-99, 89 L. Ed. 2d at 400-01. In summary, the Court held in *Inadi* that the Confrontation Clause of the Sixth Amendment did not call for an unavailability requirement in cases of co-conspirator statements and disavowed a reading of *Roberts* that would apply the unavailability requirement to all hearsay. *Id.* at 400, 89 L. Ed. 2d at 401.

The United States Supreme Court again found it necessary to clarify the relationship between hearsay and the Confrontation Clause of the Sixth Amendment in *White v. Illinois*, 502 U.S. 346, 116 L. Ed. 2d 848 (1992). There, the issue was whether hearsay admitted under the excited utterance and the statement for medical treatment exceptions violated the Confrontation Clause. *Id.* at 348-49, 116 L. Ed. 2d at 854-55. The Court held that the hearsay in question did not violate the Confrontation Clause. *Id.* at 357, 116 L. Ed. 2d at 860. In reaching this conclusion, the Court reaffirmed its analysis in *Inadi* and applied it to the facts of *White*. In its discussion, the Court pointed out that under *Inadi*, the unavailability requirement was limited to prior testimony. *Id.* at 354, 116 L. Ed. 2d at 858. The Court again distinguished former in-court testimony from hearsay admitted under a firmly rooted exception and, in the process, illuminated the relative weakness of former in-court testimony. *Id.* Finally, the Court reiterated that in cases of firmly rooted exceptions to the rule against hearsay, the benefits of the unavailability requirement would be few and the burdens would be substantial. *Id.* at 355, 116 L. Ed. 2d at 858-59. The Court summarized its reasoning and holding by stating:

> The preference for live testimony in the case of statements like those offered in *Roberts* is because of the importance of cross-examination, "the greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158, 26 L. Ed. 2d [at 497]. Thus courts have adopted the general rule prohibiting the receipt of hearsay evidence. *But where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.*

White, 502 U.S. at 356, 116 L. Ed. 2d at 859 (emphasis added) (citation modified). *White*, therefore, seems clearly to limit the application of the unavailability requirement to cases involving former testimony. *White* resolves the conflict between the Confrontation Clause and exceptions to the rule against hearsay in favor of admitting hearsay that falls within a firmly rooted exception, even in cases where there is no showing of any particular necessity for or trustworthiness of the hearsay evidence.

North Carolina Constitution

North Carolina's rule prohibiting hearsay and the exceptions thereto are now completely statutory creations. N.C.G.S. § 8C-1, Rules 801-806 (1992). Defendant contends, and the Court of Appeals held, that the trial court's admission of the victim's mother's testimony under the state of mind exception in the present case violated defendant's rights under the Confrontation Clause of the North Carolina Constitution. N.C. Const. art. I, § 23.

[2] Defendant contends that prior decisions of this Court have indicated that if the prosecution introduces hearsay evidence of any type, it violates the Confrontation Clause of the North Carolina Constitution unless it complies with a two-prong constitutional test for the admission of hearsay by establishing (1) necessity, and (2) trustworthiness. *E.g.*, *State v. Swindler*, 339 N.C. 469, 472-73, 450 S.E.2d 907, 910 (1994) (defendant argued both federal and state Confrontation Clauses); *State v. Peterson*, 337 N.C. 384, 390, 446 S.E.2d 43, 47-48 (1994) (same); *State v. Felton*, 330 N.C. 619, 640, 412 S.E.2d 344, 357 (1992) (same); *State v. Deanes*, 323 N.C. 508, 514-15, 374 S.E.2d 249, 254 (1988) (same), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989). We do not agree. First, we note that in each of those cases, the hearsay evidence was admitted under the residual or "catchall" exceptions established by Rule 803(24) and Rule 804(b)(5). Each of those rules expressly provides for the admission of residual hearsay only if both trustworthiness and necessity are established. N.C.G.S. § 8C-1, Rules 803(24), 804(b)(5); *see State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986); *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). "Necessity" in this context is not limited to a showing of unavailability, such as when the declarant is dead, out of the jurisdiction, or insane. It also includes situations in which the court "cannot expect, again, or at this time, to get *evidence of the same value* from the same or other sources." 5 John Henry Wigmore, *Evidence*

§ 1421(2) (James H. Chadbourn rev. 1974); *see also State v. Smith*, 315 N.C. 76, 95, 337 S.E.2d 833, 846 (1985) (quoting Rule 803(24), which provides that hearsay is admissible if it "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"). Further, in each of our cases relied upon by defendant, this Court dealt with Sixth Amendment challenges to the admission of hearsay, as well as challenges under the North Carolina Constitution. The United States Supreme Court has indicated that "residual" hearsay exceptions are not "firmly rooted" exceptions to the general rule against hearsay and therefore do not relieve the prosecution of the duty under the Confrontation Clause of the Sixth Amendment to establish the necessity for and reliability or trustworthiness of the hearsay evidence. *Idaho v. Wright*, 497 U.S. 805, 817, 111 L. Ed. 2d 638, 653-54 (1990); *see Peterson*, 337 N.C. at 392, 446 S.E.2d at 49. In none of our cases cited—*Swindler*, *Peterson*, *Felton*, and *Deanes*—was it necessary for us to decide whether the Confrontation Clause of the North Carolina Constitution requires that no hearsay evidence whatsoever be admitted unless the prosecution has complied with a two-prong test by establishing (1) necessity, and (2) reliability or trustworthiness. Any possible inferences to that effect in those decisions, therefore, were mere *dicta* and are disapproved.

[3],[4] Importantly, in addressing the state constitutional issue presented here, we note that in our analyses of Confrontation Clause issues in *Swindler*, *Peterson*, *Felton*, and *Deanes*, we cited and relied on the decision of the United States Supreme Court in *Roberts* or North Carolina cases which relied on *Roberts* for their analysis of Confrontation Clause issues. *Swindler*, 339 N.C. at 472-73, 450 S.E.2d at 910; *Peterson*, 337 N.C. at 392, 446 S.E.2d at 49; *Felton*, 330 N.C. at 641, 412 S.E.2d at 357; *Deanes*, 323 N.C. at 515, 374 S.E.2d at 255. Thus, it is apparent that we have relied heavily upon the United States Supreme Court's interpretation of the Confrontation Clause of the Sixth Amendment in cases in which defendants have also raised confrontation issues under the Confrontation Clause of the North Carolina Constitution. As we have noted, we are free to interpret our state Constitution differently than the United States Supreme Court interprets even identical provisions of the federal Constitution. It suffices here, however, to state that we find the reasoning of the Supreme Court of the United States when construing the Confrontation Clause of the Sixth Amendment in *Inadi* and *White* persuasive, and we adopt and shall apply that reasoning for purposes

of resolving issues arising under the Confrontation Clause of the North Carolina Constitution. Specifically, we agree that the

> preference for live testimony in the case of statements like those offered in *Roberts* [prior testimony under oath] is because of the importance of cross-examination, "the greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158, 26 L. Ed. 2d [at 497]. Thus courts have adopted the general rule prohibiting the receipt of hearsay evidence. But *where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.*

White, 502 U.S. at 356, 116 L. Ed. 2d at 859 (emphasis added) (citation modified). This reasoning is equally sound when construing the Confrontation Clause of the North Carolina Constitution. Accordingly, we hold that where hearsay proffered by the prosecution comes within a firmly rooted exception to the hearsay rule, the Confrontation Clause of the North Carolina Constitution is not violated, even though no particularized showing is made as to the necessity for using such hearsay or as to its reliability or trustworthiness.

[5] In the present case, the testimony of the victim's mother was admitted into evidence under the state of mind exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3). The state of mind exception is a "firmly rooted" exception to the hearsay rule. *State v. Stager*, 329 N.C. 278, 318, 406 S.E.2d 876, 899 (1991); *State v. Faucette*, 326 N.C. 676, 684, 392 S.E.2d 71, 75 (1990). Therefore, the Confrontation Clause of the North Carolina Constitution was not violated.

In this case, the Court of Appeals took the view that the Confrontation Clause of the North Carolina Constitution entitled defendant to greater protection than that accorded him by the United States Constitution. The Court of Appeals stated that "the prosecution in a criminal trial must, as a prerequisite to the introduction of hearsay evidence, show the necessity for using the hearsay testimony and establish the inherent trustworthiness of the original declaration." *State v. Jackson*, 126 N.C. App. 129, 138, 484 S.E.2d 405, 411 (1997). As a result, the Court of Appeals concluded that "although Mrs. [Lillian] Jackson's testimony falls within a firmly rooted hearsay exception, because [General] Jackson (the out-of-court declarant) was available as a witness, the trial court erred in admitting Mrs.

Jackson's testimony of her conversation with [General] Jackson." *Id.* For the reasons previously discussed in this opinion, the Court of Appeals erred in this conclusion and in awarding defendant a new trial. The decision of the Court of Appeals is reversed, and this case is remanded to that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ELLEN BRING, PETITIONER v. NORTH CAROLINA STATE BAR, RESPONDENT

No. 355PA97

(Filed 30 July 1998)

Attorneys at Law § 8 (NCI4th)— bar exam applicant—law school not ABA accredited—Bar rules—constitutional delegation of power—properly adopted

The trial court did not err by affirming the Bar Council's decision denying a petition to take the North Carolina Bar Examination from a petitioner who has practiced in California for fifteen years after receiving her degree from a school fully accredited by the State Bar of California but not approved by the American Bar Association. N.C.G.S. § 84-24 is not an unconstitutional delegation of power to the Board of Law Examiners without adequate standards; the directions given by the legislature are as specific as the circumstances require and there are adequate procedural safeguards in the statute. It is not practical for the General Assembly to micro manage the making of rules for the Board and the Board, with its sixty years of experience, can apply its expertise to the issue in a manner which the General Assembly cannot. The policy of allowing only graduates of ABA-approved law schools to sit for the bar examination was properly adopted; N.C.G.S. § 84-21 gives specific directions as to how the Board shall adopt rules, which govern over the general rule making provision of the Administrative Procedure Act. Finally, it was not necessary for the Council to promulgate its list of approved law schools as a rule; Rule .0702 referred to the list of approved law schools and the list was available at the office of the State Bar.

Justice ORR dissenting.

Justice LAKE joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a decision of the Court of Appeals, 126 N.C. App. 655, 486 S.E.2d 236 (1997), affirming an order entered by Spencer, J., on 4 June 1996 in Superior Court, Wake County. Heard in the Supreme Court 18 December 1997.

This case arises from Ellen Bring's petition to the North Carolina State Bar Council seeking permission to take the North Carolina Bar Examination. The petitioner received her law degree from the New College of California School of Law ("New College") in 1979, a school fully accredited by the State Bar of California but not approved by the American Bar Association (ABA). She was admitted to the California Bar in 1979 and practiced in that state for fifteen years.

In her petition, the petitioner asked the Bar Council to approve New College as meeting the law school approval requirements of Rule .0702 of the North Carolina Rules Governing Admission to Practice of Law. On 29 August 1995, the Council denied the petition on the ground that New College had "not been approved by the American Bar Association."

On 2 October 1995, the petitioner petitioned the Superior Court of Wake County for judicial review. On 4 June 1996, the trial court entered an order affirming the Council's decision. The petitioner appealed the order to the Court of Appeals, which affirmed the order of the superior court. We granted the petitioner's petition for discretionary review.

Harry H. Harkins, Jr., for petitioner-appellant.

Carolin Bakewell for respondent-appellee.

WEBB, Justice.

The petitioner challenges the refusal of the Bar Council to approve New College so that she can sit for the bar examination. She contends that the scheme with which she must comply to take the examination violates the North Carolina Constitution. She also says the refusal of the Council to allow her to take the examination was arbitrary and capricious. We disagree.

The Board of Law Examiners was created by N.C.G.S. § 84-24. This section states in part:

> The Board of Law Examiners, subject to the approval of the Council shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of the change.

N.C.G.S. § 84-24 para. 6 (1995).

Pursuant to this section, the Board of Law Examiners adopted the Rules Governing Admission to Practice of Law. Rule .0702 provides:

> Every applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law, shall prove to the satisfaction of the board that said applicant has graduated from a law school approved by the Council of the North Carolina State Bar or that said applicant will graduate within thirty (30) days after the date of the written bar examination from a law school approved by the Council of the North Carolina State Bar. There shall be filed with the secretary a certificate of the dean, or other proper official of said law school, certifying the date of the applicant's graduation. A list of the approved law schools is available in the office of the secretary.

Rules Governing Admission to Practice of Law .0702, 1998 Ann. R. N.C. 592. The Bar Council refused to approve New College, and the petitioner was not allowed to sit for the examination.

The petitioner contends that N.C.G.S. § 84-24 violates Article I, Section 6 and Article II, Section 1 of the North Carolina Constitution because it delegates legislative power to the Board of Law Examiners without adequate standards to control its action. She contends that the provision in N.C.G.S. § 84-24 that says the Board shall make and amend the rules of the Board "as in their judgment shall promote the welfare of the State and the profession" does not provide sufficient guidance to the Board to prevent this delegation of authority from being unconstitutional.

In determining whether legislation violates the rule that the General Assembly cannot delegate its power to legislate, we are

guided by *Adams v. N.C. Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978), in which we upheld the constitutionality of the Coastal Area Management Act. In that case, we said:

> In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted that such declarations need be only "as specific as the circumstances permit." [*N.C. Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 115, 143 S.E.2d 319, 323 (1965)]. *See also, Jernigan v. State*, [279 N.C. 556, 184 S.E.2d 259 (1971)]. When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.
>
> Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to "insure that the decision-making by the agency is not arbitrary and unreasoned." Glenn, [*The Coastal Management Act in the Courts: A Preliminary Analysis*, 53 N.C. L. Rev. 303, 315 (1974)]. Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. We thus join the growing trend of authority which recognizes that the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. *See* K. Davis, 1 *Administrative Law Treaties*, § 3.15 at p. 210 (2d ed. 1978).

Adams, 295 N.C. at 698, 249 S.E.2d at 411.

This is the third attack on the constitutionality of N.C.G.S. § 84-24. In *In re Willis*, we held that the provision in N.C.G.S. § 84-24 that allows the Board to determine whether an applicant possesses "the qualifications of character and general fitness requisite for an attorney and counselor at law" was an adequate standard to guide the

Board in determining whether an applicant is fit to practice law. *In re Willis*, 288 N.C. 1, 15, 215 S.E.2d 771, 779-80, *appeal dismissed*, 423 U.S. 976, 46 L. Ed. 2d 300 (1975). In *Bowens v. Board of Law Examiners*, the Court of Appeals held that a provision in N.C.G.S. § 84-24 which said, "The examination shall be held in the manner and at the times as the Board of Law Examiners may determine," provided sufficient guidance for the Board to prepare and administer the bar examination so that there was not an unconstitutional delegation of legislative authority. *Bowens v. Board of Law Examiners*, 57 N.C. App. 78, 82, 291 S.E.2d 170, 172 (1982). The Court of Appeals went on to say that the administering of the bar examination was a ministerial function and did not involve the making of a policy. *Id.*

We hold that the legislative goals and policies as set forth in N.C.G.S. § 84-24 combined with procedural requirements in regard to adopting rules and regulations are sufficient to withstand a constitutional challenge. There is a need for expertise in the achievement of the legislative policy. The Board, with its sixty years of experience, can apply its expertise to the issue in a manner which the General Assembly cannot. It is not practical for the General Assembly to micromanage the making of rules for the Board such as what law schools are to be approved. The directions given by the legislature are as specific as the circumstances require. We believe the statutory direction of N.C.G.S. § 84-24 that the Board shall make such rules governing the admission to the bar which will "promote the welfare of the State and the profession," when considered with the other provisions of the statute, means that the Board must make rules governing the admission to the bar which are intended to produce attorneys with the learning and character to serve the public well. Furthermore, we find that there are adequate procedural safeguards in the statute to assure adherence to the legislative standards. N.C.G.S. § 84-24 and N.C.G.S. § 84-21 require that the Bar Council and this Court must approve rules made by the Board. Thus, there is a sufficient standard to guide the Board so that N.C.G.S. § 84-24 does not create an unconstitutional delegation of legislative power.

The petitioner next argues that the policy of the Council in allowing only graduates of ABA-approved law schools to sit for the bar examination was not promulgated as a rule under the Administrative Procedure Act (APA), chapter 150B of the General Statutes, or under N.C.G.S. § 84-21. Because this rule was not promulgated properly, says the petitioner, it was arbitrary and capricious for the Council to rely solely on this rule in excluding her from the bar examination.

However, the petitioner concedes that if the rule had been properly promulgated, it would not be arbitrary and capricious to enforce it.

We believe the rule was properly adopted. It was not necessary to adopt the rule in accordance with the requirements of the APA. N.C.G.S. § 84-21 gives specific directions as to how the Board shall adopt rules. These directions must govern over the general rule-making provision of the APA. *National Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 629, 151 S.E.2d 582, 585-86 (1966). We note that, in her appeal, the petitioner followed N.C.G.S. § 84-24 dealing with appeals of decisions of the Board of Law Examiners and not the provisions of the APA.

The Board's rules, including Rule .0702, were submitted to this Court as required by N.C.G.S. § 84-21 and published at volume 326, page 810 of the North Carolina Reports. This complies with the statutory requirement. Rule .0702 was properly adopted.

The appellant contends nevertheless that because Rule .0702 does not contain any criteria for approving law schools but says only that an applicant must graduate from a law school approved by the Council, and because the Council has not properly promulgated its rule that only graduates of ABA-approved law schools may sit for the bar examination, there is no rule requiring graduation from an ABA-approved law school. This being so, says the petitioner, it was arbitrary and capricious for the Board to consider only the Council's approved list of law schools.

We do not believe it was necessary for the Council to promulgate its list of approved law schools as a rule. The Board promulgated Rule .0702, which referred to the Council's list of approved law schools. The list was available at the office of the State Bar. The list when read in conjunction with Rule .0702 is an adequate rule. Thus, because the rule was properly adopted, we do not find it to be arbitrary and capricious for the Board of Law Examiners to rely upon it.

For the reasons stated in this opinion, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice ORR dissenting.

In *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940), this Court set forth the standard for legislative delegation of authority as follows:

> In licensing those who desire to engage in professions or occupations as may be proper subjects of such regulation, the Legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. . . .
>
> While the power to make rules and regulations to carry into effect the laws confided to them for administration is often given to administrative bodies, and while in instances there may be some doubt as to whether the proposed regulation is legislative in character or in pursuance of a delegable power, it is clear that in a statute of this kind, giving the important power of admitting or excluding persons from a business, trade, or profession, only the Legislature can create the standards and provide the reasonable limits within which the power must be exercised.

Id. at 754-55, 6 S.E.2d at 860 (citations omitted). Until today, this Court has not essentially wavered from adherence to this test. However, the majority decision unfortunately strays far afield from this time-honored requirement. In the case before us, the only guidance given in N.C.G.S. § 84-24 to the Board of Law Examiners is that the Board "make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession." N.C.G.S. § 84-24 para. 6 (1995). I find this guidance to be totally inadequate in that it is a sweeping delegation of legislative power to the Board of Law Examiners with no guidance or standards being set forth. This broad delegation allows the Board to make policy, rather than follow the policy set by the legislature. The Court's opinion in *Harris* was more recently affirmed in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), *cert. denied*, 406 U.S. 920, 32 L. Ed. 2d 119 (1972):

> When the General Assembly delegates to administrative officers and agencies its own power to prescribe detailed administrative rules and regulations governing the right of individuals to engage in a trade or profession, the statute granting such authority must lay down or point to a standard for the guidance of the officer or agency in the exercise of his or its discretion. Otherwise, such statute will be deemed an unlawful delegation by the General Assembly of its own authority.

Id. at 712, 185 S.E.2d at 200. It should be pointed out that the legislature has in fact provided far greater guidance for licensing members

of other professions, such as physicians, dentists, psychologists, accountants, architects, engineers, and real estate brokers. There is no adequate explanation, nor is one offered, that justifies a failure to set standards for admission to the legal profession while articulating in detail various required standards in other professions.

Furthermore, it is uncontroverted that the authority delegated the Board of Law Examiners has at least in part been delegated to the American Bar Association (ABA), a voluntary organization over which this Court, the Board of Law Examiners, nor the General Assembly has any authority. N.C.G.S. § 84-24 provides that the Board of Law Examiners will set the standard for admission to the Bar. Rule .0702, adopted by the Board of Law Examiners, provides that an applicant "shall prove to the satisfaction of the board that said applicant has graduated from a law school approved by the Council of the North Carolina Bar." Rules Governing Admission to Practice of Law .0702, 1998 Ann. R. N.C. 592. No criteria have been promulgated as to what the Council will consider in approving a law school. The Council's recent practice is to accept only schools that have been accredited by the ABA. The Council's and through it the Board's reliance on ABA accreditation to determine what law schools are satisfactory is essentially a further improper delegation of the original unlawful delegation of authority.

The majority next concludes that the rule in question was properly adopted. While determining that it was unnecessary to comply with the general rule-making authority of the Administrative Procedure Act (APA), the majority instead relies on this Court's statutory duty to determine that the rule is not in conflict with our Constitution, which was in fact performed on 26 July 1990 and was duly recorded in volume 326, page 823 of the North Carolina Reports. It must be noted that Rule .0702 makes *no* mention of having *the ABA* determine which law schools are approved. Instead, the rule specifically requires *the Council of the North Carolina State Bar* to approve the law schools. Abdication of this responsibility to some other organization is a flagrant violation of the Council's duties. As such, I would conclude that the refusal to allow Ms. Bring to take the Bar Exam because the ABA has not accredited the law school from which she graduated is arbitrary and capricious.

Ms. Bring submitted information to the Board that New College School of Law enrolled its first class in 1973. The law school has a unique mission of preparing students to practice public interest law.

Students are required to participate in a formal apprenticeship program and receive on-the-job training as a condition of graduation. The school also has a complete law library and requires similar classes as other law schools. There are over five hundred graduates of New College currently practicing law. New College has been fully accredited since 1982 by the State Bar of California. New College has never sought ABA accreditation and has no plans to do so.

Despite this showing, the Board of Law Examiners gave no individualized consideration to the above-mentioned merits of New College, but relied solely on the fact that New College was not ABA approved to deny petitioner's application. The Board made no specific findings as to the whether New College properly prepared its students for the practice of law and in fact refused to make any inquiry into whether the New College School of Law sufficiently met the Bar Council's standards as to what constitutes an accredited law school. This failure to even consider the merits of New College School of Law is likewise arbitrary and capricious.

In this case, we have a graduate from a California law school that has been fully accredited by the California State Bar. In addition, Ms. Bring practiced law in good standing in the State of California for fifteen years. She sought an opportunity, not to be automatically admitted to the North Carolina Bar, but to merely sit for the Bar Examination to show her proficiency and ability to practice law in this state. Without even considering the merits of her educational and professional background, but instead relying on an accreditation process by an outside organization, the Board of Law Examiners summarily refused her right to even attempt to obtain a license to practice law by prohibiting her from taking the Bar Exam. Such a decision is arbitrary and capricious and is based solely upon an unlawful delegation of legislative power without benefit of acceptable standards, and a further delegation or abdication by the Board of Law Examiners and the State Bar Council. I therefore dissent and would hold that N.C.G.S. § 84-24 violates Article I, Section 6 and Article II, Section 1 of the North Carolina Constitution.

Justice LAKE joins in this dissenting opinion.

BETHANIA TOWN LOT COMMITTEE v. CITY OF WINSTON-SALEM

[348 N.C. 664 (1998)]

BETHANIA TOWN LOT COMMITTEE, JOHN E. COLLINS, OTIS SELLERS, HUBERT LASH, ERICSTEEN J. LASH, DIONNE BREWER KOGER JENKINS, JOSEPH C. JONES, JR., J.C. COVINGTON, BEULAH G. MILLER, CLARENCE G. HAUSER, JULIUS WALKER, TODD JORGENSEN, STEPHEN D. PETREE, HANES G. CARTER, VICKI F. CARTER, WALTER HUNTER, CHAPPELL HUNTER, BEVERLY L. HAMEL AND WILLIAM M. COBB, JR. v. CITY OF WINSTON-SALEM, SETH B. BROWN, DEBORAH THOMPSON, B.A. BYRD, G. WAYNE PURGASON AND WILLA LASH

No. 402PA97

(Filed 30 July 1998)

1. **Municipal Corporations § 18 (NCI4th)— Town of Bethania—act creating—portion of existing town excluded—insufficient record of existing town**

There was insufficient evidence of an extant town from 1835 to 1995 in an action to block an annexation by Winston-Salem where plaintiffs alleged that they were residents of an area included in the Town of Bethania created in 1839 and not included in the area covered by a 1995 act which created a new Bethania over a smaller area. The 1839 act provided that the town would not be effective until the inhabitants approved it and there are no town records showing approval; indeed, there are no town records at all. References in historical journals are not sufficient.

2. **Municipal Corporations §§ 32, 33 (NCI4th)— Town of Bethania—act creating—not unconstitutional**

A 1995 Act purporting to create the Town of Bethania did not violate the North Carolina Constitution: the General Assembly may not adopt local acts concerning the subject matter of general laws, but the Constitution does not direct the creation of municipalities by general laws; the General Assembly may not enact a prohibited local act by the partial repeal of a general law, but the 1995 act is not a prohibited general act; and the 1995 act did not unconstitutionally delegate legislative power to the City of Winston-Salem.

3. **Municipal Corporations § 18 (NCI4th)— Town of Bethania—township line**

An act creating the Town of Bethania did not change a township line in violation of the North Carolina Constitution where plaintiffs contended that their land, included in the alleged original Bethania but excluded by this act, was obviously intended to

be part of the City of Winston-Salem and that this effectively changed the township line because there cannot be a city in a township. Cities are within townships.

4. Municipal Corporations § 18 (NCI4th)— Town of Bethania—town created by 1995 act—areas excluded from alleged 1839 town—Fifteenth Amendment to U.S. Constitution—no violation

Plaintiffs were not deprived of their right to vote in elections in the new Town of Bethania where their property was included in the alleged Town of Bethania created in 1839, but not in the smaller town created by the General Assembly in 1995. Plaintiffs have never voted in Bethania and have not been denied a right which they previously possessed. The North Carolina Supreme Court does not believe that the Fifteenth Amendment to the U.S. Constitution requires that any particular area must be included in a newly created town in order that residents of that area may vote in municipal elections.

Justice ORR dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a unanimous decision of the Court of Appeals, 126 N.C. App. 783, 486 S.E.2d 729 (1997), vacating an order granting a permanent injunction entered by Burke, J., at the 10 June 1996 Civil Session of Superior Court, Forsyth County. Heard in the Supreme Court 12 February 1998.

In this case, the plaintiffs challenge an act of the General Assembly entitled "An Act to Revive the Charter of the Town of Bethania." Act of May 10, 1995, ch. 74, 1995 N.C. Sess. Laws 126 (the 1995 Act). By this Act, the General Assembly purported to create the Town of Bethania in Forsyth County. It provided that the Town would cover four hundred acres as set forth in a metes and bounds description contained in the Act. The Act provided that the Town could not expand its corporate limits without an agreement to do so with the City of Winston-Salem and that the corporate limits of the Town of Bethania shall be considered the primary corporate limits of the City of Winston-Salem for parts 1, 3, and 4 of article 4A of chapter 160A of the General Statutes.

After the adoption by the General Assembly of the 1995 Act, the City of Winston-Salem adopted an annexation ordinance in which it

proposed to annex land close to the town limits of Bethania. The plaintiffs brought this action to block the annexation. They alleged that they were residents of the true Bethania, a town of 2,500 acres which preceded the town which was purportedly created by the 1995 Act and that they resided on land which the City of Winston-Salem proposed to annex. They also alleged that they were African-American citizens, as were most of the residents of the area which the City of Winston-Salem proposed to annex, and that they were deprived of the right to vote in municipal elections in the revived Town of Bethania in violation of Article II, Section 24 and Article XIV, Section 3 of the Constitution of North Carolina as well as the Fifteenth Amendment to the Constitution of the United States.

The plaintiffs prayed that the 1995 Act be declared unconstitutional and that the City of Winston-Salem be permanently enjoined from annexing any land in the city limits of what the plaintiffs contend is the true Bethania, a town of 2,500 acres.

At a hearing on the plaintiffs' motion for an injunction, the plaintiffs showed that in 1839, the General Assembly enacted "An Act to appoint Commissioners for the Town of Bethania in the County of Stokes." Act of Jan. 3, 1839, ch. LXV, 1838-39 N.C. Sess. Laws 178. That Act provided for the appointment of commissioners and authorized the carrying out of certain governmental activity "provided that the inhabitants of said Town shall, in full Town meeting, approve of this Act of Incorporation." *Id.* sec. I, at 179. The only evidence that the inhabitants approved the Act is a reference by author Louise Bowles Kapp which said that a notice was posted which requested "[a]ll inhabitants of Bethania . . . to meet at the shop of Elias Schaub . . . at early candle light for the purpose of adopting or rejecting the act of incorporation ratified on the 3rd of January, 1839." Louise Bowles Kapp, Bethania: The First Industrial Town of Wachovia 27-28, Bethania Historical Ass'n (1995).

The 1839 Act did not establish a boundary for the town. The plaintiffs produced a map of Bethania, made by Christian Gottlieb Reuter in 1771, which shows Bethania contains 2,500 acres. There were also maps made in 1810 and 1822 which showed Bethania contained 2,500 acres. The plaintiffs also produced references which show that a constable was elected for Bethania and a tax collector appointed in 1852, *Records of the Moravians in North Carolina (1852-1879)*, vol. XI, at 5750, 5762, N.C. Dep't of Archives & History, Raleigh, N.C. (Kenneth G. Hamilton ed., 1969); that there was a sher-

iff in 1850, *Records of the Moravians in North Carolina (1841-1851)*, vol. X, at 5521, N.C. Dep't of Archives & History, Raleigh, N.C. (Kenneth G. Hamilton ed., 1966); and that elections were held in 1850, *id.* at 5526, and in 1856, vol. XI. In another publication, it is said that in March of 1848, sixteen "Gentlemen Justices" appointed and commissioned by the Governor met in a concert hall in Bethania and elected William Flynt sheriff for the ensuing year. Adelaide Fries et al., *Forsyth: The History of a County on the March* 156, Univ. of N.C. Press, Chapel Hill, N.C. (rev. ed. 1976).

The superior court held that the 1995 Act is unconstitutional on its face in that it violates the Constitution of North Carolina. The court permanently enjoined the City of Winston-Salem from annexing any part of the 2,500 acres known as the Town of Bethania.

The Court of Appeals reversed the judgment of the superior court and ordered that judgment be entered for the defendant City. This Court allowed discretionary review.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Annie Brown Kennedy; Harold L. Kennedy, III; Harvey L. Kennedy; and Harold L. Kennedy, Jr., for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Roddey M. Ligon, Jr.; and Ronald G. Seeber, City Attorney, for defendant-appellee City of Winston-Salem.

NAACP Legal Defense & Educational Fund, Inc., by Victor A. Bolden, pro hac vice, amicus curiae.

WEBB, Justice.

[1] The plaintiffs contend that the General Assembly in 1839 created the Town of Bethania comprising 2,500 acres. They say the General Assembly could not by local act in 1995 create a new Bethania, reduced in size to 400 acres.

We do not believe a town exists because of the 1839 Act. The Act provided the Town would not be effective until the inhabitants of the Town approved it. There are no town records showing approval. Indeed, there are no town records at all. There is a reference in a historical journal to a meeting for the purpose of ratifying the Act. There was no evidence as to whether the Act was ratified. There were references from historical journals to a constable, a tax collector, and a sheriff who were elected at various times, and there were references

to two elections. The last of these events occurred in 1856, which was 139 years prior to the enactment of chapter 74 of the 1995 Session Laws (the 1995 Act). This is not sufficient evidence to show the 1839 Act created a town which was extant in 1995.

[2] The General Assembly may, by special or local act, create municipalities and change the boundaries of municipalities. *Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 207 (1972); *Matthews v. Town of Blowing Rock*, 207 N.C. 450, 452, 177 S.E. 429, 430 (1934); *Lutterloh v. City of Fayetteville*, 149 N.C. 65, 69, 62 S.E. 758, 760 (1908). This causes plaintiffs' argument that the 1995 Act violates certain parts of the North Carolina Constitution to fail.

The plaintiffs contend that the 1995 Act violates Article XIV, Section 3 of our Constitution. This section provides that when the General Assembly is directed or authorized by the Constitution to enact general laws, no local act may be adopted concerning the subject matter directed to be accomplished by general laws. This section has no application to this case. The Constitution does not direct the General Assembly to create municipalities by general laws.

The plaintiffs also contend that the 1995 Act violates Article II, Section 24(2) of the North Carolina Constitution. This section provides that the General Assembly may not enact a prohibited local act by the partial repeal of a general law. The 1995 Act is not a prohibited local act.

The plaintiffs contend further that the 1995 Act violates Article II, Section 1 of the Constitution by delegating legislative power to the City of Winston-Salem. This argument was answered by former Chief Justice Sharp in *Plemmer v. Matthewson*, in which she said:

> In delegating to the town commissioners the discretionary right to decide whether to enlarge the corporate limits as specified in the Act, the General Assembly did not delegate legislative authority in violation of N.C. Const. art. II, § 1, or art. I, § 6. Except for approval by the town's board of commissioners, the Act was complete in every respect at the time of its ratification. The only discretion given the commissioners was to decide whether or not to annex the territory specified in the Act . . . . In authorizing the annexation, the General Assembly determined that the annexation was suitable and proper.

Plemmer, 281 N.C. at 726, 190 S.E.2d at 207.

The plaintiffs next argue that the 1995 Act is a nullity because it attempts to revive the charter of a town whose charter had not been repealed. This argument is answered by our holding that there was not a Town of Bethania at the time the 1995 Act was adopted.

[3] The plaintiffs next contend that the 1995 Act is a local act which changes a township line in violation of Article II, Section 24(1)(h) of the North Carolina Constitution. They argue that the southern boundary of the original Bethania is coterminous with the southern boundary of Bethania Township. When the General Assembly created a new Bethania, say the plaintiffs, it was obvious the land excluded from the original Bethania was intended to be part of the City of Winston-Salem. The plaintiffs argue that this had the effect of changing the township line because there cannot be a city in a township.

Cities are within townships. The fact that Winston-Salem may extend its boundary should have no effect on the Bethania Township line.

[4] The plaintiffs next contend that the 1995 Act is in violation of the Fifteenth Amendment to the Constitution of the United States because it deprives them of their right to vote in elections in the Town of Bethania. They rely on *Gomillion v. Lightfoot*, 364 U.S. 339, 5 L. Ed. 2d 110 (1960), in which the United States Supreme Court held the Alabama legislature could not change the boundaries of the City of Tuskegee to exclude African-Americans from the City and deprive those persons of the right to vote in city elections. This case is distinguishable from *Gomillion* in that the plaintiffs have never voted in Bethania. They have not been denied a right which they previously possessed.

The plaintiffs have not cited a case and we cannot find one that deals with the effect of the Fifteenth Amendment on the incorporation of a town by a legislature. We do not believe that when such a situation occurs, the Amendment requires that any particular area must be included in the newly created town in order that the residents of that area may vote in municipal elections.

Finally, the plaintiffs contend that they sufficiently pled a constitutional violation so that the case should not have been dismissed on the pleadings. The case was not dismissed on the pleadings. Evidence was adduced at the hearing, and the facts were not in dispute. The court could, as it did, enter a final judgment.

For the reasons stated in this opinion, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice ORR dissenting.

I dissent from the majority's conclusion that the 1995 "Act to Revive the Charter of the Town of Bethania" is constitutional. This Act violates Article XIV, Section 3 of the North Carolina Constitution, which provides:

> Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, *no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws*, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State.

N.C. Const. art. XIV, § 3 (emphasis added). The General Assembly of North Carolina has developed specific procedures for annexation, set out in N.C.G.S. §§ 160A-24 through -58.28, which apply to *all* North Carolina municipalities. However, the Act in question provides, in pertinent part, as follows:

> (c) Notwithstanding Parts 1 through 5 of Article 4A of Chapter 160A of the General Statutes, only areas described as subject to annexation by the Town of Bethania in an annexation agreement between the City of Winston-Salem and the Town of Bethania under Part 6 of that Article may be annexed by the Town of Bethania. Annexation of any areas so designated, however, must be done in accordance with Parts 1 through 5 of that Article, as applicable.
>
> (d) The corporate limits of the Town of Bethania shall also be considered the primary corporate limits of the City of Winston-Salem for the purposes of Parts 1, 3 and 4 of Article 4A of Chapter 160A of the General Statutes.

Act of May 10, 1995, ch. 74, sec. VII(c), (d), 1995 N.C. Sess. Laws 126, 129. As reflected in the minutes of 20 February 1995, the City

Attorney explained to the Board of Aldermen of the City of Winston-Salem the effect of this Act:

> Another provision is that Bethania may not annex in the future without first having an annexation agreement with the City of Winston-Salem. A third provision is that the area of Bethania itself will be considered the primary corporate limits of the City of Winston-Salem for purposes of future City of Winston-Salem annexations under G.S. 160A in order that Winston-Salem can be contiguous to these areas as the City limits are extended.

The obvious effect of this Act is to grant Winston-Salem greater annexation authority than other municipalities and to diminish annexation powers of the Town of Bethania in comparison with other municipalities. This is the exact type of circumstance that our Constitution seeks to prevent. To sanction this Act is to allow powerful municipal interests to have other special acts passed in the General Assembly giving them ever-greater authority over annexation procedures and threatening the rights of smaller, less-powerful municipalities in the process.

I would affirm the trial court's decision that this Act is unconstitutional on its face.

STATE OF NORTH CAROLINA v. TEDDY LEE WALL

No. 417PA97

(Filed 30 July 1998)

1. Burglary and Unlawful Breakings § 173 (NCI4th)— burglary—sentencing—defendant on parole for prior offenses —plea bargain—sentence consecutive

The trial court erred by directing that defendant's sentence be served concurrently rather than consecutively where defendant received a ten-year sentence for larceny and breaking and entering in 1989, with probation; defendant's parole was revoked; he was subsequently paroled again and the parole was again revoked; before the notice of the last parole revocation reached the Department of Correction, defendant entered into a plea agreement for second-degree burglary, larceny, and breaking or entering which called for a consolidated judgment of twenty-five years; the agreement and judgment did not provide for a consec-

utive or concurrent sentence; the Department of Correction eventually modified defendant's record to reflect that the last sentence was to be consecutive pursuant to N.C.G.S. § 14-52; and defendant filed a motion for appropriate relief which was granted. In accord with the plain meaning of N.C.G.S. § 14-52 (effective until 1 January 1995), defendant's sentence for burglary could commence only at the expiration of the 1989 sentence because he was already serving the 1989 sentence.

2. **Criminal Law § 131 (NCI4th Rev.)— plea agreement—burglary—concurrent sentence—defendant entitled to benefit of bargain—defendant not entitled to specific performance**

A defendant who entered into a plea agreement in 1994 under which several 1993 cases, including burglary, were consolidated for judgment was entitled to the benefit of his bargain where defendant, his attorney, and the prosecutor understood that the 1994 sentence was to run concurrently with the sentence defendant was already serving. However, defendant is not entitled to specific performance because that would violate the law of the state. Defendant may withdraw his plea and proceed to trial or attempt to negotiate another agreement that does not violate N.C.G.S. § 14-52.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered by Caldwell, J., on 7 January 1997 in Superior Court, Gaston County, allowing defendant's motion for appropriate relief and ordering that defendant's sentences be served concurrently, not consecutively. Heard in the Supreme Court 12 February 1998.

Michael F. Easley, Attorney General, by Elizabeth F. Parsons, Assistant Attorney General, for the N.C. Department of Correction petitioner-appellant.

Henry L. Fowler, III, for defendant-appellee.

North Carolina Prisoner Legal Services, Inc., by Winnifred H. Dillon, amicus curiae.

FRYE, Justice.

In this case we decide: (1) whether the superior court's order directing that defendant's sentences be served concurrently was in violation of N.C.G.S. § 14-52, and (2) whether defendant is entitled to a remedy for his reliance on the validity of his plea agreement.

This case developed as follows: On 12 December 1989, defendant received a ten-year suspended sentence upon his plea of guilty to several charges of larceny and breaking and entering and was placed on supervised probation. On 16 July 1991, defendant's probation was revoked, and his ten-year suspended sentence was activated. On 5 August 1992, the North Carolina Parole Commission gave notice of its intent to parole defendant from the activated sentence, and he was subsequently paroled. On 30 December 1993, defendant's parole was again revoked, reactivating his 1989 sentence.

On 26 July 1994, defendant entered into a plea agreement in case number 93CRS5858 to the offenses of second-degree burglary and felonious larceny and in case number 93CRS28258 to felonious breaking or entering and felonious larceny under which it was agreed that the two cases would be "consolidated for judgment and Defendant sentenced to twenty-five years in NCDOC [the North Carolina Department of Correction]." The agreement did not say whether the sentence should be served consecutively or concurrently with any sentences defendant was then obligated to serve. The trial court accepted defendant's plea and entered judgment that "defendant be imprisoned for a term of twenty-five (25) years in the custody of the N.C. Department of Correction." The judgment did not specifically provide for a consecutive or concurrent sentence.

When the 30 December 1993 notice of parole revocation was ultimately received by the Department of Correction, defendant's combined inmate record was modified to reflect that the 26 July 1994 sentence was to be served consecutive to the 1989 sentence as required by N.C.G.S. § 15A-1354(a) and § 14-52. Thereafter, defendant's trial counsel, David Childers, wrote to the Department of Correction requesting that the sentences for the 1989 and 1993 offenses run concurrently since nothing in the judgment or plea transcript justified consecutive terms. The Department of Correction replied in writing to Childers that defendant's sentences "were set up according to Statute 14-51 [sic], punishment for [b]urglary." The Department of Correction's letter further explained:

> [Defendant] began his 10 years sentence on July 16, 1991 and was not convicted until July 26, 1994 on his Second Degree Burglary.
>
> Therefore[,] according to Statutes, it was to begin at expiration of any and all sentences.

In October 1996, defendant filed a motion for appropriate relief. The Department of Correction was neither served with notice of nor represented at the hearing on the motion. Judge Jesse B. Caldwell granted the motion for appropriate relief. In an order entered 7 January 1997, the court found as fact:

> the Defendant entered into a plea agreement on July 26, 1996 [sic] in cases 93 CRS 5858 and 28258 under which it was agreed that the two sentences in the two cases would be consolidated for Judgment and the Defendant would be sentenced to 25 years in the North Carolina Department of Corrections, a copy of the plea agreement having been attached to the Defendant's Motion; that there was nothing in the Judgment of the court that stated that the sentences should be served consecutively; but, the Defendant was notified by the Department of Corrections and the Defendant's attorney was informed by the Department of Corrections that the sentences were to be served consecutively rather than concurrently; that it was Defendant's understanding as well as the understanding of the Defendant's attorney that the sentences would run concurrently, and that was a large reason for the Defendant entering into the plea that he entered into; Assistant District Attorney Charles Hubbard having reviewed the matter, has consented and agreed to the Defendant's position that said sentences were to be served concurrently and not consecutively.

Based on these findings, the court concluded as a matter of law that defendant's sentences should be served concurrently and ordered that defendant's sentences in cases 89CRS17941 through 17956 and 17978 and 93CRS5858 and 28258 "shall all be served concurrently, not consecutively."

On 8 July 1997, the Department of Correction filed a petition for writ of certiorari in the Court of Appeals requesting review of the superior court's order. On 28 July 1997, the Court of Appeals dismissed the petition.

On 22 August 1997, the Department of Correction filed a petition for writ of certiorari in this Court, which was allowed on 2 October 1997.

[1] N.C.G.S. § 15A-1354 deals with concurrent and consecutive terms of imprisonment. Subsection (a) provides:

> (a) Authority of Court.—When multiple sentences of imprisonment are imposed on a person at the same time or when a term

> of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. *If not specified or not required by statute to run consecutively, sentences shall run concurrently.*

N.C.G.S. § 15A-1354(a) (1997) (emphasis added). Under this statute, sentences run concurrently unless the judgment specifies consecutive sentences or unless consecutive sentences are required by statute.

The Department of Correction notes that, under former N.C.G.S. § 14-52, consecutive sentences are required for burglary convictions. It is, therefore, applicable in this case. That statute provided, in pertinent part, as follows:

> ***§ 14-52. Punishment for burglary.***
>
> . . . Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

N.C.G.S. § 14-52 (1993) (effective until 1 January 1995).

This Court has previously considered the requirement of N.C.G.S. § 14-52 that sentences for burglary must commence at the expiration of any other sentence then being served. *See State v. Warren*, 313 N.C. 254, 328 S.E.2d 256 (1985). In that case, the defendant contended that under the statute, the only time a trial court was "required to enter a burglary sentence consecutive to another sentence [was] when that other sentence was also imposed for burglary." *Id.* at 265, 328 S.E.2d at 264. This Court disagreed, stating as follows:

> The last sentence of N.C.G.S. 14-52 is clear and unambiguous. In such cases judicial construction is not permitted and the courts must give the statute its plain and definite meaning. The plain meaning of N.C.G.S. 14-52 is that a term imposed for burglary under the statute is to run consecutively with *any other sentence* being served by the defendant.

Id. (citations omitted).

This Court's holding in *Warren* compels the conclusion that in the instant case, the court was bound to issue its order in accordance with the plain meaning of N.C.G.S. § 14-52. Because defendant was

already serving the 1989 sentence, his 1994 sentence for second-degree burglary could commence only at the expiration of the 1989 sentence he was then serving. The court's order directing that defendant's sentences be served concurrently rather than consecutively was in violation of N.C.G.S. § 14-52 and must, therefore, be vacated.

[2] Next, we address whether defendant in this case is entitled to a remedy for his reliance on the validity of his plea agreement. The record reflects that on 26 July 1994, defendant entered into a plea agreement under which the 1993 cases would be consolidated for judgment and defendant would be sentenced to twenty-five years in prison. Defendant, his attorney, and the prosecutor understood that the 1994 sentence was to run concurrently with the sentence defendant was already serving.

In *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980), this Court stated:

> When viewed in light of the analogous law of contracts, it is clear that plea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading.

Id. at 149, 265 S.E.2d at 176. In the instant case, defendant's plea of guilty was consideration given for the prosecutor's promise. He was entitled to receive the benefit of his bargain. However, defendant is not entitled to specific performance in this case because such action would violate the laws of this state. Nevertheless, defendant may avail himself of other remedies. He may withdraw his guilty plea and proceed to trial on the criminal charges. He may also withdraw his plea and attempt to negotiate another plea agreement that does not violate N.C.G.S. § 14-52.

For the reasons stated herein, we vacate the Superior Court's order of 7 January 1997 and remand to the Superior Court, Gaston County, for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

IN RE TUCKER

[348 N.C. 677 (1998)]

IN RE: INQUIRY CONCERNING A JUDGE, NO. 207 ELTON G. TUCKER, RESPONDENT

No. 617A97

(Filed 9 July 1998)

1. **Judges, Justices, and Magistrates § 36 (NCI4th)— district court judge—DWI cases—ex parte representations of counsel—entry of not guilty verdicts—shorthand disposal acquiesced in by State—not judicial misconduct—censure not warranted**

A district court judge's entry of not guilty pleas and not guilty verdicts in two DWI cases based solely on the *ex parte* representations of the defense attorney, without determining whether the State had consented to the dispositions or wished to be heard, did not amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute and did not warrant censure where the judge acted pursuant to a process of disposing of cases in a shorthand manner that had been initiated or acquiesced in by the State, defense counsel misled the judge as to the status of these two cases, and the judge did not intentionally or knowingly dispose of the cases without the knowledge of the prosecuting attorney.

2. **Judges, Justices, and Magistrates § 36 (NCI4th)— district court judge—PJC in DWI cases—mistaken belief as to law—censure not warranted**

A district court judge's conduct in entering prayers for judgment continued and then dismissals rather than sentences as required by N.C.G.S. § 20-179 upon finding the defendants guilty of DWI did not amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute and did not merit censure where the judge did not know that a prayer for judgment continued was not available for DWI cases, and his conduct was the result of a mistaken, but honest, belief that the mandatory sentencing provisions of N.C.G.S. § 20-179 would not come into effect if he continued prayer for judgment until a date certain and then dismissed the case.

This matter is before the Court upon a recommendation by the Judicial Standards Commission, entered 16 December 1997, that respondent, Judge Elton G. Tucker, a Judge of the General Court of Justice, District Court Division, Fifth 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, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct. Heard in the Supreme Court 28 May 1998.

William N. Farrell, Jr., Special Counsel, for the Judicial Standards Commission.

Tharrington Smith, L.L.P., by Roger W. Smith, E. Hardy Lewis, and F. Hill Allen, for respondent.

ORDER REJECTING CENSURE.

The Judicial Standards Commission (Commission) bases its recommendation for censure upon two sets of actions by Judge Tucker (respondent) involving four individual cases. The Commission notified respondent on 15 July 1996 that it had ordered a preliminary investigation to make inquiry concerning alleged misconduct. Special counsel for the Commission filed a complaint against respondent on 19 May 1997, alleging that respondent: (1) disposed of two cases involving defendants charged with driving while impaired (DWI), *State v. Mullaney*, New Hanover County docket number 96CR05088, and *State v. Nored*, New Hanover County docket number 96CR10555, *ex parte* when neither case was calendared for his courtroom and no evidence was presented; and (2) continued prayer for judgment for two years and then dismissed the cases of *State v. Webb*, Pender County docket number 93CR01250, and *State v. Doffermyre*, New Hanover County docket number 93CR19541, also involving defendants charged with DWI. Respondent answered, generally admitting the factual allegations but denying that they described the use of his judicial power for purposes which he knew or should have known were beyond the legitimate exercise of his authority.

After a hearing conducted 13 November 1997, the Commission found that respondent entered not guilty pleas and not guilty verdicts in the *Mullaney* and *Nored* cases based solely on the *ex parte* representations of defense attorney John Collins, without determining whether the State had consented to the dispositions or wished to be heard. The Commission further found that respondent failed to carry out his duty to pronounce judgment and sentence as mandated by N.C.G.S. § 20-179 in the *Webb* and *Doffermyre* cases. Based on its findings, the Commission concluded that respondent's conduct constituted conduct in violation of Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct, conduct prejudicial to the

administration of justice that brings the judicial office into disrepute, and willful misconduct in office in light of a private reprimand issued in 1986. The Commission recommended that this Court censure respondent.

We appreciate the Commission's thorough analysis and recommendations. The Commission serves "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, when the Commission's recommendations are reviewed, they "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). Historically, the Court has resisted adopting "strict guidelines" for determining whether a judge should be censured or removed and has instead chosen to decide each case "upon its own facts." *In re Peoples*, 296 N.C. 109, 157, 250 S.E.2d 890, 918 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). After carefully reviewing the record, the evidence presented at the hearing before the Commission, the recommendation of the Commission, and the briefs of both parties, and after hearing oral argument, this Court concludes that respondent's conduct does not require censure.

[1] Respondent's conduct as to the first set of cases can be summarized as follows. On 26 June 1996, respondent was presiding over New Hanover County Criminal District Court in courtroom 317. Defense attorney Collins approached respondent at the bench with the *Mullaney* and *Nored* case files. Collins presented respondent with the files and said, "These are for not guilty, not guilty." According to former assistant district attorney Sandra Gray Criner, "not guilty, not guilty" was a practice which had developed in dealing with DWI cases for which the Breathalyzer test results were sufficient but for which some other essential element was lacking. The policy of the elected district attorney was "not to dismiss driving while impaired charges" for a defendant who blew .08 on the Breathalyzer or refused to take the Breathalyzer test. Rather than violate this policy by dismissing a DWI case, the assistant district attorney would call the case but not present any evidence. Of necessity, if the State presented no evidence, the judge would enter a not guilty verdict.

Over a period of time, this practice was reduced to the shorthand of "not guilty, not guilty." After determining that the State had insuf-

ficient evidence to prosecute a DWI case, Criner testified that she and the defense attorney would take the case file to respondent and state, "This is a not guilty, not guilty," meaning that the defendant was pleading not guilty, the State was presenting no evidence, and the judge should enter a verdict of not guilty. In some instances, after discussing the case, either Criner or the defense attorney alone would take the case to respondent for this "not guilty, not guilty" treatment. Respondent testified that while this was not a common practice, it was not unusual either. Evidence in the record suggests that other assistant district attorneys and other defense attorneys may also have engaged in this "not guilty, not guilty" procedure; the evidence is inconclusive as to whether it was practiced by any other district court judges. It is apparent from the record that John Carriker, District Attorney for the Fifth Prosecutorial District, was unaware of this practice.

In the *Nored* and *Mullaney* cases, when defense attorney Collins presented respondent with the case files and stated, "These are for not guilty, not guilty," respondent understood that to mean that the assistant district attorney had been consulted on these cases and that the State would present no evidence. Respondent acted as he had on previous occasions under similar circumstances and entered not guilty pleas and not guilty verdicts. Collins testified that he "believed [he] had the consent of Ms. Criner" in the *Nored* and *Mullaney* cases based on a brief conversation they had had two weeks earlier. However, Criner had not authorized Collins to proceed in such a manner with these two cases. Collins had removed the *Nored* case file from courtroom 302 and had taken the *Mullaney* file from its place in courtroom 317 without the permission of either of those courtrooms' prosecuting attorneys. For unknown motives, Collins, whom respondent had ample reason to trust by reputation, by personal knowledge, and by his position as an officer of the court, misled respondent as to the status of these two cases, resulting in *State v. Mullaney* and *State v. Nored* being disposed of without the State's consent and without the State being heard.

In 1978, Chief Justice Sharp wrote that no judge can "justify disposing of a criminal case in court without the knowledge of the prosecuting attorney, for when he does so he purposely violates the duties of his office." *In re Peoples*, 296 N.C. at 155, 250 S.E.2d at 916. This pronouncement is as valid today as when it was made, and our decision in this case is in no measure intended to weaken or undermine it. However, we conclude that in the particular instances in question

respondent did not intentionally or knowingly dispose of the cases "without the knowledge of the prosecuting attorney." The State, through the actions of at least one assistant district attorney, had acquiesced in, if not initiated, the process of disposing of cases in this shorthand manner. We cannot say, under these peculiar circumstances, that respondent must be censured for failing to make further inquiry as to the State's position.

Nonetheless, we strongly condemn the "not guilty, not guilty" practice engaged in by respondent, assistant district attorney Criner, and Mr. Collins. Each judge and attorney in the courts of our State has a duty to uphold the legal process. Neither complacency nor the search for efficiency should obscure that responsibility. We reaffirm the standard announced in *In re Nowell*:

> [T]he disposition of any case for reasons other than an honest appraisal of the facts and law as disclosed by the evidence and the advocacy of both parties[] will amount to conduct prejudicial to the administration of justice. In due course, such conduct cannot fail to bring the judicial office into disrepute.

In re Nowell, 293 N.C. at 251, 237 S.E.2d at 256. While we do not approve of or condone respondent's actions, we decline to hold that respondent's participation in this process, under the circumstances, amounted to conduct prejudicial to the administration of justice which brings the judicial office into disrepute. However, we send a clear warning to judges, district attorneys, assistant district attorneys, and defense attorneys that such procedures and practices are wholly unacceptable.

[2] As to the second set of cases at issue, respondent's actions can be described as follows. On 3 June 1993, in the case of *State v. Webb*, respondent determined, following a trial on a plea of not guilty, that the defendant was guilty of driving while impaired. Defense counsel argued that the defendant had no prior alcohol-related offenses, that he drove for a living and would lose his commercial driver's license if convicted of DWI, and that he had small children. Respondent did not enter a verdict of guilty, but continued prayer for judgment for two years with the case to be dismissed at that time if the defendant had no alcohol-related moving violations in that time period. On 3 February 1994, the defendant in the *Webb* case came before respondent again, having been charged with DWI but pleading guilty to a reduced charge of reckless operation, a nonalcohol-related offense. When the DWI case from June 1993 came on for disposition before

respondent on 22 June 1995, respondent dismissed it because there had been no intervening convictions for alcohol-related moving violations. In a similar occurrence, on 19 April 1994, respondent continued prayer for judgment for two years in the case of *State v. Doffermyre* after finding the defendant guilty on a plea of guilty to DWI. When the *Doffermyre* case came on for judgment on 19 April 1996, respondent dismissed the case.

Evidence adduced at the hearing before the Commission showed that respondent firmly believed he had the authority to prevent a "conviction" by continuing prayer for judgment to a date certain and then dismissing the case. Respondent considered the PJC (prayer for judgment continued) to be a "commonly used tool" in disposing of misdemeanor cases and did not know that it was not available for DWI cases. He mistakenly believed that the mandatory sentencing provisions of N.C.G.S. § 20-179 would not come into effect if he continued prayer for judgment until a date certain and then dismissed the case. Respondent testified that "it was my opinion that until a sentence was entered—until a judgment was pronounced that there was no conviction." He continued to adhere to this interpretation of the law even after the complaint in this inquiry was filed.

This Court held in *In re Greene*, 297 N.C. 305, 255 S.E.2d 142 (1979), that "the Courts of North Carolina do not have an 'inherent' power to continue prayer for judgment on conditions or to suspend sentence where the sentence is made mandatory by the General Assembly." *Id.* at 312, 255 S.E.2d at 147. *Greene* involved the sentencing provisions of N.C.G.S. § 20-179, under which the General Assembly mandated an entry of judgment and sentence upon conviction on or a plea of guilty to a charge of DWI. When the case of *Greene* was brought to the attention of respondent in August 1997 by former Superior Court Judge Gary Trawick, respondent conceded that he did not have authority to continue prayer for judgment in a DWI case by virtue of the mandatory sentencing required by N.C.G.S. § 20-179. Respondent testified before the Commission that he recognized that he had been mistaken about his authority and that he would no longer continue prayer for judgment in order to dismiss a DWI case.

A judge is expected to "be faithful to the law and maintain professional competence in it." Code of Judicial Conduct Canon 3A(1), 1998 Ann. R. N.C. 247-48. However, we have stated that judges may not be disciplined for errors of judgment or errors of law. *In re*

Martin, 333 N.C. 242, 245, 424 S.E.2d 118, 120 (1993). Respondent's error in the *Webb* and *Doffermyre* cases occurred when he entered prayers for judgment continued and then dismissals, rather than sentences as required by N.C.G.S. § 20-179, upon finding the defendants guilty of DWI. This conduct was the result of a mistaken, but honest, interpretation of the law and respondent's authority under the statute. It did not involve "more than an error of judgment or a mere lack of diligence," *In re Nowell*, 293 N.C. at 248, 237 S.E.2d at 255, and, as such, does not merit censure.

In summary, we conclude that the actions of respondent at issue here were not so egregious as to amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of N.C.G.S. § 7A-376.

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 Elton G. Tucker be censured be, and is hereby, rejected.

Done by order of the Court in Conference, this the 8th day of July, 1998.

ORR, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of July 1998.

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

CAROL B. TEMPLETON
Assistant Clerk

JANNETT J. MARTIN AND RICHARD W. MARTIN v. JOHN MICHAEL BENSON AND INDUSTRIAL ELECTRIC, INC.

No. 119A97

(Filed 9 July 1998)

Evidence and Witnesses § 671 (NCI4th)— motion in limine—failure to object at trial—admissibility question not preserved

Plaintiffs' motion *in limine* was insufficient to preserve for appeal the question of the admissibility of a neuropsychologist's testimony where they failed to further object to that testimony when it was offered at trial.

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 125 N.C. App. 330, 481 S.E.2d 292 (1997), finding error in the trial that resulted in a judgment for plaintiff Jannett Martin in the amount of $50,000 entered 13 June 1995 by Albright, J., in Superior Court, Guilford County, and ordering a new trial. Heard in the Supreme Court 16 October 1997.

Mary K. Nicholson and Joseph A. Williams for plaintiff-appellees.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for defendant-appellants.

Tharrington Smith, L.L.P., by Michael Crowell, on behalf of the American Psychological Association, the North Carolina Psychological Association, and the National Academy of Neuropsychology, amici curiae.

Bailey, Patterson, Caddell, Hart & Bailey, P.A., by Allen A. Bailey, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

Defendants appeal a decision of the Court of Appeals reversing the trial court in a personal injury case and awarding a new trial to the plaintiffs based on the trial court's decision to allow a neuropsychologist to testify regarding the medical causation of plaintiff Jannett Martin's (herein plaintiff) impairments.

On 28 November 1990, a truck driven by defendant John Michael Benson and owned by defendant Industrial Electric, Inc., crossed the

median and collided with an automobile driven by plaintiff. The parties entered into stipulations that defendants' negligence caused the collision and that the amount of plaintiff's medical bills was $100,041.22.

On 27 March 1995, two weeks before the trial began, defendants moved to have plaintiff examined by Dr. Elizabeth Gamboa, a neuropsychologist, for the purpose of updating information on plaintiff's condition. The motion was allowed. Plaintiffs thereafter filed a motion *in limine* to exclude Dr. Gamboa's report and testimony. The trial court denied the motion and permitted Dr. Gamboa to testify. At trial the parties presented numerous expert and lay witnesses as to the proximate causation of plaintiff's injuries and plaintiff's damages. Plaintiffs presented testimony from Dr. James U. Adelman, a specialist in neurology, and from Dr. Gary Hoover, a psychologist. When Dr. Gamboa testified for defendant, plaintiffs did not object to her testimony. The jury found that defendants' negligence was the proximate cause of plaintiff's injuries and awarded her $50,000 in damages.

On appeal to the Court of Appeals, plaintiffs contended that the trial court erred in denying plaintiffs' motion *in limine* and allowing Dr. Gamboa to testify. The Court of Appeals agreed.

The rule is that "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the [movant] fails to further object to that evidence at the time it is offered at trial." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995); *see also State v. Warren*, 347 N.C. 309, 318, 492 S.E.2d 609, 613 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 818 (1998); *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997), *cert. denied*, —— U.S. ——, 140 L. Ed. 2d 1099 (1998); *State v. Wilson*, 289 N.C. 531, 537, 223 S.E.2d 311, 315 (1976); *T&T Dev. Co. v. Southern Nat'l Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49, *disc. rev. denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). Thus, by failing to object at trial, plaintiffs have waived their right to appellate review of the admission of Dr. Gamboa's testimony.

Accordingly, we reverse the opinion below and remand to the Court of Appeals for consideration of plaintiffs' remaining assignment of error.

REVERSED AND REMANDED.

FAYE AND WOODY BRIGGS, MARY AND TOM CLELAND, SUE AND STEVE EDWARDS, PEGGY AND KERMIT DOTSON, RADA AND RAY GREENLAW, BONNIE AND LINDSEY HODGES, SUE AND MARTY LUCKACH, FAYE AND DON MOOS, JOAN AND VANCE REECE, ANN AND CHARLIE STEWART, AND BARBARA WATKINS AND JOE WALLACE v. EDWARD M.G. RANKIN AND MARGARET P. RANKIN

No. 536PA97

(Filed 9 July 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 127 N.C. App. 477, 491 S.E.2d 234 (1997), affirming an order entered 6 May 1996 by Battle, J., in Superior Court, Chatham County, allowing defendants' motion for summary judgment. Heard in the Supreme Court 26 May 1998.

Bradshaw, Vernon & Robinson, L.L.P., by Patrick E. Bradshaw and Nicolas P. Robinson, for plaintiff-appellants.

Pulley, Watson, King & Lischer, P.A., by Richard N. Watson, Stella A. Boswell, and F. Edward Kirby, Jr., for defendant-appellees.

Jordan, Price, Wall, Gray & Jones, L.L.P., by R. Frank Gray, on behalf of N.C. Manufactured Housing Institute, amicus curiae.

PER CURIAM.

AFFIRMED.

TERRY W. BANKS, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF TERECIA L. BANKS; DEBORAH P. BOWMAN, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF K. DAWN BOWMAN; SUSAN G. CAMERON, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF CARRIE D. CAMERON; MICHAEL W. MOORE, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF MATTHEW W. MOORE; PAUL J. PLESS, JR., INDIVIDUALLY AND AS GUARDIAN AD LITEM OF JOSEPH H. PLESS; BENNIE LEE TATE, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF CHARMIE A. TATE; AND THE BUNCOMBE COUNTY BOARD OF EDUCATION, A BODY CORPORATE, PLAINTIFFS V. THE COUNTY OF BUNCOMBE, A BODY POLITIC AND CORPORATE OF THE STATE OF NORTH CAROLINA; AND THE BOARD OF COMMISSIONERS FOR THE COUNTY OF BUNCOMBE, GOVERNING BOARD OF THE COUNTY OF BUNCOMBE, DEFENDANTS AND ASHEVILLE CITY BOARD OF EDUCATION, A BODY CORPORATE, INTERVENOR DEFENDANT

No. 39A98

(Filed 9 July 1998)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 128 N.C. App. 214, 494 S.E.2d 791 (1998), finding no error in a trial that resulted in a judgment for defendants and intervenor-defendant entered by Bogle, J., on 3 September 1996 in Superior Court, Buncombe County. Heard in the Supreme Court 29 May 1998.

Roberts & Stevens, P.A., by Walter L. Currie and Cynthia S. Lopez, for plaintiff-appellants.

County Attorney's Office, by Joseph A. Connolly, Buncombe County Attorney, for defendant-appellees; and Schwartz & Shaw, P.L.L.C., by Brian C. Shaw and Ann S. Estridge, for intervenor-defendant-appellee.

PER CURIAM.

AFFIRMED.

MARTIN MARIETTA TECHNOLOGIES, INC. AND MARTIN MARIETTA MATERIALS, INC. v. BRUNSWICK COUNTY, NORTH CAROLINA

No. 421PA97

(Filed 9 July 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, 126 N.C. App. 806, 487 S.E.2d 145 (1997), dismissing the defendant's appeal from orders entered by Stephens (Ronald L.), J., on 3 August 1995, 11 June 1996 and 11 July 1996, in Superior Court, Brunswick County. Heard in the Supreme Court 9 March 1998.

Poyner & Spruill, L.L.P., by Cecil W. Harrison, Jr., and Robin T. Morris, for plaintiff-appellants.

Faison & Gillespie, by Reginald B. Gillespie, Jr., Michael R. Ortiz, and Keith D. Burns, for defendant-appellee.

PER CURIAM.

Pursuant to this Court's opinion in *DKH Corp. v. Rankin-Patterson Oil Co., Inc.*, 348 N.C. 583, 500 S.E.2d 666 (1998), the decision of the Court of Appeals is reversed and this case is remanded to that court to hear the appeal and decide the case on its merits.

REVERSED AND REMANDED.

MARTY C. KENNEDY v. CLARICE HAWLEY, ADMINISTRATRIX OF KEITH RAY HAWLEY, DECEASED

No. 20PA98

(Filed 9 July 1998)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 128 N.C. App. 312, 494 S.E.2d 787 (1998), reversing an order granting summary judgment in favor of defendant entered by Sumner, J., on 19 December 1996 in Superior Court, Nash County. Heard in the Supreme Court 26 May 1998.

Alison A. Erca for plaintiff-appellee.

Battle, Winslow, Scott & Wiley, P.A., by J. Brian Scott and M. Greg Crumpler, for defendant-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Neil P. Andrews, on behalf of N.C. Association of Defense Attorneys, amicus curiae.

PER CURIAM.

Pursuant to this Court's holding in *Dyson v. Stonestreet*, 326 N.C. 798, 392 S.E.2d 398 (1990), we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Nash County, for reinstatement of its summary judgment in favor of defendant.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
TIMOTHY LANIER ALLEN	)	

No. 70A86-5

(Filed 29 July 1998)

This matter is before the Court on defendant's petition for certiorari and motion for summary reversal, from which, and from the State's response, the Court finds the following:

1. Petitioner was sentenced to death for first-degree murder.

2. On 1 June 1994, petitioner filed a Motion for Appropriate Relief and a Motion for Discovery.

3. The Honorable Charles C. Lamm, Jr., in Superior Court, Halifax County, reviewed *in camera* the complete files of the Sheriff's Department, the State Bureau of Investigation, and the District Attorney's office relating to the Halifax County criminal cases involving petitioner. On 23 May 1995, Judge Lamm ordered certain named items disclosed to petitioner.

4. Judge Lamm conducted an evidentiary hearing on petitioner's Motion for Appropriate Relief during the week of 16 October 1995.

5. On 21 June 1996, N.C.G.S. § 15A-1415(f), North Carolina's post-conviction discovery statute, became effective.

6. Petitioner filed a Post-Hearing Motion for Discovery on 24 July 1996, requesting additional discovery in light of N.C.G.S. § 15A-1415(f). Judge Lamm denied petitioner's Motion for Appropriate Relief and Post-Hearing Motion for Discovery.

7. Petitioner petitioned this Court for a Writ of Certiorari to review the trial court's order. The petition was denied.

8. Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of North Carolina on 9 February 1998.

9. After this Court decided *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998), interpreting N.C.G.S. § 15A-1415(f), petitioner filed another Motion for Discovery in the Superior Court, Halifax County. The Honorable Henry W. Hight denied this motion on 18 May 1998.

10. Petitioner now petitions this Court for a Writ of Certiorari to review the order entered by Judge Hight. Petitioner argues that he has never been allowed the discovery to which he is entitled pursuant to N.C.G.S. § 15A-1415(f). The State responds that Judge Lamm's order for disclosure of certain items from the State's files provided petitioner with all the discovery to which he is entitled under N.C.G.S. § 15A-1415(f).

11. This Court is unable to determine from the petition and response whether defendant was provided with all the items to which he is entitled under this Court's interpretation of N.C.G.S. § 15A-1415(f) set forth in *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998).

12. In order to insure that defendant has been accorded his full statutory rights to discovery, as well as equal treatment with other defendants similarly situated, the petition for certiorari should be allowed for the limited purpose of remanding this case to Judge Charles C. Lamm, Jr., Superior Court, Halifax County, for reconsideration of his order in light of our decision in *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998).

13. The motion for summary reversal is without merit and should be denied.

IT IS THEREFORE ORDERED that the motion for summary reversal be, and hereby is, denied. The petition for certiorari is allowed for the limited purpose of remanding the case to the Superior Court, Halifax County, for a hearing before Judge Lamm, for reconsideration of his order in light of *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998).

Done by order of the Court in conference this the 29th day of July, 1998.

Orr, J.
For the Court

ARMSTRONG v. N.C. STATE BD. OF DENTAL EXAMINERS

No. 184P98

Case below: 129 N.C.App. 153

Motion by respondent to dismiss appeal allowed 29 July 1998. Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998. Petition by respondent for discretionary review pursuant to G.S. 7A-31 dismissed as moot 29 July 1998.

BROMHAL v. STOTT

No. 213P98

Case below: 129 N.C.App. 426

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 29 July 1998. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

BROWN v. AMERICAN MESSENGER SERVICES, INC.

No. 186P98

Case below: 129 N.C.App. 207

Petition by defendant (Ballard) for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

IN RE GILLIS

No. 215P98

Case below: 129 N.C.App. 427

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

IN RE ROBINSON

No. 198P98

Case below: 129 N.C.App. 424

Petition by respondent (Jeffrey Todd Robinson) for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

IN RE WILL OF DUNN

No. 214P98

Case below: 129 N.C.App. 321

Petition by propounder for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998. Conditional petition by caveator for discretionary review pursuant to G.S. 7A-31 dismissed as moot 29 July 1998.

JENKINS v. WYSONG & MILES CO.

No. 164P98

Case below: 129 N.C.App. 263

Petition by plaintiff (Jenkins) for discretionary review pursuant to G.S. 7A-31 denied 20 July 1998. Conditional petition by defendant (Wysong & Miles) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 20 July 1998. Conditional petition by defendant (Highland Tank and JJF Properties) for discretionary review pursuant to G.S. 7A-31 dismissed as moot 20 July 1998.

JOHNSON v. NAYLOR

No. 191P98

Case below: 129 N.C.App. 263

Petition by defendant for discretionary pursuant review to G.S. 7A-31 denied 29 July 1998. Conditional petition by plaintiff for discretionary review as to additional issues dismissed 29 July 1998.

KEITH v. NORTHERN HOSP. DIST. OF SURRY COUNTY

No. 225P98

Case below: 129 N.C.App. 402

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

KEMPSON v. HOLLIFIELD

No. 258P98

Case below: 129 N.C.App. 647

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

LUMBEE TRIBE v. LUMBEE REGIONAL DEV. ASS'N

No. 226P98

Case below: 129 N.C.App. 431

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

PECHOTA v. CONVALESCENT CTR. OF LEE COUNTY

No. 236P98

Case below: 129 N.C.App. 647

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

PENLAND v. PRIMEAU

No. 239P98

Case below: 129 N.C.App. 647

Petition by defendant for writ of supersedeas denied 29 July 1998.

PHC, INC. v. N.C. FARM BUREAU MUT. INS. CO.

No. 252P98

Case below: 129 N.C.App. 801

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

RATLIFF v. BRIGHT ENTERPRISES

No. 169P98

Case below: 129 N.C.App. 116

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 29 July 1998.

ROBINSON, BRADSHAW & HINSON v. SMITH

No. 212P98

Case below: 129 N.C.App. 305

Petition by defendant (Bonita Smith) for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998. Petition by defendant (Ollen Smith) for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 29 July 1998.

STAFFORD v. BARKER

No. 247P98

Case below: 129 N.C.App. 576

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

STATE v. AIKEN

No. 283P98

Case below: 130 N.C.App. 151

Motion by Attorney General for temporary stay denied 22 July 1998.

STATE v. BOGGESS

No. 310A97

Case below: Durham County Superior Court

Defendant's motion to compel production of transcript, tapes and notes is denied 29 July 1998 without prejudice for the defendant to refile following action by the Superior Court of Durham County on the issues presented by this motion.

STATE v. BURR

No. 179A93-3

Case below: Alamance County Superior Court

Defendant's petition for writ of certiorari is allowed 29 July 1998 for the limited purpose of remanding this case to the Superior Court, Alamance County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 and *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276.

STATE v. COLLINS

No. 257P98

Case below: 129 N.C.App. 648

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

STATE v. DECASTRO

No. 221A93-2

Case below: Johnston County Superior Court

Defendant's petition for writ of certiorari is allowed 10 July 1998 for the limited purpose of remanding this case to the Superior Court, Johnston County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. Bates*, 348 N.C. 29, — S.E.2d — (3 April 1998) (No. 145A91-3).

STATE v. GANNON

No. 227P98

Case below: 129 N.C.App. 428

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 29 July 1998.

STATE v. INGRAM

No. 196P98

Case below: 129 N.C.App. 429

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

STATE v. JONES

No. 497A93-2

Case below: Duplin County Superior Court

Motion by Attorney General to dismiss defendant's petition for writ of certiorari denied 20 July 1998.

STATE v. MAYS

No. 234P98

Case below: Wake County Superior Court

Motion by defendant for temporary stay denied 15 July 1998. Motion by defendant to substitute corrected transcript page and corrected page of petition for writ of certiorari allowed 15 July 1998. Petition by defendant for writ of supersedeas of the judgment of the Superior Court, Wake County, denied 29 July 1998. Petition by defendant for writ of certiorari to review the order of the Superior Court, Wake County, denied 29 July 1998. Motion by Attorney General to strike petitioner's affidavits in support of petition for writ of supersedeas and petition for writ dismissed as moot 29 July 1998.

STATE v. POWELL

No. 190A93-2

Case below: Cleveland County Superior Court

Defendant's petition for writ of certiorari and petition for writ of supersedeas are allowed 29 July 1998 for the limited purpose of remanding this case to the Superior Court, Cleveland County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254, —— S.E.2d —— (9 May 1998) (No. 148A91) and *State v. Bates*, 348 N.C. 29, —— S.E.2d —— (3 April 1998) (No. 145A01-3)

STATE v. SMITH

No. 180P98

Case below: 129 N.C.App. 267

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

STATE v. WARD

No. 291P98

Case below: 130 N.C.App. 153

Motion by Attorney General for temporary stay allowed 27 July 1998.

STATE ex rel. UTIL. COMM'N v. CAROLINA UTIL. CUSTOMERS ASS'N

No. 22A96

Case below: 348 N.C. 452

Motion by Public Staff-North Carolina Utilities Commission to stay issuance of mandate denied 29 July 1998. Motion by Public Staff-North Carolina Utilities Commission to withdraw opinion denied 29 July 1998. Motion by NC Natural Gas Corporation in support of motion to stay mandate or withdraw opinion denied 29 July 1998. Motion by Bell-South in support of motion by Public Staff-North Carolina Utilities Commission to stay issuance of mandate or withdraw opinion denied 29 July 1998.

WHITAKER v. HARRIS

No. 231P98

Case below: 129 N.C.App. 430

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 29 July 1998.

WHITE v. BEEKMAN

No. 260P98

Case below: 129 N.C.App. 648

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

WHITFIELD v. WESTERN STEER OF N. C.

No. 204P98

Case below: 129 N.C.App. 646

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 July 1998.

WILLIAMS v. HUNTER

No. 245P98

Case below: 129 N.C.App. 646

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 29 July 1998.

APPENDIXES

PRESENTATION OF
CHIEF JUSTICE WALTER CLARK
PORTRAIT

ORDER ADOPTING RULES FOR MOTIONS
FOR APPROPRIATE RELIEF IN
CAPITAL CASES

ORDER ADOPTING AMENDMENTS
TO THE RULES IMPLEMENTING
STATEWIDE MEDIATED SETTLEMENT
CONFERENCES IN SUPERIOR COURT
CIVIL ACTIONS

ORDER ADOPTING AMENDMENT TO
RULE 4 OF THE RULES OF
APPELLATE PROCEDURE

Presentation of the Portrait

of

WALTER CLARK

Chief Justice
Supreme Court of North Carolina
1903 - 1924

Associate Justice
Supreme Court of North Carolina
1889 - 1902

October 14, 1998

RECOGNITION OF ELIZABETH F. KUNIHOLM
BY
CHIEF JUSTICE BURLEY B. MITCHELL, JR.

Chief Justice Burley B. Mitchell, Jr. welcomed official and personal guests of the Court. The Chief Justice then recognized the Clark family and Elizabeth F. Kuniholm, president of the North Carolina Academy of Trial Lawyers, who would make the presentation address to the Court:

> It is a rare occasion when one Chief Justice who presides over 50 years after one of his favorite predecessors has the opportunity to accept a portrait of that mentor. I am that fortunate today. Today we will be receiving a portrait of the late Chief Justice Walter Clark who presided as Chief Justice of this Court during the years of 1903-1924. We are going to have the opportunity to learn of an evolution of a man, and the growth of our State through the presentation of this portrait. The portrait we are able to receive is an oil over daguerreotype done in 1864 when Chief Justice Clark was a Lt. Colonel in the North Carolina regiment of the Confederate Army. He was at 16 years old the youngest person of his rank in either Army. We will learn much more over the afternoon about this soldier, about our collective consciences during his lifetime, and about the ability of a Justice to shape the heritage of our lives by fairly applying the mandates of our legal system.
>
> At this point, I will ask Ms. Kuniholm to come to the podium and present her remarks.

PRESENTATION ADDRESS
BY
ELIZABETH F. KUNIHOLM

Chief Justice Mitchell, Justices of the Supreme Court, Members of the Supreme Court Historical Society, Joanne Clark Schlaginhaufen, Recipients of the North Carolina Academy of Trial Lawyers Walter Clark Award and friends:

We are here today to honor and remember Justice Walter Clark, whose 35 years as Associate and Chief Justice of this the North Carolina Supreme Court from 1889 to 1924 forever changed the fabric of North Carolina law, whose legacy is found in our workers' compensation statutes and in the law's protection of the powerless, and whose wisdom continues to inspire and guide those who now work tirelessly to champion the rights of the individual against the powerful.

This occasion is brought about by the death of Justice Clark's grand nephew and namesake, Walter Clark, Jr., a trial lawyer who for the 20 years before his death on June 26, 1994 was an active and devoted member of the North Carolina Academy of Trial Lawyers. Today the North Carolina Academy of Trial Lawyers joins together with Walter Clark, Jr.'s widow, Joanne Clark Schlaginhaufen, to present to the Supreme Court Historical Society this portrait of Justice Walter Clark as a young man. Walter Clark, Jr., proudly hung this portrait of his revered family member the young Justice Clark in his home, and would, we believe, be honored that it is presented in his name to the North Carolina Supreme Court Historical Society. Walter Clark, Jr., was born in Asheville in 1935, was educated at Wake Forest University, and received his law degree, also from Wake Forest, in 1959. His professional life was spent in Greensboro, where he served as Solicitor, served on the District Court bench for five years, and for 20 years was a trial lawyer with the firm of Turner, Rollins, Rollins & Clark. We are honored also to have with us today David Clark, also a grand nephew of Justice Clark, a cousin of Walter Clark, Jr., and also a trial lawyer in the Clark tradition and a member of the Academy.

In 1980, the North Carolina Academy of Trial Lawyers established the Walter Clark Award, our highest and most prestigious award, to honor those among our members who exemplify the ideals by which Justice Clark lived his life and who have unselfishly given extraordinary service to the cause of justice. It is fitting that the first and

second Walter Clark awards were given to William Thorp and Allen Bailey, whose work on behalf of the powerless continues to inspire. We are fortunate today to be joined by Bill and Allen and by all the other recipients of the Walter Clark Award: Judge Eugene Phillips, 1983; Howard Twiggs, 1986; Jim Fuller, 1992; Charles Blanchard, 1993; Mary Ann Tally, 1996; and Adam Stein, 1998.

Why has the Academy of Trial Lawyers named its highest award for Justice Clark? Why does Justice Clark serve as an inspiration and a guiding light for us? It is simple. Justice Clark's philosophy of law and government as described by Aubrey Lee Brooks in his biography of Justice Clark, Walter Clark Fighting Judge, is our philosophy, and his work and his life a lodestar. Mr. Brooks said:

> [Justice Clark] embraced Jefferson's trust in the common people, Jackson's willingness to fight for them, and Lincoln's devotion to them. As for the law, he had an unvarying definition oft repeated in his opinions from the bench: "The welfare is the supreme law." He was familiar with Justice Holmes's observation that "the life of the law has not been logic; it has been experience," and with Samuel Johnson's abstract definition, "law is the last result of human wisdom acting upon human experience for the benefit of the public." It will be observed that Holmes spoke of what kept the law alive, and Johnson of what law is, but Clark was primarily concerned with who had the power to make the law and for whose benefit it was written. If, as he proclaimed, the welfare of the public was the supreme law, then it necessarily followed that the people should write the law by legislation and into codes, and not the judges by opinions based on precedents established by earlier judges, whose opinions were in turn the result of still earlier judges' opinions, ad infinitum.[1]

As Justice Willis Whichard observed in his examination of Justice Clark's life and work, Justice Clark "did not consider a matter settled until it was settled correctly, in accordance with his point of view."[2] Clark often invoked natural law and principles of right and justice, believing that our law is "humane."[3] If he believed precedent should be overruled, that it was not "right" and not consistent with recent

1. Brooks, Aubrey Lee, *Walter Clark Fighting Judge* (UNC Press, 1944).

2. Whichard, Willis P., *A Place for Walter Clark in the American Judicial Tradition*, 63 N.C. L. Rev. 287, 327 (1986).

3. *Id.*, 63 N.C. L. Rev. at 306.

thinking, he believed the court "would need no authority further than to say, 'We have advanced from such barbarism.' "[4]

During his 35 years on the Supreme Court, Justice Clark poured his heart and soul into his opinions—3300 opinions, hundreds of which were dissents in which he brazenly blazed trails for the future. He lived to see some of his dissents become law; others became law after his death.

Clark asserted that women's rights should include equal pay for equal services and equality of property rights. He called for the repeal of judicial decisions that give a husband the right to chastise or imprison a wife, for equality of right in the custody of children and the appointment of guardians, for the same grounds for divorce for a wife as for a husband, and finally for women to have an equal share in the conduct of government by an equal right to vote and equality of right to hold office.

Clark battled the powerful business interests of tobacco and railroads. He was an outspoken advocate of many social reforms, working to promote child labor laws and workplace safety. He advocated a minimum wage for labor and restricted work hours, and promoted the elimination of the prohibition against workers organizing for the protection of their own interests. Justice Clark was an early advocate of a Workers' Compensation Law.

Justice Clark particularly railed the exploitation of child labor in the rise of industrialism and the application of the harsh doctrines of contributory negligence and assumption of risk against child workers injured in manufacturing.[5] Once again, the law to be just must be humane. If it is not, it should be changed.

Finally, it was Justice Clark who first wrote so eloquently that mental anguish is actual damage and is compensable under tort law, and that a jury is the best decision maker to value such loss.[6] He said:

> It is very truthfully and appropriately remarked by a learned author that "the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter." . . . The difficulty of measuring damages to the feel-

4. *Id.*, 63 N.C. L. Rev. at 327.

5. Brooks, *supra*, at 170-75; *Ward v. Odell Mfg. Co.*, 126 N.C. 946, 36 S.E. 194 (1900).

6. *Young v. Western Union Telegraph Co.*, 107 N.C. 370, 385, 11 S.E. 1044 (1890).

> ings is very great, but the admeasurement is submitted to the jury in many other instances, . . . And it is better it should be left to them, under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties injured in their feelings by the negligence, the malice or wantonness of others, to go without remedy.[7]

We at the North Carolina Academy of Trial Lawyers are honored to take part in this gift to the North Carolina Supreme Court Historical Society, proud to be members of the bar of a state that produced such a jurist, and look forward to opportunities to come before this court that carries on the legacy of Justice Walter Clark.

Thank you very much.

The Chief Justice calls upon Joanne Schlaginhaufen, the widow of the late Walter Clark, Jr., who was the grand nephew of the late Chief Justice Clark, to unveil the portrait.

ACCEPTANCE OF CHIEF JUSTICE CLARK'S PORTRAIT BY CHIEF JUSTICE MITCHELL

Thank you very much Ms. Kuniholm and we thank the Academy. It may seem strange to some that a Confederate veteran winds up being so venerated in the modern day. As I indicated earlier, his is just a case history in the evolution of human spirit. He was just a child when he went into the confederacy when his home country, as it was referred to in those days, was attacked. He acquitted himself well, was wounded, was in many major battles, came home, and as Ms. Kuniholm has described, pushed for what today would be known liberal causes in the nineteenth century. In fact, he became known as, and on his historical marker is described as, "Walter Clark, fighting liberal." That was before that became a pejorative term in America. Every time a group of students comes into this chamber and I have the opportunity to talk to them about the history of the Court, I point to Walter Clark's portrait as Chief Justice which hangs at the rear of the courtroom and talk to them about courage. I have always thought I know one person who had more courage than those republicans who voted against the conviction of Andrew Johnson on impeachment charges, and that is Walter Clark. In 1914 when Jim Crow was the law of the land, *Plessey v. Ferguson* was the national law and approved, even encouraged, racial segregation. Walter Clark, an

7. *Id.*, 107 N.C. at 385-86.

elected justice from what many would have viewed as a backwood southern state, wrote the case *State v. Darnell*, which I believe to be, and nobody's corrected me yet, the first case in the United States, maybe in the history of the world, striking down a residential segregation law. The opinion is as contemporary as this morning's newspaper. The old town of Salem, which is now part of Winston-Salem, had a city ordinance which required people of one race to live in one block of the city and own property there. Walter Clark went through what was happening then and what we all came later to know about what was happening in Northern Ireland and the fact that the native Irish were being pushed beyond the pale, the pale being the secure area. The native Irish were being required to live beyond the pale. He goes into the fact that at that very moment, as he was writing the opinion, Jews were being ghettoized in Russia, and we saw the ultimate effect of that. He talked about how this was contrary to the laws of God. He ended up striking down the ordinance and did it with a fine Eastern North Carolina twist. He said "besides, nobody's got a right to tell a man what to do with his own property," which Eastern North Carolinians understand. There was a movement to impeach Justice Clark for that action. I have often thought that, had it been anybody other than a Civil War hero, one who had written the regimental records at his own expense, and who was really a hero to the people of this State, the impeachment probably would have succeeded. He probably would have been removed. Here you have a man forty years before *Brown v. Board of Education*, an elected southern judge, taking the same position that Earl Warren and others were given so much credit for courageously adopting from their lifetime appointments in Washington, DC. We have much to be proud of in Walter Clark, both as North Carolinians and as members of the human race.

It is now my pleasure to call upon the President of the North Carolina Supreme Court Historical Society, Hubert Humphrey, to please come forward to accept the portrait from the Academy on behalf of the Historical Society and to offer brief remarks.

REMARKS BY HUBERT HUMPHREY
PRESIDENT
NORTH CAROLINA SUPREME COURT HISTORICAL SOCIETY

The Supreme Court Historical Society proudly accepts. We will try our best to honor the portrait at the proper time and appropriate place. It is very pleasing to us and very meaningful to accept this portrait and preserve it for the people.

CONCLUSION
BY
CHIEF JUSTICE BURLEY B. MITCHELL, JR.

The Court wishes to express its thanks to the family of the late Chief Justice Clark, to the Academy of Trial Lawyers for sharing this real treasure of North Carolina with us, to the Society for preserving the traditions and history of this Court and for your willingness to assist us in preserving this great work of North Carolina. The entire contents of this proceeding, including the full presentation of Ms. Elizabeth Kuniholm, shall be reprinted in the next published volume of the North Carolina Reports.

Order Adopting Rules for Motions for Appropriate Relief in Capital Cases

Pursuant to the authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of a new Rule 25.

Rule 25. Motions for Appropriate Relief in Capital Cases.

When considering motions for appropriate relief in capital cases, the following procedures should be followed:

(1) All appointments of defense counsel should be made by the senior resident superior court judge in each district or the senior resident superior court judge's judicial designee;

(2) All requests for experts, *ex parte* matters, interim attorney fee awards, and similar matters arising prior to the filing of a motion for appropriate relief should be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee; and

(3) All motions for appropriate relief, when filed, should be referred to the senior resident superior court judge or the senior resident superior court judge's designee for the judge's review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order for subsequent events in the case, or other appropriate actions.

Adopted by the Court in Conference this 7th day of May, 1998. This amendment shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals and shall be effective 1 June 1998.

Orr, J.
For the Court

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

WHEREAS, section 7A-38.1 of the North Carolina General Statutes establishes a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 8th day of May, 1997.

Adopted by the Court in conference the 8th day of May, 1997. The Appellate Division Reporter shall publish the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions in their entirety, as amended through this action, at the earliest practicable date.

Orr, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

RULE 1 ORDER FOR MEDIATED SETTLEMENT CONFERENCE

A. BY ORDER IN EACH ACTION

(1) **Order by Senior Resident Superior Court Judge.** The Senior Resident Superior Court Judge of any district, or part thereof, authorized to participate in the mediated settlement conference program may, by written order, require all persons and entities identified in Rule 4 to attend a pretrial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Timing of the Order.** The Senior Resident Superior Court Judge shall issue the order as soon as practicable after the time for the filing of answers has expired. Rules 1.A.(3) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(3) **Content of Order.** The court's order shall (1) require the mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a form prepared and distributed by the Administrative Office of the Courts.

(4) **Motion for Court Ordered Mediated Settlement Conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and

shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(5) **Motion to Dispense With Mediated Settlement Conference.** A party may move the Senior Resident Superior Court Judge, within 10 days after the Court's order, to dispense with the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

(6) **Motion to Authorize the use of Other Settlement Procedures.** A party may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. Such motion shall state the reasons the authorization is requested and that all parties consent to the motion. The Court may order the use of any agreed upon settlement procedure authorized by Supreme Court or local rules. The deadline for completion of the authorized settlement procedure shall be as provided by rules rules authorizing said procedure or, if none, the same as ordered for the mediated settlement conference.

(7) **Exemption from Mediated Settlement Conference**. The Senior Resident Superior Court Judge may be required by the Administrative Office of the Courts to exempt from such conferences a random sample of cases so as to create a control group to be used for comparative analysis.

B. BY LOCAL RULE (Reserved for future adoption.)

C. MOTION TO AUTHORIZE OTHER SETTLEMENT PROCEDURES.

(Reserved for future adoption.)

RULE 2. SELECTION OF MEDIATOR

A. Selection of Certified Mediator by Agreement of Parties. The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the

court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts.

B. **Nomination and Court Approval of a Non-Certified Mediator.** The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that mediator and opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on a form prepared arid distributed by the Administrative Office of the Courts.

C. **Appointment of Mediator by the Court.** If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts. The motion shall

state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the Senior Resident Judge shall appoint a certified non-attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the Senior Resident Judge may appoint a certified attorney mediator or a certified non-attorney mediator.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules or other written document. Only mediators who agree to mediate indigent cases without pay shall be appointed. The Dispute Resolution Commission shall furnish for the consideration of the Senior Resident Superior Court Judge of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district.

C. **Mediator Information Directory.** To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office if the Clerk of Court in such county.

D. **Disqualification of Mediator.** Any party may move a Resident or Presiding Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **Where Conference Is to be Held.** Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. **When Conference Is to be Held.** As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule I.A.(1) shall state a date of completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order.

C. **Request to Extend Date of Completion.** A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by entering a written order setting a new date for the completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. **Recesses.** The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

E. **The Mediated Settlement Conference Is Not To Delay Other Proceedings.** The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including, the completion of discovery, the filing or

hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS

A. Attendance.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) Insurance Company Representatives. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the

carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

B. **Notifying Lien Holders.** Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. **Finalizing Agreement.** If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

D. **Payment of Mediator's Fee.** The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND

If a party or other person required to attend a mediated settlement conference fails to attend without good cause, a

Resident or Presiding Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 6. AUTHORITY AND DUTIES OF MEDIATOR.

A. Authority of Mediator.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. Duties of Mediator.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) The fact that the mediated settlement conference is not a trial, the mediator is not a judge, and the

parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38. 1 (1);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of mediator timely to determine that an impasse exists and that the conference should end.

(4) **Reporting Results of Conference**. The mediator shall report to the court in writing whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent without permission from the mediated settlement conference. The Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by it.

(5) **Scheduling and Holding the Conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator

unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

RULE 7. COMPENSATION OF THE MEDIATOR

A. **By Agreement**. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **By Court Order.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate at $100 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $100, which is due upon date of appointment.

C. **Indigent Cases.** No party found to be indigent by the court for purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. **Payment of Compensation by Parties.** Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment of the conference fee shall be due upon completion of the conference.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must:

A. Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Dispute Resolution Commission:

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, or

(ii) a member in good standing of the Bar of another state; and completes a six hour training on North Carolina legal terminology and civil court procedure, mediator ethics and confidentiality, provided by a trainer certified by the Dispute Resolution Commission; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney;

and

(b) has at least five years of experience as a judge, practicing attorney, law professor, mediator or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B. (1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission;

(b) after completing the 20 hour training required by Rule 8.B.(2)(a), five years of experience as a mediator, having mediated: (i) at least 12 cases in each year, and (ii) for at least 20 hours in each year or equivalent experience;

(c) a six hour training on North Carolina legal terminology and civil court procedure, mediator ethics and confidentiality, provided by a trainer certified by the Dispute Resolution Commission;

(d) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's mediation experience;

(e) a four year degree from an accredited college or university.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator:

(1) at least one of which must be court ordered by a Superior Court.

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein, in cases pending in the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, North Carolina Superior Court or the US District Courts for North Carolina.

D. Demonstrate familiarity with statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any ethical standards hereafter adopted by this Court;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts; and

H. Agree to mediate indigent cases without pay.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Standards of conduct for mediators;

(4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(5) Demonstrations of mediated settlement conferences;

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. Payment of all administrative fees must be made prior to certification.

RULE 10. LOCAL RULE MAKING

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these rules is authorized to publish local rules implementing mediated settlement conferences not inconsistent with these rules and G.S. 7A-38.1.

Order Adopting Amendment to Rule 4 of the Rules of Appellate Procedure

Rule 4(d) is hereby amended to read as follows:

(d) To Which Appellate Court Addressed. An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to ~~life imprisonment or~~ death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

Adopted by the Court in Conference this 2nd day of October 1997. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.aoc.state.nc.us).

Orr, J.
For the Court

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

ADMINISTRATIVE LAW AND PROCEDURE

§ 65 (NCI4th). Procedure on review; scope and effect of review generally

When the issue on appeal is whether a state agency erred in interpreting a statutory term, an error of law is asserted, and an appellate court may employ de novo review. **Walker v. Bd. of Trustees of the N.C. Local Gov't. Emp. Ret. Sys.,** 63.

When the issue on appeal is whether a state agency erred in interpreting a regulatory term, an appellate court may freely substitute its judgment for that of the agency and employ de novo review. **Britt v. N.C. Sheriffs' Educ. and Training Stds. Comm'n,** 573.

APPEAL AND ERROR

§ 22 (NCI4th). Appeals of right from decisions of Court of Appeals; dissent to decision in Court of Appeals generally

Where the dissent in the Court of Appeals was based on the premise that there was sufficient evidence to support defendant's conviction for indecent exposure, the State was not limited to arguing solely the reason stated in the dissent but could argue any reasoning in support of the proposition that the evidence was sufficient to support defendant's conviction. **State v. Fly,** 556.

§ 92 (NCI4th). Determination in judgment of no just reason for delay

The Court of Appeals erred by dismissing as interlocutory an appeal from a summary judgment on one claim arising from a lease dispute where the trial court certified that there was no just reason for delay. **DKH Corp. v. Rankin-Patterson Oil Co.,** 583.

§ 150 (NCI4th). Preserving constitutional issues

A defendant who failed to raise constitutional claims in the trial court is barred from asserting them for the first time on appeal. **State v. Billings,** 169.

§ 206 (NCI4th). Time for appeal; tolling of time

Plaintiffs' second timely Rule 59 motion for a new trial extended the thirty-day limit specified in Rule 3(c) for giving notice of appeal where plaintiff's first oral motion asserted that the verdict was contrary to the weight of evidence and her subsequent written motion asserted additional grounds; therefore, the thirty-day time period for giving notice of appeal commenced when an order was entered ruling on the second motion for a new trial. **Sherrod v. Nash General Hospital,** 526.

§ 341 (NCI4th). Failure to properly assign error

A noncapital murder defendant's assignments of error to the admission of certain evidence were overruled where defendant made no objection at trial and waived plain error analysis by failing to assert plain error in the assignments of error. **State v. Gary,** 510.

ARREST AND BAIL

§ 63 (NCI4th). Arrest by law enforcement officer without a warrant; probable cause; identification of suspect by victims and bystanders

Officers had probable cause to arrest defendant for breaking and entering an automobile where the officers made an investigatory stop of defendant based upon a physical description of the race, gender and clothing of the suspect by two witnesses,

CONSTITUTIONAL LAW—Continued

A defendant on trial for the first-degree murder of a child was not denied the effective assistance of counsel by his attorney's failure to object to four photographs of defendant's living room which showed items, including a mannequin head with a knife through it, which defendant now considers as inappropriate, where the photographs were authenticated, relevant and admissible. **Ibid.**

Defense counsel's failure to object to hearsay testimony was not negligent conduct and did not constitute ineffective assistance where the hearsay statements were admissible as prior consistent statements which corroborated a witness's trial testimony. **Ibid.**

§ 340 (NCI4th). Right of confrontation generally

In resolving issues arising under the Confrontation Clause of the North Carolina Constitution, the appellate court will apply the reasoning of the United States Supreme Court when construing the Confrontation Clause of the Sixth Amendment. **State v. Jackson,** 644.

§ 343 (NCI4th). Presence of defendant; pretrial proceedings

An unrecorded conference in the judge's chambers that occurred prior to the start of defendant's capital trial without defendant being present did not amount to constitutional or other error. **State v. Bonnett,** 417.

§ 344 (NCI4th). Presence of defendant; voir dire

A capital first-degree murder defendant's constitutional rights to be present at every critical stage of his trial were not violated when the trial court failed to require that prospective jurors take their oath in defendant's presence or when the clerk entered the room outside the courtroom in which the prospective jurors were waiting and asked whether anyone had not filled out a jury questionnaire. **State v. Lemons,** 335.

§ 344.1 (NCI4th). Presence of defendant; conduct of trial

The trial court did not violate defendant's constitutional right to be present at every stage of his capital trial by conducting ten bench conferences outside his presence where defendant was present in the courtroom and was represented by counsel at each conference. **State v. Bonnett,** 417.

§ 374 (NCI4th). Prohibition on cruel and unusual punishment; life imprisonment generally

Committing a thirteen-year-old defendant to a term of life imprisonment for first-degree sexual offense does not constitute cruel and unusual punishment. **State v. Green,** 588.

§ 376 (NCI4th). Allegation of unequal application of punishment based on race

A juvenile defendant failed to establish a prima facie showing of discrimination under the Equal Protection Clause in the transfer of juvenile offenders to superior court. **State v. Green,** 588.

COSTS

§ 29 (NCI4th). Attorney's fees in actions preserving common property

In a class action in which it was held that the 1989 legislation which partially taxed state and local government retirement benefits was unconstitutional and that

CRIMINAL LAW—Continued

§ 121 (NCI4th Rev.). Arraignment and pleas generally

Defendant was not prejudiced by being arraigned on a capital charge in chambers rather than in open court. **State v. Bonnett,** 417.

§ 131 (NCI4th Rev.). Plea arrangements relating to sentence

A defendant who entered into an erroneous plea bargain agreement which included a burglary offense was entitled to the benefit of his bargain where defendant, his attorney, and the prosecutor understood that the sentence was drawn concurrently with the sentence defendant was already serving; however, defendant is not entitled to specific performance but may withdraw his plea and proceed to trial or attempt to negotiate another agreement that does not violate the statute. **State v. Wall,** 671.

§ 381 (NCI4th Rev.). Conduct and duties of judge; miscellaneous

A noncapital first-degree murder defendant did not show substantial evidence of partiality or the appearance of partiality where the court included in its findings on his motion to replace appointed counsel the statement that "it is readily apparent to anyone with an IQ level above room temperature that the differences between counsel and defendant relate to trial strategy and tactics." **State v. Gary,** 510.

§ 422 (NCI4th Rev.). Argument of counsel; matters beyond permissible scope of argument

Assuming it was improper for the prosecutor to argue during a capital sentencing proceeding that "Prior cases [have] found course of conduct when a woman was kidnapped from the car and raped," this argument was not so grossly improper as to require the trial court to intervene ex mero motu. **State v. Billings,** 169.

§ 432 (NCI4th Rev.). Argument of counsel; defendant's silence generally

There was no gross impropriety requiring the trial court to intervene on its own motion in a prosecutor's argument in a capital first-degree murder prosecution where the prosecutor said he was sorry that defendant had not read his statement to a detective and that perhaps he ought to let defendant look at the statement in the courtroom. The prosecutor was simply refuting the claim by the defense that the detective's notes and the recording of defendant's statements were inaccurate. **State v. Gregory,** 203.

§ 433 (NCI4th Rev.). Argument of counsel; defendant's failure to testify

The trial court did not err in the closing argument of the guilt phase of a capital first-degree murder prosecution by overruling defendant's objection to the prosecutor's arguments that "You're going to hear a lot from the defendant—well, from the defense counsel." **State v. Warren,** 80.

§ 433 (NCI4th Rev.). Argument of counsel; defendant's failure to testify; comment by prosecution

The prosecutor did not improperly comment during closing argument on defendant's failure to testify where the prosecutor's remarks were directed toward defendant's failure to offer evidence to rebut the State's case, not at defendant's failure to take the stand himself. **State v. Fletcher,** 292.

§ 439 (NCI4th Rev.). Argument of counsel; defendant characterized as professional criminal, outlaw, or bad person

The closing remarks of a prosecutor in a capital first-degree murder prosecution were properly based on facts in evidence where the prosecutor contended that this defendant was not the average killer and did not care. **State v. Warren,** 80.

The trial court did not err in a capital sentencing proceeding by overruling defendant's objection to the prosecutor calling defendant a coward in his closing argument. **Ibid.**

The prosecutor's characterizations of defendant as mean, bad, and a dangerous man during closing argument were reasonable inferences based on the evidence and did not require intervention by the trial court. **State v. Lee,** 474.

§ 442 (NCI4th Rev.). Argument of counsel; defendant's callousness, lack of remorse, or potential for future crime

The prosecutor's argument in a capital trial that defendant had not shown any remorse for his actions was not an improper comment on defendant's exercise of his right to silence. **State v. Billings,** 169.

§ 444 (NCI4th Rev.). Argument of counsel; miscellaneous comments on defendant's general character and truthfulness

The prosecutor's remarks in a capital first-degree murder prosecution were not so grossly prejudicial and grossly improper as to require the trial court to intervene ex mero motu where defendant contended that the prosecutor referred to defendant and a defense witness as liars but the prosecutor instead characterized portions of the testimony as inaccurate. **State v. Lemons,** 335.

§ 447 (NCI4th Rev.). Argument of counsel; expert witnesses

The prosecutor's remarks disparaging defendant's expert witness in a capital first-degree murder prosecution were neither prejudicial nor grossly improper in light of other testimony about the restriction or suspension of the witness's license and defense counsel's argument regarding the witness. **State v. Lemons,** 335.

§ 454 (NCI4th Rev.). Argument of counsel; victim's age, circumstances, or characteristics

There was no impropriety in a prosecutor's argument in a capital first-degree murder prosecution where the prosecutor asked the jury to imagine being there as the victim was strangled and asked them whether they could imagine anything more degrading. **State v. Warren,** 80.

§ 456 (NCI4th Rev.). Argument of counsel; violent, dangerous, or depraved nature of offense or conduct

A prosecutor's argument in a first-degree murder prosecution comparing defendant to the Gestapo and his conduct to the Holocaust was extreme but did not require intervention ex mero motu. **State v. Lemons,** 335.

§ 458 (NCI4th Rev.). Argument of counsel; comment on aggravating or mitigating circumstances and factors

Defendant was not prejudiced by the prosecutor's argument that the mitigating circumstances submitted to the jury had been requested by defendant when submission of the no significant history of prior criminal activity mitigating circumstance was opposed by defendant. **State v. Billings,** 169.

The prosecutor's arguments in a capital sentencing proceeding that jurors should reject mitigating circumstances because many people had the same problems in their lives as defendant but did not commit murder and that the circumstances did not justify the killing were not grossly improper so as to require intervention by the trial court on its own motion. **Ibid.**

§ 460 (NCI4th Rev.). Argument of counsel; comment on punishment; capital cases generally

The prosecutor's jury argument in a capital sentencing proceeding which contended that the Bible did not prohibit the death penalty was not grossly improper. **State v. Billings,** 169.

There was no gross impropriety requiring intervention ex mero motu in a capital sentencing proceeding where the prosecutor commented to the jury in his opening statement that the evidence would show that defendant had been convicted of capital or first-degree murder in Asheville and noncapital murder in South Carolina. **State v. Warren,** 80.

There was no plain error in a capital sentencing proceeding where the trial court failed to intervene ex mero motu when the prosecutor argued that the law requires you to return a recommendation of death. **State v. Hipps,** 377.

§ 461 (NCI4th Rev.). Argument of counsel; deterrent effect of death penalty

It was not improper for the prosecutor to argue in a capital sentencing proceeding that if the jury failed to recommend death, defendant might get out of prison and hurt other people or the surviving victim. **State v. Billings,** 169.

The trial court did not abuse its discretion by failing to intervene ex mero motu in the prosecutor's argument in a first-degree murder prosecution where the prosecutor focused on the gravity of the jury's duty and its responsibility to follow the law rather than the general deterrent effect of the death penalty. **State v. Lemons,** 335.

There was no plain error in a capital sentencing proceeding where the trial court did not intervene ex mero motu when the prosecutor argued that prison had been tried and didn't work. **State v. Hipps,** 377.

§ 467 (NCI4th Rev.). Argument of counsel; permissible inferences

There was no gross impropriety requiring the trial court to intervene ex mero motu in a capital first-degree murder prosecution where defendant contended that the prosecutor argued contrary to the evidence that the female victim had been sexually assaulted, but the statement merely characterized the actions of defendant and his accomplices as dehumanizing, which was supported by the facts. **State v. Lemons,** 335.

Closing argument statements by the prosecutor which were offered as hypothetical thoughts that defendant and the child murder victim may have made during the week of the homicide were reasonable inferences drawn from the evidence and did not require intervention by the trial court. **State v. Lee,** 474.

§ 471 (NCI4th Rev.). Argument of counsel; misstatement of evidence

The trial court did not err during a capital prosecution for first-degree murder by sustaining an objection and later objecting ex mero motu to defense counsel's attempts in his closing argument to explain proof beyond a reasonable doubt and to his use of a quotation from a jury instruction from *State v. Phillip,* 261 N.C. 263, involving moral certainty. **State v. Warren,** 80.

§ 472 (NCI4th Rev.). Argument of counsel; explanation of applicable law

There was no prejudicial error in a capital prosecution for first-degree murder where the prosecutor argued that defendant premeditated and deliberated the killing if he intended to kill the victim at any point prior to the victim dying. **State v. Warren,** 80.

CRIMINAL LAW—Continued

§ 1371 (NCI4th Rev.). Capital punishment; particular aggravating circumstances; particularly heinous, atrocious, or cruel offense; submission of circumstance to jury

The trial court did not err in a capital sentencing proceeding by submitting to the jury the especially heinous, atrocious or cruel aggravating circumstance where the evidence supported the conclusion that the victim's death was physically agonizing, conscienceless, pitiless, and unnecessarily torturous and that the victim was aware of but helpless to prevent her impending death. **State v. Hipps,** 377.

§ 1382 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; lack of prior criminal activity

The trial court did not err during a capital sentencing proceeding by submitting as a mitigating circumstance that defendant had no significant history of prior criminal activity where defendant had been convicted of five misdemeanors and two felonies and had unlawfully consumed drugs and alcohol as a child and adult. **State v. Billings,** 169.

The trial court erred by failing to submit to the jury in a capital sentencing proceeding the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where the evidence showed that defendant's prior criminal activities were largely nonviolent in nature. **State v. Fletcher,** 292.

The trial court did not err in failing to submit in this capital sentencing proceeding the (f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity because no reasonable juror could have concluded that defendant's criminal history was insignificant. **State v. Bonnett,** 417.

§ 1384 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; mental or emotional disturbance; instructions

The trial court erred by failing to submit to the jury in a capital sentencing proceeding the statutory mitigating circumstance that the capital felony was committed while defendant was under the influence of a mental or emotional disturbance. **State v. Fletcher,** 292.

The trial court did not err in failing to submit to the jury in a capital sentencing proceeding the statutory mitigating circumstance that defendant was under the influence of a mental or emotional disturbance at the time of the offense where neither of defendant's experts suggested any nexus between defendant's personality characteristics and the crimes he committed. **State v. Bonnett,** 417.

§ 1388 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; impaired capacity of defendant

The trial court did not err in a capital sentencing proceeding by not submitting the mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired where there was no testimony or evidence suggesting that his capacity to understand right from wrong or to conform to the law was impaired at the time of the murder. **State v. Lemons,** 335.

§ 1390 (NCI4th Rev.). Capital punishment; particular mitigating circumstances; age of defendant

The trial court erred by failing to submit to the jury in a capital sentencing proceeding the mitigating circumstance of defendant's age, although defendant was twenty-seven years old at the time of the murder, where a psychologist and a psychiatrist

testified that defendant had a low IQ and suffered from mild to moderate mental retardation, and that defendant's mental condition significantly restricted his ability to conform his conduct to the requirements of the law. **State v. Zuniga,** 214.

The trial court did not err by failing to submit the (f)(7) mitigating circumstance of age to the jury in this capital sentencing proceeding where defendant was twenty-six years old at the time of the murder, but he offered no evidence of his immaturity or lack of emotional or intellectual development at the time of the crime. **State v. Bonnett,** 417.

§ 1392 (NCI4th Rev.). Capital punishment; other mitigating circumstances arising from the evidence

Any error in the trial court's refusal to submit to the jury in a capital sentencing proceeding the mitigating circumstance that "Defendant was not heavily armed" was harmless error. **State v. Bonnett,** 417.

The trial court did not err by failing to submit mitigating circumstances requested by defendant where those circumstances were subsumed by circumstances submitted to the jury. **Ibid.**

§ 1402 (NCI4th Rev.). Death penalty held not excessive or disproportionate

A sentence of death imposed on defendant for first-degree murder was not excessive or disproportionate where defendant raped the eleven-year-old female victim in her home and then kidnapped and killed her and also repeatedly stabbed the victim's thirteen-year-old brother. **State v. Billings,** 169.

A sentence of death was not disproportionate. **State v. Warren,** 80; **State v. Gregory,** 203; **State v. Lemons,** 335; **State v. Hipps,** 377.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant was found guilty under theories of both premeditation and deliberation and felony murder, the jury found the three submitted aggravating circumstances, and the evidence showed that defendant supplied the murder weapon and actually took the money box from the victim's store. **State v. Bonnett,** 417.

DIVORCE AND SEPARATION

§ 359 (NCI4th). Modification of custody order

The Court of Appeals erred by concluding that the party seeking modification of child custody based upon changed circumstances must show that the change has had or will have an adverse effect on the child. **Pulliam v. Smith,** 616.

§ 370 (NCI4th). Particular circumstances as warranting modification of child custody; parent's cohabitation with another

The Court of Appeals erred by holding that there was insufficient evidence to support the trial court's finding of a substantial change of circumstances affecting the welfare of two minor children warranting a change of custody where defendant's homosexual partner moved into defendant's home with the children. Activities such as the regular commission of sexual acts in the home by unmarried people, failing and refusing to counsel the children against such conduct while acknowledging the conduct, allowing the children to see unmarried persons known to be sexual partners in bed together, keeping admittedly improper sexual material in the home, and the partner taking the children out of the home without their father's knowing of their whereabouts supported the trial court's findings of improper influences. The trial court

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

§ 735 (NCI4th). Prejudicial error in the admission of evidence; statements by crime victims

There was no prejudicial error in a capital first-degree murder prosecution in admitting the victim's statements to a witness that defendant had beaten her and given her the bruises and knots on her head. **State v. Hipps,** 377.

§ 876 (NCI4th). Hearsay; admissibility to show state of mind of victim

There was no prejudicial error in a capital first-degree murder prosecution in the admission of statements from the victim to three witnesses that she was afraid of defendant and that he might kill her. **State v. Hipps,** 377.

The admissibility of testimony by an assault victim's mother under the firmly rooted state of mind exception to the hearsay rule without a showing of necessity or truthworthiness did not violate the Confrontation Clause of the North Carolina Constitution. **State v. Jackson,** 644.

The trial court did not err in a noncapital first-degree murder prosecution by allowing hearsay testimony from the victim's mother regarding threats made by defendant to the victim. **State v. Gary,** 510.

§ 927 (NCI4th). Relationship of hearsay evidence admitted under exceptions to hearsay rule to right of confrontation

Any possible inferences in prior decisions that the Confrontation Clause of the North Carolina Constitution requires that no hearsay evidence be admitted unless the prosecution has established (1) necessity and (2) reliability or trustworthiness were mere dicta and are disapproved. **State v. Jackson,** 644.

Where hearsay proffered by the prosecution comes within a firmly rooted exception to the hearsay rule, the Confrontation Clause of the North Carolina Constitution is not violated by its admission even though no particularized showing is made as to the necessity for using such hearsay or as to its reliability or trustworthiness. **Ibid.**

The admissibility of testimony by an assault victim's mother under the firmly rooted state of mind exception to the hearsay rule without a showing of necessity of truthworthiness did not violate the Confrontation Clause of the North Carolina Constitution. **Ibid.**

§ 1064 (NCI4th). Flight; instructions generally

There was no plain error in a capital first-degree murder prosecution where the jury was instructed on flight. **State v. Warren,** 80.

§ 1145 (NCI4th). Statements made in course and furtherance of conspiracy generally

The evidence in a first-degree murder and robbery trial was sufficient to meet the State's burden of showing that a conspiracy existed so as to render admissible statements of a codefendant in which the codefendants agreed to "hit this store," "stick together whatever happens," and to "smoke" the store's proprietor, along with statements made during the robbery and murder. **State v. Bonnett,** 417.

§ 1235 (NCI4th). Confessions and other inculpatory statements; custodial interrogation defined

The trial court did not err in a capital prosecution for first-degree murder by admitting a statement made by defendant to police when they were looking for the missing victim. **State v. Hipps,** 377.

EVIDENCE AND WITNESSES—Continued

tion cease, and it was not error for the court to admit defendant's subsequent incriminating statement or the fruits of that statement. **State v. Fletcher,** 292.

§ 1274 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; defendant's mental capacity

The trial court did not err in a capital first-degree murder prosecution by admitting statements given by defendant to officers where defendant contended that the statements should have been suppressed because of his low IQ and impaired reading and spelling skills. **State v. Hipps,** 377.

§ 1611 (NCI4th). "Fruit of the poisonous tree" doctrine inapplicable; evidence held admissible

Officers had probable cause to arrest defendant for breaking and entering an automobile, and incriminating statements subsequently made by defendant about a murder and the recovery of property stolen from the murder victim as a result of those statements were not fruits of an unlawful arrest. **State v. Fletcher,** 292.

§ 1695 (NCI4th). Photographs of crime victim; decomposed body

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion in limine and allowing the admission of seven photographs of the victim's body. **State v. Warren,** 80.

§ 2176 (NCI4th). Basis for expert's opinion, generally; scientific evidence; acceptability of methods used in examination or analysis; new and established methods

A horizontal gaze nystagmus (HGN) test does not measure behavior a lay person would commonly associate with intoxication but represents specialized knowledge that must be presented to the jury by a qualified expert. **State v. Helms,** 578.

The State failed to present a sufficient foundation for the admission in a DWI prosecution of testimony by the arresting officer as to the results of an HGN test administered to defendant where nothing in the record indicates that the trial court took judicial notice of the reliability of the HGN test, and the State presented no evidence and the court conducted no inquiry regarding the reliability of the HGN test. **Ibid.**

§ 2602 (NCI4th). Competency of witnesses; beneficiary of holographic will

The trial court erred in a caveat to a holographic will by permitting the caveators' five interested witnesses to testify as to conversations they had with decedent in his final years about his plans to write a new will and about specific bequests he planned to include. The statutory exception to the Dead Man's Statute for holographic wills is specifically limited to testimony about such material facts as may establish the will as valid. **In re Will of Lamparter,** 45.

§ 2787 (NCI4th). Counsel's questioning of witness; questions insinuating attorney's opinions or beliefs

The trial court did not err in a capital sentencing proceeding by overruling defendant's objections to the manner in which the prosecutor cross-examined defendant's expert witness. **State v. Hipps,** 377.

HOMICIDE—Continued

The trial court did not err in a noncapital first-degree murder prosecution by not charging the jury as to the lesser included offense of second-degree murder where all of the evidence supports a finding of premeditation and deliberation. **State v. Gary,** 510.

§ 583 (NCI4th). Instructions; acting in concert

The trial court properly instructed the jury on the law of acting in concert in accordance with *State v. Blankenship,* 337 N.C. 543, which applied to defendant's first-degree murder trial, where the court emphasized to the jury that in order to find defendant guilty of premeditated and deliberate murder, the jury must find that defendant specifically intended to kill the victim. **State v. Bonnett,** 417.

§ 669 (NCI4th). Propriety of instructions on intoxication; where there was lack of evidence that capacity to think and plan was affected by drunkenness

The trial court did not err in refusing to instruct the jury on voluntary intoxication in a first-degree murder prosecution, although there was sufficient evidence to support a finding that defendant was intoxicated, where the evidence was insufficient to support a finding that defendant's mind and reason were so overthrown as to render him incapable of forming a deliberate and premeditated purpose to kill. **State v. Billings,** 169.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 62 (NCI4th). Tort liability generally

The evidence was insufficient for the jury on the issue of negligence by defendant rest home and its employees in failing to restrain a ninety-eight-year-old resident at the time she fell and was seriously injured. **Swann v. Len-Care Rest Home,** 68.

INDIGENT PERSONS

§ 10 (NCI4th). Removal or substitution of counsel

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion for a new counsel where defense counsel decided not to subpoena certain witnesses whom defendant claimed would have provided testimony. **State v. Gary,** 510.

INFANTS OR MINORS

§ 99 (NCI4th). Transfer to superior court for trial as adult generally

G.S. 7A-610 is not constitutionally infirm without the factors set forth in the appendix to *Kent v. United States,* 383 U.S. 541. **State v. Green,** 588.

A juvenile court judge acted within the statutory guidelines of G.S. 7A-610(c) in transferring to superior court a thirteen-year-old defendant accused of first-degree sexual offense and other crimes. **Ibid.**

INSURANCE

§ 509 (NCI4th). Uninsured motorist coverage generally

The limitation of liability provision of the UM section of personal automobile policies reducing UM coverage for amounts paid or payable under workers' compen-

sation law is authorized by G.S. 20-279.21(e) without regard to characterization of the coverage as "mandatory" or "voluntary," and UM coverage in policies owned by the driver and a passenger of a vehicle leased by their employer for the driver's use was not available to their estates for their deaths in a collision with an uninsured motorist where the workers' compensation benefits paid or payable to their survivors exceed the UM coverage of the policies. **Liberty Mut. Ins. Co. v. Ditillo,** 247.

INTENTIONAL INFLICTION OF MENTAL DISTRESS

§ 3.1 (NCI4th). Damages

There was no error in the application of the thin skill rule in an action for the intentional infliction of emotional distress by sexual harassment. **Poole v. Copland, Inc.,** 260.

The trial court's instructions on the thin skull rule in an action for the intentional infliction of emotional distress by sexual harassment adequately informed the jury that it could not find that plaintiff had been injured by a flashback to her suppressed mental problems until it first found that the individual defendant's actions could have caused severe emotional distress to a person of ordinary mental condition. **Ibid.**

The trial court's instructions on the thin skull rule did not improperly allow the jury to find liability based solely on a finding that the individual defendant's conduct exacerbated plaintiff's preexisting dissociative disorder, but clearly told the jury that it must find that the wrongful actions under the same circumstances could reasonably have been expected to injure a person of ordinary mental condition before it could hold defendants liable for all the harmful consequences of the individual defendant's actions. **Ibid.**

Defendant was not prejudiced by the fact that the thin skull instructions were given during the part of the charge on damages rather than during the liability phase. **Ibid.**

JUDGES, JUSTICES, AND MAGISTRATES

§ 36 (NCI4th). Censure or removal; conduct prejudicial to the administration of justice; particular illustrations

A district court judge's entry of not guilty pleas and not guilty verdicts in two DWI cases based solely on the ex parte representations of the defense attorney, without determining whether the State had consented to the dispositions or wished to be heard, did not amount to conduct prejudicial to the administration of justice and did not warrant censure where the judge acted pursuant to a process of disposing of cases in a shorthand manner that had been acquiesced in by the State, and defense counsel misled the judge as to the status of the two cases. **In re Tucker,** 677.

A district court judge's conduct in entering prayers for judgment continued and then dismissals rather than sentences as required by G.S. 20-179 upon finding the defendants guilty of DWI did not amount to conduct prejudicial to the administration of justice and did not merit censure where the judge's conduct was the result of a mistaken, but honest, belief that the mandatory sentencing provisions of the statute would not come into effect if he continued prayer for judgment until a date certain and then dismissed the case. **Ibid.**

The prosecutor did not improperly attempt to stake out prospective jurors in a capital case with respect to whether they could vote for the death penalty where the prosecutor's questions simply attempted to determine whether the jurors could follow the law in imposing the death penalty. **State v. Fletcher,** 292.

The prosecutor did not attempt to stake out prospective jurors with respect to whether they would weigh aggravating circumstances more heavily than mitigating circumstances where the prosecutor's questions asked the jurors if they could weigh the significance of the aggravating and mitigating circumstances rather than the relative number of aggravators and mitigators. **Ibid.**

Defense counsel's question to a prospective juror in a capital trial as to whether the juror would automatically vote for the death penalty if the jury found the especially heinous, atrocious, or cruel aggravating circumstance was an inappropriate stake-out question. **Ibid.**

§ 141 (NCI4th). Voir dire examination; parole procedures

The trial court properly denied defendant's pretrial motion to conduct a voir dire in this capital trial regarding the jurors' perceptions about parole eligibility. **State v. Billings,** 169.

§ 203 (NCI4th). Challenges for cause; effect of preconceived opinions, prejudices, or pretrial publicity; where juror indicated ability to be fair and impartial

The trial court did not err in denying defendant's challenge for cause of a prospective juror on the basis that the juror had formed an opinion and knew the victim where the juror stated unequivocally that he could set aside his opinion and base his decision on the evidence. **State v. Bonnett,** 417.

§ 210 (NCI4th). Challenges for cause; relationship by blood or marriage to victim

Any error in the trial court's denial of defendant's challenge for cause of an alternate juror who was related within the sixth degree to the victim was harmless where the alternate juror did not decide defendant's case. **State v. Bonnett,** 417.

§ 218 (NCI4th). Exclusion of prospective juror because of opposition to death penalty based on religious beliefs as violation of free exercise of religion clause

The trial court did not err in a capital prosecution for first-degree murder by excusing a juror for cause based on her religious opposition to the death penalty. **State v. Warren,** 80.

A capital first-degree defendant's liberty interest under Article I, section 26 of the North Carolina Constitution was not violated by excusing a juror who was unable to vote for the death penalty for religious reasons. **Ibid.**

There was no merit to a capital first-degree murder defendant's contention that G.S. 15A-2000 is unconstitutional if *State v. Davis,* 325 N.C. 607, is not overturned. **Ibid.**

§ 222 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; unequivocal opposition to imposition of death sentence generally

The trial court did not err by excusing a prospective juror for cause because of his capital punishment views where the juror stated that his moral convictions about

the death penalty would substantially impair him in the sentencing process and prevent him from voting for the death penalty. **State v. Billings,** 169.

§ 227 (NCI4th). Necessity that veniremen be unequivocal in opposition to death sentence; effect of equivocal answers

The trial court did not err during jury selection in a capital first-degree murder prosecution by excusing for cause two prospective jurors where one juror's equivocation reflected only her desire to abide by her oath and follow the law and not an actual ability to sentence defendant to death, and the other's likewise clearly indicated that his views on the death penalty would impair his ability to act as a juror. **State v. Hipps,** 377.

§ 237 (NCI4th). Right of defendant to have separate juries hear guilt and punishment phases of trial

The trial court properly denied defendant's motion to bifurcate his capital trial and his alternative motion to continue so that he would not be tried or sentenced until after two codefendants were tried. **State v. Bonnett,** 417.

§ 257 (NCI4th). Use of peremptory challenge to exclude on basis of race; sufficiency of evidence to establish prima facie case

The trial court did not err in finding no prima facie case of racial discrimination in the State's peremptory strikes of two black prospective jurors where two of five black jurors had been seated after the second black juror was excused. **State v. Fletcher,** 292.

A capital first-degree murder prosecution was remanded for a hearing on the *Batson* issue with regard to two prospective jurors. **State v. Hoffman,** 548.

§ 259 (NCI4th). Sufficiency of evidence to show racial discrimination in use of peremptory challenges

The trial court's finding of no racial discrimination in the State's peremptory strike of a black potential juror in this capital trial based upon his prior record and his expressed lack of confidence in the judicial system was not error because the court found that the prosecutor's explanation that he peremptorily struck the only other black male in the same panel for his membership in the NAACP was not racially neutral and was pretextual. **State v. Fletcher,** 292.

The trial court did not err by failing to find intentional racial discrimination in the State's peremptory strike of a black prospective juror for his expressed lack of confidence in the judicial system on the basis of disparate questioning of black and white prospective jurors about their views of the judicial system. **Ibid.**

The trial court did not err in failing to find that a black prospective juror was stricken for impermissible racially discriminatory reasons where defendant found a single factor among several articulated by the prosecutor and matched it to a passed white juror who exhibited the same factor. **Ibid.**

§ 260 (NCI4th). Use of peremptory challenge to exclude on basis of race; effect of racially neutral reasons for exercising challenges

The prosecutor's reasons for peremptorily challenging four black prospective jurors in a capital trial were sufficient to support the trial court's findings that the challenges were not racially motivated and that the prosecutor had not engaged in purposeful discrimination. **State v. Bonnett,** 417.

MUNICIPAL CORPORATIONS—Continued

city is not required to pay an amount that covers the cost of cleaning its own streets. **Ibid.**

A city's stormwater plan is not arbitrary and does not deprive owners of developed property of equal protection because the plan exempts undeveloped land, commercial property with less than 1200 square feet of impervious area, golf courses, state roads, and railroad corridors and tracks, or because the maximum charge for residential property is $3.25 per month. **Ibid.**

OBSCENITY, PORNOGRAPHY, INDECENCY, OR PROFANITY

§ 25 (NCI4th). Indecent exposure

The phrase "private parts" in the indecent exposure statute includes the external organs of sex and excretion. **State v. Fly,** 556.

The buttocks are not private parts within the meaning of the indecent exposure statute. **Ibid.**

The indecent exposure statute does not require the private parts to be exposed to a member of the opposite sex before a crime is committed, but rather that they be exposed in the presence of a member of the opposite sex. **Ibid.**

The evidence was sufficient to support defendant's conviction of indecent exposure in that the jury could find from the evidence that defendant had willfully exposed private parts, either his anus, his genitals, or both, in the presence of the female victim. **Ibid.**

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

§ 54 (NCI4th). Ethical principles of psychologists

The Court of Appeals erred in an action arising from the suspension of a psychologist's license for having social and sexual relationships with former patients by focusing on the policy objectives underpinning the Ethics Code for psychologists rather than on the conduct specifically prohibited. The conclusion that petitioner violated a principle of that ethics code was not supported by the evidence. **Elliot v. N.C. Psychology Bd.,** 230.

§ 137 (NCI4th). Sufficiency of evidence; injuries arising from surgery generally

Even if plaintiffs' tardy expert witness designation had been considered by the trial court in ruling on defendants' motion for summary judgment in this medical malpractice action arising out of surgery performed upon the female plaintiff, plaintiffs would not have had a sufficient forecast of evidence to overcome defendants' motion. **Briley v. Farabow,** 537.

PLEADINGS

§ 61 (NCI4th). Signing of pleadings; sanctions generally

Where an attorney was given notice of a motion for the imposition of sanctions upon him for his filing of an adoption petition, the trial court erred by imposing sanctions on the attorney for the filing of pleadings for which the attorney had not received notice that sanctions would be sought. **Griffin v. Griffin,** 278.

PUBLIC OFFICERS AND EMPLOYEES

§ 35 (NCI4th). Civil liability generally; negligence

The public duty doctrine applies to actions against state agencies brought under the Tort Claims Act. **Hunt v. N.C. Dept. of Labor,** 192.

The exceptions to the public duty doctrine are (1) where there is a special relationship between the injured party and the governmental entity, and (2) when the governmental entity creates a special duty by promising protection to an individual. **Ibid.**

The "special relationship" and "special duty" exceptions to the public duty doctrine were inapplicable as a basis for liability by the Department of Labor in plaintiff go-kart rider's action based upon allegations that the Department inspected and passed go-karts which did not have shoulder straps as well as seat belts as required by the Administrative Code and that plaintiff suffered injuries as a result of this negligence. **Ibid.**

RAPE AND ALLIED SEXUAL OFFENSES

§ 107 (NCI4th). First-degree sexual offense; sufficiency of evidence to show analingus or anal intercourse

The State's evidence was sufficient to support defendant's conviction of first-degree sexual offense against a two-year-old child. **State v. Lee,** 474.

RETIREMENT

§ 4 (NCI4th). Teachers' and State Employees' Retirement Fund

The relationship between the retirement systems for state and local government employees and employees vested in the systems is contractual in nature, and the right to retirement benefits exempt from state taxation is a term of such contract. **Bailey v. State of North Carolina,** 130.

The 1989 legislation which placed a $4,000 annual state tax exemption cap on retirement benefits received by state and local government employees impaired the contractual rights of employees whose retirement benefits had vested to a tax exemption for those benefits in violation of Art. I, § 10 of the United States Constitution, and this impairment was neither reasonable nor necessary for achieving an important state interest. **Ibid.**

The 1989 legislation which placed a $4,000 annual state tax exemption cap on retirement benefits received by state and local government employees constituted a taking without just compensation of the property of employees whose retirement benefits had vested in violation of the Fifth Amendment to the United States Constitution and Art. I, § 19 of the North Carolina Constitution. **Ibid.**

§ 10 (NCI4th). Local Governmental Employees' Retirement System

Under the statutory death benefit plan for local government employees, when an employee retires, that employee's "employment has been terminated" within the meaning of G.S. 128-27(l)(2)(a), and the retired employee's last day of actual service is the last day the employee actually worked. **Walker v. Bd. of Trustees of the N.C. Local Gov't. Emp. Ret. Sys.,** 63.

Petitioner's decedent terminated her employment within the meaning and intent of G.S. 128-27(l)(2)(a) when she went on disability retirement, and petitioner was not entitled to receive the statutory death benefit where decedent died more than 180 days from the last day she actually worked. **Ibid.**

SEARCHES AND SEIZURES

§ 61 (NCI4th). Consent to search of person

The conclusion of a superior court judge that a defendant in a cocaine possession and trafficking prosecution had consented to a search of his person was erroneous where defendant had consented to a search of his car and was told that he would be frisked. The acquiescence of defendant when the officer told him he would be frisked was not a consent considering all the circumstances. **State v. Pearson,** 272.

§ 80 (NCI4th). Stop and frisk procedures; reasonable suspicion of criminal activity

Officers had reasonable suspicion to make an investigatory stop of defendant based upon his proximity in time and location to the breaking and entering of an automobile and a physical description of the race, gender and clothing of the suspect by two witnesses. **State v. Fletcher,** 292.

§ 81 (NCI4th). Lack of reasonable suspicion for stop and frisk

The circumstances did not justify a nonconsensual search of defendant's person where defendant was stopped for improper driving, he consented to a search of his car, and he was frisked because it was standard procedure to do so when a vehicle was searched. **State v. Pearson,** 272.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 31 (NCI4th). North Carolina Sheriffs' Education and Training Standards Commission

A deputy sheriff's plea of no contest to a class B misdemeanor of obstruction of justice, followed by the trial court's entry of a prayer for judgment continued upon the payment of costs, constituted a "conviction" which permitted revocation of her certification as a justice officer. **Britt v. N.C. Sheriffs' Educ. and Training Stds. Comm'n,** 573.

A deputy sheriff's certification as a justice officer could properly be revoked on the ground that she "has committed" a class B misdemeanor irrespective of whether she was "convicted" when she entered a plea of no contest, followed by the trial court's entry of a prayer for judgment continued, where she does not contest that she in fact committed a class B misdemeanor. **Ibid.**

STATE

§ 24 (NCI4th). Waiver of sovereign immunity

The public duty doctrine applies to actions against state agencies brought under the Tort Claims Act. **Hunt v. N.C. Dept. of Labor,** 192.

§ 27 (NCI4th). Entry into contract as implied consent to suit

The trial court correctly dismissed plaintiff's claims against the State for attorney fees and costs of legal services on the basis of quantum meruit. A contract implied in law will not form a sufficient basis for a court to make a reasonable inference that the State has intended to waive its sovereign immunity. **Whitfield v. Gilchrist,** 39.

TAXATION

TRIAL

UTILITIES

Findings by the Utilities Commission in a natural gas rate case with regard to cost of service for the various classes of customers lacked analysis and were insufficient to enable the appellate court to properly review the ordered rate design. **Ibid.**

§ 198 (NCI4th). Discriminatory rates prohibited; particular customer classifications

A gas company's use of full margin transportation rates was proper as a matter of law where those rates were supported by competent, material and substantial evidence. **State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n,** 452.

§ 232 (NCI4th). Stipulations and agreements; prehearing conference

A stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under Chapter 62 should be accorded full consideration and weighed by the Utilities Commission with all other evidence presented by any of the parties in the proceeding. **State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n,** 452.

Only those stipulations that are entered into by all of the parties before the Utilities Commission may form the basis of informal disposition of a contested proceeding under G.S. 62-69(a). **Ibid.**

The Utilities Commission erred in finding the 11.4% rate of return on common equity specified in a nonunanimous stipulation by a gas company and the public staff in a natural gas rate case where it is clear that the Commission merely adopted the 11.4% rate set forth in the stipulation rather than considering the stipulation as one piece of evidence to be weighed in making an otherwise independent determination as to the appropriate rate of return. **Ibid.**

WILLS

§ 51 (NCI4th). Jurisdiction over caveat proceedings

Plaintiff will beneficiaries' claims challenging on the ground of undue influence decedent's inter vivos transfers of stocks, bonds, and bank accounts to joint ownership with defendant with right of survivorship is not a collateral attack on a codicil that recognized the inter vivos transfers so as to deprive the superior court of jurisdiction, and the plaintiffs were not required to file a caveat in order to attack the inter vivos transfers. **Robinson v. Powell,** 562.

WORKERS' COMPENSATION

§ 220 (NCI4th). Scope of employer's liability for medical compensation generally

The Industrial Commission had subject matter jurisdiction to decide whether an employer who had previously been ordered to pay an injured employee's reasonable and necessary medical expenses was required to pay medical providers the difference between the amount paid by Medicaid and the amount allowable under the Workers' Compensation Act. **Pearson v. C.P. Buckner Steel Erection Co.,** 239.

An employer who denies liability but is ordered to pay an injured employee's reasonable and necessary medical expenses under the workers' compensation law may not fulfill this obligation by merely reimbursing Medicaid where Medicaid has paid medical providers a portion of the cost of treatment, but also must pay medical providers the difference between the amount covered by Medicaid and the full amount authorized under the Industrial Commission fee schedule for medical expenses. **Ibid.**

WORD AND PHRASE INDEX