NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice
HENRY E. FRYE[1]

Associate Justices

SARAH PARKER
I. BEVERLY LAKE, JR.
ROBERT F. ORR
MARK D. MARTIN
GEORGE L. WAINWRIGHT, JR.
FRANKLIN E. FREEMAN, JR.[2]

Former Chief Justices
RHODA B. BILLINGS
JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.

Former Justices

DAVID M. BRITT
ROBERT R. BROWNING
J. PHIL CARLTON
FRANCIS I. PARKER
HARRY C. MARTIN
LOUIS B. MEYER
JOHN WEBB
WILLIS P. WHICHARD
JAMES A. WYNN, JR.

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Librarian
THOMAS P. DAVIS

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H. JAMES HUTCHESON
KIMBERLY WOODELL SIEREDZKI[3]

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1. Appointed Chief Justice by Gov. James B. Hunt, Jr. and sworn in 1 September 1999 to replace Burley B. Mitchell, Jr. who retired 1 September 1999.
2. Appointed by Gov. James B. Hunt, Jr. and sworn in 8 September 1999 to replace Henry E. Frye who became Chief Justice.
3. Appointed by the Supreme Court effective 6 March 2000.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	J. Richard Parker	Manteo
	Jerry R. Tillett	Manteo
2	William C. Griffin, Jr.	Williamston
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.	Greenville
6A	Dwight L. Cranford[1]	Halifax
6B	Cy A. Grant, Sr.	Windsor
7A	Quentin T. Sumner	Rocky Mount
7B	G. K. Butterfield, Jr.	Wilson
7BC	Frank R. Brown	Tarboro
	Second Division	
3B	James E. Ragan III	Oriental
	Benjamin G. Alford	Morehead City
4A	Russell J. Lanier, Jr.	Kenansville
4B	Charles H. Henry	Jacksonville
5	Ernest B. Fullwood	Wilmington
	W. Allen Cobb, Jr.	Wilmington
	Jay D. Hockenbury	Wilmington
8A	Paul L. Jones	Kinston
8B	Arnold O. Jones[2]	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Yanceyville
10	Henry V. Barnette, Jr.	Raleigh
	Donald W. Stephens	Raleigh
	Narley L. Cashwell	Raleigh
	Stafford G. Bullock	Raleigh
	Abraham P. Jones	Raleigh
	Howard E. Manning, Jr.	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	A. Leon Stanback, Jr.	Durham
	Ronald L. Stephens	Durham
	David Q. LaBarre	Durham

DISTRICT	JUDGES	ADDRESS
15A	J. B. Allen, Jr.	Burlington
	James Clifford Spencer, Jr.	Burlington
15B	Wade Barber	Chapel Hill
	Fourth Division	
11A	Wiley F. Bowen	Dunn
11B	Knox V. Jenkins, Jr.	Smithfield
12	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
	Jack A. Thompson	Fayetteville
	James F. Ammons, Jr.	Fayetteville
13	William C. Gore, Jr.	Whiteville
	D. Jack Hooks, Jr.	Whiteville
16A	B. Craig Ellis	Laurinburg
16B	Dexter Brooks	Pembroke
	Robert F. Floyd, Jr.	Lumberton
	Fifth Division	
17A	Melzer A. Morgan, Jr.	Wentworth
	Peter M. McHugh	Reidsville
17B	Clarence W. Carter	King
	A. Moses Massey	Mount Airy
18	W. Douglas Albright	Greensboro
	Thomas W. Ross	Greensboro
	Howard R. Greeson, Jr.	High Point
	Catherine C. Eagles	Greensboro
	Henry E. Frye, Jr.	Greensboro
19B	Russell G. Walker, Jr.	Asheboro
	James M. Webb	Carthage
21	Judson D. DeRamus, Jr.	Winston-Salem
	William H. Freeman	Winston-Salem
	William Z. Wood, Jr.	Winston-Salem
	L. Todd Burke	Winston-Salem
23	Michael E. Helms	North Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	Larry G. Ford	Salisbury
20A	Michael Earle Beale	Wadesboro
20B	William H. Helms	Monroe
	Sanford L. Steelman, Jr.	Weddington
22	C. Preston Cornelius	Mooresville
	Mark E. Klass	Lexington
	Kimberly S. Taylor	Hiddenite

DISTRICT	JUDGES	ADDRESS
	Seventh Division	
25A	CLAUDE S. SITTON	Morganton
	BEVERLY T. BEAL	Lenoir
25B	L. OLIVER NOBLE, JR.	Hickory
	TIMOTHY S. KINCAID	Hickory
26	SHIRLEY L. FULTON	Charlotte
	ROBERT P. JOHNSTON	Charlotte
	MARCUS L. JOHNSON	Charlotte
	RAYMOND A. WARREN	Charlotte
	W. ROBERT BELL	Charlotte
	RICHARD D. BONER	Charlotte
27A	JESSE B. CALDWELL III	Gastonia
	TIMOTHY L. PATTI	Gastonia
27B	FORREST DONALD BRIDGES	Shelby
	JAMES W. MORGAN	Shelby
	Eighth Division	
24	JAMES L. BAKER, JR.	Marshall
28	DENNIS JAY WINNER	Asheville
	RONALD K. PAYNE	Asheville
29	ZORO J. GUICE, JR.	Rutherfordton
	LOTO GREENLEE CAVINESS	Marion
30A	JAMES U. DOWNS	Franklin
30B	JANET MARLENE HYATT	Waynesville

SPECIAL JUDGES

STEVE A. BALOG	Burlington
DAVID H. BEARD[3]	Murfreesboro
JERRY BRASWELL	Goldsboro
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MARVIN K. GRAY	Charlotte
THOMAS D. HAIGWOOD[4]	Greenville
CHARLES C. LAMM, JR.[5]	Boone
OLA M. LEWIS[6]	Southport
BEN F. TENNILLE[7]	Greensboro
CARL L. TILGHMAN	Beaufort
GARY TRAWICK, JR.[8]	Burgaw
JAMES R. VOSBURGH	Washington

EMERGENCY JUDGES

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NAPOLEON BAREFOOT, SR.	Wilmington

DISTRICT	JUDGES	ADDRESS
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	ROBERT M. BURROUGHS	Charlotte
	GILES R. CLARK	Elizabethtown
	JAMES C. DAVIS	Concord
	ROBERT L. FARMER	Raleigh
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	DONALD M. JACOBS	Goldsboro
	ROBERT W. KIRBY	Cherryville
	JAMES E. LANNING	Charlotte
	ROBERT D. LEWIS	Asheville
	JAMES D. LLEWELLYN	Kinston
	JERRY CASH MARTIN	Mt. Airy
	F. FETZER MILLS	Wadesboro
	HERBERT O. PHILLIPS III	Morehead City
	J. MILTON READ, JR.	Durham
	JULIUS ROUSSEAU, JR.	North Wilkesboro
	THOMAS W. SEAY JR.	Spencer

RETIRED/RECALLED JUDGES

HARVEY A. LUPTON	Winston-Salem
LESTER P. MARTIN, JR.	Mocksville
HENRY A. MCKINNON, JR.	Lumberton
D. MARSH MCLELLAND	Burlington
HOLLIS M. OWENS, JR.	Rutherfordton
J. HERBERT SMALL	Elizabeth City
HENRY L. STEVENS III	Warsaw

SPECIAL EMERGENCY JUDGE

DONALD L. SMITH	Raleigh

1. Appointed and sworn in 4 October 2000 to replace Richard B. Allsbrook who retired 1 October 2000.
2. Retired 31 August 2000 and deceased 6 October 2000.
3. Appointed and sworn in 31 May 2000.
4. Appointed to a new position and sworn in 16 April 1999.
5. Reappointed and sworn in 2 October 2000.
6. Appointed to a new position and sworn in 14 July 2000.
7. Reappointed and sworn in 2 October 2000.
8. Reappointed and sworn in 2 October 2000.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	GRAFTON G. BEAMAN (Chief)	Elizabeth City
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	MICHAEL A. PAUL	Washington
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	JOSEPH A. BLICK, JR.	Greenville
	G. GALEN BRADDY	Greenville
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	KENNETH F. CROW	New Bern
	PAUL M. QUINN	New Bern
	KAREN A. ALEXANDER	New Bern
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	PAUL A. HARDISON	Jacksonville
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	LOUIS F. FOY, JR.	Pollocksville
	SARAH COWEN SEATON	Jacksonville
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	J. H. CORPENING II	Wilmington
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	REBECCA W. BLACKMORE	Wilmington
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	DWIGHT L. CRANFORD[2]	Halifax
6B	ALFRED W. KWASIKPUI (Chief)	Jackson
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	JOHN L. WHITLEY	Wilson
	JOHN M. BRITT	Tarboro
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	LONNIE W. CARRAWAY	Goldsboro
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	DANIEL FREDERICK FINCH	Oxford
	J. HENRY BANKS	Henderson
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	MARK E. GALLOWAY	Roxboro
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	C. EDWARD DONALDSON	Fayetteville
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	JOHN W. DICKSON	Fayetteville
	CHERI BEASLEY	Fayetteville
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	MARION R. WARREN[7]	Southport
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	FREDRICK B. WILKINS, JR.	Wentworth
17B	OTIS M. OLIVER (Chief)	Dobson
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	SPENCER GRAY KEY, JR.[8]	Elkin
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	SHERRY FOWLER ALLOWAY	Greensboro
	THOMAS G. FOSTER, JR.	Greensboro
	JOSEPH E. TURNER	Greensboro
	DONALD L. BOONE	High Point
	WENDY M. ENOCHS	Greensboro
	ERNEST RAYMOND ALEXANDER, JR.	Greensboro
	SUSAN ELIZABETH BRAY	Greensboro
	PATRICE A. HINNANT	Greensboro
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	DONNA G. HEDGEPETH JOHNSON	Concord
	MICHAEL KNOX[9]	Concord
	MARTIN B. MCGEE[10]	Concord
19B	WILLIAM M. NEELY (Chief)	Asheboro
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	MICHAEL A. SABISTON	Troy
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	LEE W. GAVIN	Asheboro

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	TED A. BLANTON	Salisbury
	CHARLES E. BROWN	Salisbury
	WILLIAM C. KLUTTZ, JR.	Salisbury
20	TANYA T. WALLACE (Chief)[11]	Rockingham
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	JOSEPH J. WILLIAMS	Monroe
	CHRISTOPHER W. BRAGG	Monroe
	KEVIN M. BRIDGES	Albemarle
	LISA D. THACKER	Wadesboro
	HUNT GWYN[12]	Monroe
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	CHESTER C. DAVIS	Winston-Salem
	RONALD E. SPIVEY	Winston-Salem
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	VICTORIA LANE ROEMER	Winston-Salem
	LAURIE L. HUTCHINS	Winston-Salem
	LISA V. L. MENEFEE	Winston-Salem
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	JIMMY L. MYERS	Mocksville
	JACK E. KLASS	Lexington
	MARTIN J. GOTTHOLM	Statesville
	WAYNE L. MICHAEL	Lexington
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	GEORGE T. FULLER[13]	Mocksville
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	JEANIE R. HOUSTON	Wilkesboro
	MITCHELL L. MCLEAN	Wilkesboro
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	ROBERT M. BRADY	Lenoir
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	DAVID ABERNETHY	Hickory
	L. SUZANNE OWSLEY	Hickory
	C. THOMAS EDWARDS	Morganton
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	RESA L. HARRIS	Charlotte
	H. WILLIAM CONSTANGY	Charlotte

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	DAVID S. CAYER	Charlotte
	C. JEROME LEONARD, JR.	Charlotte
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	RALPH C. GINGLES, JR.	Gastonia
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	K. DEAN BLACK	Lincolnton
	CHARLES A. HORN, SR.[16]	Lincolnton
28	EARL JUSTICE FOWLER, JR. (Chief)	Asheville
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	GARY S. CASH	Asheville
	SHIRLEY H. BROWN	Asheville
	REBECCA B. KNIGHT	Asheville
29	ROBERT S. CILLEY (Chief)	Pisgah Forest
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	MARK E. POWELL	Hendersonville
	DAVID KENNEDY FOX	Hendersonville
	LAURA J. BRIDGES	Hendersonville
	C. RANDY POOL	Marion
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	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City
	RICHLYN D. HOLT	Waynesville
	BRADLEY B. LETTS[17]	Sylva

EMERGENCY JUDGES

ABNER ALEXANDER	Winston-Salem
CLAUDE W. ALLEN, JR.	Oxford
PHILIP W. ALLEN	Reidsville
E. BURT AYCOCK, JR.	Greenville

DISTRICT	JUDGES	ADDRESS
	LOWRY M. BETTS	Pittsboro
	DAPHENE L. CANTRELL	Charlotte
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	J. KEATON FONVIELLE[19]	Shelby
	STEPHEN F. FRANKS	Hendersonville
	GEORGE T. FULLER[20]	Lexington
	ADAM C. GRANT, JR.	Concord
	LAWRENCE HAMMOND, JR.[21]	Asheboro
	ROBERT L. HARRELL	Asheville
	JAMES A. HARRILL, JR.	Winston-Salem
	ROBERT W. JOHNSON	Statesville
	ROBERT K. KEIGER	Winston-Salem
	EDMUND LOWE	High Point
	J. BRUCE MORTON	Greensboro
	DONALD W. OVERBY[22]	Raleigh
	L. W. PAYNE JR.	Raleigh
	STANLEY PEELE	Chapel Hill
	MARGARET L. SHARPE	Winston-Salem

RETIRED/RECALLED JUDGES

ROBERT R. BLACKWELL[23]	Yanceyville
WILLIAM A. CREECH	Raleigh
ROBERT T. GASH	Brevard
WALTER P. HENDERSON	Trenton
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed to a new position and sworn in 25 July 2000.
2. Appointed as Superior Court Judge and sworn in 4 October 2000.
3. Appointed Chief Judge effective 1 August 2000.
4. Appointed and sworn in 10 August 2000 to vacancy left by J. Patrick Exum who retired 31 July 2000.
5. Appointed Chief Judge effective 1 October 2000 to replace William A. Christian who retired and was appointed Emergency Judge 2 October 2000.
6. Appointed to a new position and sworn in 21 July 2000.
7. Appointed and sworn in 17 August 2000 to fill vacancy left by Ola Lewis who was appointed to the Superior Court 14 July 2000.
8. Appointed and sworn in 24 April 2000 to replace Aaron Moses Massey who was sworn in as Superior Court Judge 25 April 2000.
9. Appointed and sworn in 1 September 2000.
10. Appointed and sworn in 6 October 2000 to replace Randall R. Combs who died 30 August 2000.
11. Appointed Chief Judge effective 1 August 2000.
12. Appointed and sworn in 11 August 2000 to fill vacancy left by Ronald W. Burris who retired 31 July 2000.
13. Appointed and sworn in 1 May 2000.
14. Appointed to a new position and sworn in 28 July 2000.
15. Appointed to a new position and sworn in 23 October 2000.
16. Appointed and sworn in 25 April 2000.
17. Appointed to a new position and sworn in 7 August 2000.
18. Appointed and sworn in 28 September 2000.
19. Resigned 26 August 2000.
20. Appointed and sworn in 1 May 2000 filling unexpired term in District 22 until December 2000.
21. Appointed and sworn in 19 May 2000.
22. Appointed and sworn in 11 May 2000.
23. Resigned 1 July 2000.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
MICHAEL F. EASLEY

Deputy Attorney General for Administration
SUSAN W. RABON

Deputy Attorney General for Policy and Planning
HAMPTON DELLINGER, JR.

General Counsel
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KATHLEEN U. BALDWIN
GRADY L. BALENTINE, JR.
JOHN P. BARKLEY
JOHN G. BARNWELL, JR.
VALERIE L. BATEMAN
MARC D. BERNSTEIN
WILLIAM H. BORDEN
HAROLD D. BOWMAN
RICHARD H. BRADFORD
LISA K. BRADLEY
HILDA BURNETT-BAKER
GWENDOLYN W. BURRELL
MARY D. CARRAWAY
MARY ANGELA CHAMBERS
LUCY CHAVIS
LEONIDAS CHESTNUT
LAUREN M. CLEMMONS
LISA G. CORBETT
ALLISON S. CORUM
ROBERT A. CRABILL
LAURA E. CRUMPLER
WILLIAM B. CRUMPLER
JOAN M. CUNNINGHAM
ROBERT M. CURRAN

NEIL C. DALTON
CLARENCE J. DELFORGE III
KIMBERLY W. DUFFLEY
BRENDA EADDY
JEFFREY R. EDWARDS
DAVID L. ELLIOTT
DONALD R. ESPOSITO, JR.
CHRISTINE A. EVANS
JUNE S. FERRELL
BERTHA L. FIELDS
LISA B. FINKELSTEIN
WILLIAM W. FINLATOR, JR.
MARGARET A. FORCE
VIRGINIA L. FULLER
EDWIN L. GAVIN II
ROBERT R. GELBLUM
STEPHEN T. GHEEN
JANE A. GILCHRIST
MICHAEL DAVID GORDON
ANGEL E. GRAY
LEONARD G. GREEN
PATRICIA BLY HALL
DOUGLAS W. HANNA
JANE T. HAUTIN
E. BURKE HAYWOOD
DAVID G. HEETER
JOSEPH E. HERRIN
JILL B. HICKEY
CLINTON C. HICKS
JAMES D. HILL
KAY L. MILLER HOBART
CHARLES H. HOBGOOD
DAVID F. HOKE
JAMES C. HOLLOWAY
GEORGE K. HURST
DANIEL S. JOHNSON
STEWART L. JOHNSON
LINDA J. KIMBELL
ANNE E. KIRBY
DAVID N. KIRKMAN
BRENT D. KIZIAH
TINA KRASNER
AMY C. KUNSTLING
FREDERICK L. LAMAR
KRISTINE L. LANNING
SARAH LANNOM
CELIA G. LATA
DONALD W. LATON
THOMAS O. LAWTON III
PHILIP A. LEHMAN
ANITA LEVEAUX-QUIGLESS
FLOYD M. LEWIS
SUE Y. LITTLE
KAREN E. LONG
JAMES P. LONGEST
SUSAN R. LUNDBERG
JOHN F. MADDREY
JENNIE W. MAU
WILLIAM MCBLIFF
J. BRUCE MCKINNEY
MICHELLE B. MCPHERSON
SARAH Y. MEACHAM
THOMAS G. MEACHAM, JR.
MARY S. MERCER
STACI T. MEYER
ANNE M. MIDDLETON
DIANE G. MILLER
EMERY E. MILLIKEN
DAVID R. MINGES
ROBERT C. MONTGOMERY
THOMAS H. MOORE
DENNIS P. MYERS
DEBORAH L. NEWTON
DANIEL O'BRIEN
JANE L. OLIVER
JAY L. OSBORNE
ROBERTA OUELLETTE
ELIZABETH L. OXLEY
SONDRA PANICO
ELIZABETH F. PARSONS
JEFFREY B. PARSONS
SHARON PATRICK-WILSON
CHERYL A. PERRY
ELIZABETH C. PETERSON
ADRIAN A. PHILLIPS
THOMAS J. PITMAN
MARK J. PLETZKE
DIANE M. POMPER
CHARLES R. POOLE
DOROTHY A. POWERS
NEWTON G. PRITCHETT, JR.
ROBERT K. RANDLEMAN
DIANE A. REEVES
RUDOLPH E. RENFER
GERALD K. ROBBINS
JOYCE S. RUTLEDGE
CHRISTINE M. RYAN
JOHN P. SCHERER III
BRIAN J. SCHOOLMAN
NANCY E. SCOTT
BARBARA A. SHAW
BUREN R. SHIELDS III
CHRIS Z. SINHA
T. BROOKS SKINNER, JR.
RICHARD E. SLIPSKY
BELINDA A. SMITH
DONNA D. SMITH
JANETTE M. SOLES
RICHARD G. SOWERBY, JR.
D. DAVID STEINBOCK, JR.
DIANE W. STEVENS
LASHAWN L. STRANGE
ELIZABETH N. STRICKLAND
KIP D. STURGIS
JOHN C. SULLIVAN
SUEANNA P. SUMPTER
GWYNN T. SWINSON
MELISSA H. TAYLOR
SYLVIA H. THIBAUT
KATHRYN J. THOMAS
JANE R. THOMPSON
JUDITH L. TILLMAN
MELISSA L. TRIPPE
RICHARD JAMES VOTTA
J. CHARLES WALDRUP
SHARON WALLACE-SMITH
MICHAEL L. WARREN
KATHLEEN M. WAYLETT
GAINES M. WEAVER
MARGARET L. WEAVER
ELIZABETH J. WEESE
TERESA L. WHITE
CLAUD R. WHITENER III
THEODORE R. WILLIAMS
MARY D. WINSTEAD
DONNA B. WOJCIK
THOMAS B. WOOD
CATHERINE WOODARD
MCKINLEY WOOTEN, JR.
HARRIET F. WORLEY
AMY L. YONOWITZ
CLAUDE N. YOUNG, JR.
REUBEN F. YOUNG, JR.

DISTRICT ATTORNEYS

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

PUBLIC DEFENDERS

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

ORDER

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

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

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

PETITIONS TO REHEAR

GENERAL STATUTES CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

CONSTITUTION OF THE UNITED STATE CITED

RULES OF APPELLATE PROCEDURE CITED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners as of the 25h day of February 2000 and said persons have been issued a certificate of this Board:

Kurt Douglas Weaver ..... Applied from the State of New York
David Bert Zoffer ..... Applied from the State of New York
Linda Jenkins Thomason ..... Applied from the State of Virginia
Mark Ellis Henderson ..... Applied from the State of Texas
Kenneth Miles Johnson ..... Applied from the District of Columbia
Stanislav Antolin ..... Applied from the State of Pennsylvania
Angeleigh Elliott Dorsey ..... Applied from the State of Indiana
Vincent F. Bick, Jr. ..... Applied from the State of New York
Rose Lee Bailey ..... Applied from the State of Texas
Karen Lundy Douglas ..... Applied from the State of Illinois
Alison Y. Ashe-Card ..... Applied from the State of Illinois
Matthew Joseph Holden ..... Applied from the State of Pennsylvania
Sarah E. Powell ..... Applied from the State of Virginia
Edgar Sidney Levy III ..... Applied from the District of Columbia
Jennifer R. Gray ..... Applied from the State of Texas
Mark Kevin Seifert ..... Applied from the District of Columbia
James Allen Hoffman ..... Applied from the District of Columbia
Christopher John Tucci ..... Applied from the State of Ohio
Melissa Walker Robinson ..... Applied from the State of Virginia
Cynthia Bibb Pectol ..... Applied from the State of Kentucky
Pamela I. Gordon ..... Applied from the State of Virginia
Gunther Lahm ..... Applied from the State of Ohio
Benard Elliot Grysen ..... Applied from the State of Michigan
David John Adinolfi II ..... Applied from the State of New York
Robert W. Wilson ..... Applied from the State of Illinois
Scott Summy ..... Applied from the State of Texas
Nicholas Dmytro Krawec ..... Applied from the State of Pennsylvania
Gregory Alan Newman ..... Applied from the State of Tennessee

Given over my hand and seal of the Board of Law Examiners this the 1st day of March, 2000.

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 18th day of March, 2000 and said persons have been issued a license certificate.

FEBRUARY 2000 NORTH CAROLINA BAR EXAMINATION

Sonya Maria Allen ..... Cary
Nicholle Elizabeth Allen ..... Fuquay-Varina
Kelly Kathlyn Andres ..... San Diego, California
Richard S. Arfa ..... Cayucos, California

Brad Allen Bailey ..... Charlotte
Jennifer Schiller Boynton ..... Winston-Salem
Tanisha Lyon Brown ..... Raleigh
Sarah Elizabeth Buffett ..... Charlotte
Garland Franklin Byers, Jr. ..... Forest City
Stephen R. Calkins ..... Charlotte
William Seth Campbell ..... Elizabethtown
Elizabeth Cushing Chew ..... Beacon Falls, Connecticut
Leonor Ortiz Childers ..... Durham
Richard P. Church ..... Durham
David J. Clark ..... Charlotte
Mihea Clark ..... Clayton
Jerry W. Clark ..... Wake Forest
Edwin Duane Clontz ..... Candler
Ashley Kinchen Cobb ..... Greensboro
Kayce Rena Cole ..... Denver
Timothy Christopher Cole ..... Chapel Hill
Charles Daniel Collins ..... Raleigh
Andrew Abram Cross ..... Valencia, California
James Calvin Cunningham III ..... Lexington
Owen Joseph Curley ..... Annapolis, Maryland
Brian C. Daniels ..... Rocky Mount
Walter Edmund Daniels III ..... Asheville
Frederick Martin Davis ..... Raleigh
Adrian Jaye Davis ..... Raleigh
John Kenny Deaton ..... Star
Sean Gilligan Delaney ..... Raleigh
Lisa Michelle Drabik ..... Statesville
Dennis Michael Duffy ..... Raleigh
Catherine M. Dziuba ..... Boone
Mary Jane Eisenbeis ..... Elizabeth City
William Steadfast Farnsworth Freeman ..... Greenville, South Carolina
David J. Ferris, Jr. ..... Raleigh
Robin L. Frankenberry ..... Hillsborough
Katherine Freeman ..... Charlotte
Scarlette Kaye Gardner ..... Raleigh
Tilman Thomas Gates ..... Charlotte
Kimberly Bullock Gatling ..... Jamestown
Rebecca A. Gegick ..... Greensboro
Kelly Thigpen Goodrich ..... Raleigh
Brian Edwardo Guy ..... Greensboro
Lisa Rene Hajjar ..... Shorewood, Minnesota
John Ronald Halada ..... Cary
LeRonda Michelle Hall ..... Charlotte
Austine M. Long Hamilton ..... Durham
Brian David Hannahs ..... Concord
Carolyn Kirby Happer ..... Durham
John Martin Hicks Hart, Jr. ..... Salisbury
John David Hauser ..... Cary
Anne Margaret Hayes ..... Cary
Andrew Neal Heathcoat ..... Cary

Christopher A. Helmer ..... Columbus, Ohio
Robert Edward Hensley, Jr. ..... Waynesville
Denelle Louise Hicks ..... Raleigh
William Latham Hirata ..... Davidson
Daniel Stuart Hirschman ..... Durham
Leanor Deborah Bailey Hodge ..... Raleigh
Levette Howell Hopkins ..... Raleigh
Richard Allan Horgan ..... Wilmington
Stephen Francis Horne III ..... Greenville
Rebecca Joan Horton ..... Rock Hill, South Carolina
Alicia Stacey Hunter ..... Durham
Charles Joseph Hutson ..... Chapel Hill
Christina Maria Jacuzzo ..... Charlotte
Seth Hillel Jaffe ..... Cary
Stephanie E. Jamieson ..... Charlotte
Gabriel F. Jimenez ..... Raleigh
Julius Johnston IV ..... Raleigh
Christopher W. Jones ..... Apex
Tina Cutlip Jones ..... Apex
Inna Kaspler ..... Raleigh
Tolly Albert Kennon III ..... Miami, Florida
Carl Lewis King ..... Charlotte
Kjersten Walker Klassen ..... Durham
Jason Andrew Knight ..... Greensboro
John D. Kocher ..... Charlotte
Kathleen H. Kowal ..... Wrightsville Beach
Samuel Christopher LaVergne ..... Charlotte
Thomas Byron Langan ..... Winston-Salem
Jane Rebecca Langdell ..... Raleigh
Robert Andreas Larsen ..... Chapel Hill
Christopher Todd Lashley ..... Rocky Mount
Rene Jean LeBlanc-Allman ..... Charlotte
Dr. Jerry D. Leonard ..... Winston-Salem
Angela Lea Little ..... Greensboro
Christopher W. Livingston ..... North Miami, Florida
Kelly Ann Loeblein ..... Charlotte
Kelly A. Luongo ..... Charlotte
Kelli Gregg Maddox ..... Columbia, South Carolina
Christine Anne Marshall ..... Carrboro
Lance Paul Martin ..... Ayden
Melissa Lynn McAleer ..... Charlotte
Elizabeth Lindsay McCoy ..... Raleigh
Gregg E. McDougal ..... Raleigh
John Charles McNeill ..... Raleigh
Nikole Setzler Mergo ..... West Columbia, South Carolina
Janiere Elizabeth Monroe ..... Charlotte
Michael A. Muskus ..... Greensboro
Natarsha Denise Nesbitt ..... Hollywood, South Carolina
Geri R. Nettles ..... Hillsborough
Meredith Sien Nicholson ..... Chapel Hill
Brian James Odom ..... Charlotte

Robert Owusu-Ansah ..... Carrboro
Richard Allen Paschal ..... Washington, District of Columbia
Sanjay Shikant Patel ..... Charlotte
yh Patt ..... Raleigh
Wendell A. Peete, Jr. ..... Raleigh
Jessica Kirsten Peterson ..... Charlotte
Charles Grainger Pierce, Jr. ..... Chapel Hill
Allison Ann Pluchos ..... Kernersville
Kathleen Ortlip Stockin Prevost ..... Monroe
Keri C. Prince ..... Durham
Kristen Elizabeth Puccini ..... Charlotte
Rick S. Queen ..... Asheville
Banumathi Rangarajan ..... Raleigh
Samuel Timothy Reaves ..... Charlotte
Jennifer Fields Reaves ..... Charlotte
William Kennon Reed ..... Arden
Leighton Parks Roper III ..... Raleigh
Theresa Joan Rosenberg ..... Raleigh
Tonza Demetria Ruffin ..... Windsor
Allan C. J. Russ ..... Chapel Hill
Sarah Elizabeth Salton ..... Charlotte
Robert Philip Santandrea ..... Greensboro
Laura Leipold Schaftner ..... Clover, South Carolina
Paul Ryan Schell ..... Charlotte
Eugenia Walker Scheurer ..... Charlotte
Patrick Joseph Schuette ..... Raleigh
Adam Micah Seifer ..... Charlotte
Jesse Sayre Shapiro ..... Cary
Barry Kurt Shuster ..... Cary
Holly Leigh Simmons ..... Elizabethtown
Nicholas Charles Perry Sisk ..... Fayetteville
Barbara R. Smith ..... Fuquay-Varina
Chet Aaron Smith ..... Raleigh
Shannon Hedrick Smith ..... Raleigh
Charles Woodrow Smith III ..... Wilmington
Samantha Gray Steffen ..... Martinez, Georgia
Samuel A. Sue III ..... Coronado, California
Sofia Taj ..... Durham
Scott Alan Thomas ..... Knoxville, Tennessee
Robert Christopher Townley ..... Fayetteville
Scott Brian Townsend ..... Charlotte
Ronald Tucceri ..... Butner
Emily Beth Uhler ..... Charlotte
Leigh Puryear Vancil ..... Chapel Hill
Anna Gregory Wagoner ..... Greensboro
Susan Elizabeth Waller ..... Wilmington
Laurie Ann Walsh ..... Charlotte
Bambi Faivre Walters ..... Kernersville
Sammy Davis Webb ..... Scotland Neck
Jeffrey B. Welty ..... Efland
Matthew Robert Whitler ..... Salisbury

Robert Maynard Wilkins ..... Key West, Florida
Algernon Williams ..... Charlotte
Amanda M. Willis ..... Greensboro
Frank C. Wilson III ..... Selma, Alabama
Danae Christina Woodward ..... Charlotte
Melanie Jeannette Wright ..... Charlotte
Terre Thomas Yde ..... Clemmons
Pedro Juan Zabala II ..... Durham

Given over my hand and seal of the Board of Law Examiners this the 28th day of March, 2000.

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 7th day of April, 2000 and said persons have been issued a license certificate.

JULY 1999 NORTH CAROLINA BAR EXAMINATION

Jon Cary Findlay, Jr. ..... Washington, District of Columbia
Heather K. Huff ..... Bahama
Daniel Ray Rua ..... Reston, Virginia

FEBRUARY 2000 NORTH CAROLINA BAR EXAMINATION

Ansley M. Adamy ..... Charlotte
Richard A. Adamy, Jr. ..... Charlotte
James Edwin Akers ..... Charlotte
Marna Michele Albanese ..... San Diego, California
Brian Henry Alligood ..... Greensboro
Heather M. Beach ..... Raleigh
Tiffany Erin-Lorry Bryan ..... Chapel Hill
Marvin Seay Cash, IV ..... Charlotte
Sheila Wohl Chandonnet ..... Charlotte
Paul H. Derrick ..... Greer, South Carolina
Michael A. Durr ..... Matthews
Laura Eckert ..... Greensboro
James Craig Edwards ..... Matthews
Brian D. Edwards ..... Charlotte
Neal I. Fowler ..... Apex
Bernard J. Gallagher ..... Charlotte
William Michael Gatesman ..... Silver Spring, Maryland
Eric D. Gazin ..... Charlotte
Joel Flesher Geer ..... Smyrna, Georgia
Alton Clayton Hale, Jr. ..... Port St. Lucie, Florida
Erica Renee Johnson ..... Durham
Antone Pereira Manha, Jr. ..... Charlotte
Larry Thomas McLean, Jr. ..... Charlotte

Jonathan Adam Mickle ..... Charlotte
Leigh Anne Pollard Miller ..... Lewisville
Jared Daniel Mobley ..... Charlotte
Lucky Theophilus Osho ..... Charlotte
Jane Luckey Parker ..... Newton Grove
Carmen Perez-Llorca ..... Charlotte
David Eric Peterson ..... Asheville
Kevin Edson Pethick ..... Raleigh
Susan Raphaela Russo ..... Pisgah Forest
Jocelyn Davis Singletary ..... Cornelius
Jeffrey Thomas Skinner ..... Durham
R. Yvette Stackhouse ..... Winston-Salem
Jodi Weiss ..... Fayetteville
Thomas Powell Whitaker, Jr. ..... Bradenton, Florida
Pamela Suzanne Wilcox ..... Raleigh
James D. Wright ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 7th day of April, 2000.

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 7th day of April, 2000 and said person has been issued a license certificate.

FEBRUARY 2000 NORTH CAROLINA BAR EXAMINATION

Scott A. MacGregor ..... Raleigh

Given over my hand and seal of the Board of Law Examiners this the 17th day of April, 2000.

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 14th day of April, 2000 and said persons have been issued a license certificate.

FEBRUARY 2000 NORTH CAROLINA BAR EXAMINATION

Patrick Downs ..... Greensboro
Mary Dianne Hulett ..... Pittsboro
John Robert Peace ..... Easley, South Carolina

Given over my hand and seal of the Board of Law Examiners this the 17th day of April, 2000.

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 as of the 14th day of April, 2000 and said persons have been issued a license certificate.

COMITY APPLICANTS

Lynn Ellen Coleman . . . . . .Applied from the State of Texas
Eric John Emerson . . . . . .Applied from the State of Illinois

Given over my hand and seal of the Board of Law Examiners this the 17th day of April, 2000.

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 as of the 23rd day of June, 2000 and said person has been issued a license certificate.

Scott Ralph Taylor . . . . . .Applied from the State of Oklahoma

Given over my hand and seal of the Board of Law Examiners this the 26th day of June, 2000.

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 as of the 23rd day of June, 2000 and said persons have been issued a license certificate.

Tamara Paragino Williams Desai . . . . . .Applied from the State of Pennsylvania
Richard Ennis Biemiller . . . . . .Applied from the State of Virginia
Teresa Darlene Daniel . . . . . .Applied from the State of West Virginia
Steven Woth Morris . . . . . .Applied from the State of Virginia
John A. Wasleff . . . . . .Applied from the District of Columbia
Applied from the State of Ohio

Given over my hand and seal of the Board of Law Examiners this the 29th day of June, 2000.

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 as of the 24th day of July, 2000 and said person has been issued a license certificate.

Thomas Edward Taylor ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 24th day of July, 2000.

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 as of the 28th day of July, 2000 and said persons have been issued a license certificate.

Cary Michael Grant ..... Applied from the State of Pennsylvania
Kevin Afton Sembrat ..... Applied from the State of Pennsylvania
Raymond Charles Ruppert ..... Applied from the State of Oklahoma
Theodore Franklin Claypoole ..... Applied from the State of Ohio
Eugenia Sykes Schwartz ..... Applied from the State of Indiana
Stephen Andrew Hellrung ..... Applied from the State of Missouri
Philip Christian Scheurer ..... Applied from the District of Columbia
Marie Duesing Lang ..... Applied from the State of Virginia
Warren Eugene Crabill ..... Applied from the State of Illinois
Mary Jane Crabill ..... Applied from the State of Illinois
Carol Ruth Bouchner ..... Applied from the State of New York
John Albert Doyle, Jr. ..... Applied from the State of Nebraska
Darryl R. Marsch ..... Applied from the District of Columbia
Robert Hench Hammer III ..... Applied from the State of Pennsylvania
Cynthia S. Grady ..... Applied from the State of Texas
Michael Cesar Guanzon ..... Applied from the State of Virginia
Christian Andre-Albert Klein ..... Applied from the State of Virginia
Eugene Parrs ..... Applied from the State of New York
David Rober Krosner ..... Applied from the State of Wisconsin

Given over my hand and seal of the Board of Law Examiners this the 7th day of August, 2000.

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 18th day of August, 2000 and said persons have been issued a license certificate.

JULY 2000 NORTH CAROLINA BAR EXAMINATION

Michael J. Abbass ..... Carthage, New York
Valeree Renee Adams ..... Hickory
Frederick Bertrand Adams II ..... Winston-Salem
John Brantley Adcock ..... Holly Springs
John Waverly Akins ..... Fuquay-Varina
Christopher Jay Albee ..... Mebane
David Benjamin Alexander ..... Durham
Zeba Tahmeen Ali ..... Marion
Robert Christopher Amrine ..... Morrisville
Kevin Paul Anderson ..... Durham
Steven Douglas Anderson ..... Charlotte
William Albert Anderson III ..... Durham
Demitrius McKaye Anthony ..... Ahoskie
Elizabeth Kizer Arias ..... Greensboro
Craig Owen Asbill ..... Asheboro
Joanne E. Ashley ..... Chapel Hill
Anna Johnson Averitt ..... Raleigh
Martha Hillary Bailey ..... Raleigh
James Herman Baker ..... Fayetteville
Jeffrey Michael Baker ..... Wrightsville Beach
Brian Todd Baker ..... Winston-Salem
Susan M. Ballantine ..... Charlotte
Katherine Barber ..... Greensboro
Lisa Kaminski Bartle ..... Greensboro
Debra Elizabeth Batten ..... Charlottte
Tyler Baucom ..... Wilmington
David B. Bayard ..... Raleigh
Gloria Taft Becker ..... Raleigh
Julia B. Beddingfield ..... Raleigh
Jessica Irene Benjamin ..... Durham
Tiffany Kay Bennett ..... Winston-Salem
Douglas W. Benson ..... Charlotte
P. Kevin Berger ..... Eden
Andrew Nicholas Bernardini ..... Charlotte
Emly Barnett Berndt ..... Oxford
Joseph Edward Betts ..... Monroe
Michael Eric Bienvenu ..... Cary

James H. Bingham, Jr. ..... Lexington
Anthony David Blankenship ..... Buies Creek
Kevin Christopher Boland ..... Durham
Zachary Clayton Bolen ..... Raleigh
James Merrick Borden ..... Winston-Salem
Nicole Elaine Bourget ..... Charlottte
William Flint Boyer ..... Chapel Hill
Jennifer Elizabeth Braccia ..... Charlotte
G. Carol Brani ..... Winston-Salem
Jonathan David Breeden ..... Laurinburg
Laurie Jennifer Bremer ..... Goldsboro
Heather Elizabeth Bridgers ..... Raleigh
John G. Briggs III ..... Durham
John Decker Bristow ..... Raleigh
Stuart Alan Brock ..... Winston-Salem
Carol L. Brooke ..... Carrboro
Jeanette Doran Brooks ..... Raleigh
Nicole Dione Brovet ..... Ann Arbor, Michigan
Darrell Keith Brown ..... Goldsboro
Jason M. Bruno ..... Southern Pines
Valderia DeCarole Brunson ..... Durham
Gregory A. Bullard ..... Rowland
David Scott Burkholder ..... Charlotte
April Michele Burt ..... Chandler
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Dara Lynn Cacciamani ..... Durham
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Clyde Alexander Cheek III ..... Chapel Hill
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Charles Hendrix Christopher, Jr. ..... Willow Springs
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Richard Croutharmel ..... Apex
Matthew Sean Cunningham ..... Raleigh
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William Stephen Dale, Jr. ..... Lenoir
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Erin Elisabeth Dancy ..... Raleigh
Warren Todd Daniel ..... Morganton
Matthew James Davenport ..... Raleigh
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Drew Henderson Davis ..... Winston-Salem
Elizabeth Joy Davis ..... Buies Creek
Vance Tate Davis ..... Winston-Salem
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Charlotte Anne Denton ..... Wilmington
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LaMonica Dalton Dewey ..... Cary
Linda Michelle Dhunjishah ..... Orange, California
Bryant Kyle Dickerson ..... Greensboro
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Kirsten Lee Dunton ..... Winston-Salem
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James William Dymond ..... Chapel Hill
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Margaret Phillips Eagles ..... Raleigh
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Scott Michael Eden ..... Chapel Hill
Jarvis John Edgerton, IV ..... Raleigh
Brian Scott Edlin ..... Raleigh
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Brian Donald Gulden ..... Hendersonville
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Tia Gayle Hartley ..... Matthews
Mark Spence Hartman ..... Greensboro
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Charlena Alise Harvell ..... Charlotte
Douglas Clemente Hatch ..... Boone
Rebecca Jeannette Hatcher ..... Raleigh
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Matthew Bryan Hawkins ..... Durham
Parrish Kathryn Hayes ..... Dunn
Keenan Headen ..... Durham
Sarah Llewellyn Heekin ..... Goldsboro

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Shannon Paige Herndon ..... Durham
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Gregory Todd Higgins ..... Greensboro
Rebecca High ..... *Chapel Hill*
Ralph McCoy Hill, Jr. ..... Hillsborough
Howard Clay Hodges, Jr. ..... Raleigh
Howard Grayman Hodges, Jr. ..... Wrightsville Beach
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James Brandon Holder ..... Winston-Salem
David Eric Holm ..... Winston-Salem
Scott Thomas Horn ..... *East Bend*
Elizabeth Ann Ising ..... Arlington, Virginia
Donna Jones Jackson ..... Charlotte
Marcus Aurelius Jackson ..... Durham
Curtisia Renee Jarrett ..... *Charlotte*
Vickie York Jenkins ..... Stony Point
Trent Eugene Jernigan ..... Winston-Salem
Daniel Stuart Johnson ..... North Wilkesboro
Amy Elizabeth Blackmon Johnson ..... *Fuquay-Varina*
Mitchell Paul Johnson ..... Statesville
Tammy Kay Johnson ..... Fuquay-Varina
Timothy William Jones ..... Mt. Pleasant
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Melissa Elaine Little ..... Raleigh
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Sean Kent Lloyd ..... Wendell
Christopher James Locascio ..... North Brunswick, New Jersey
Marco Patrick Locco, Jr. ..... Wilmington
Nicole Sabourin Loeffler ..... Apex
Brett Alan Loftis ..... Seneca, South Carolina
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Jennifer Siobhan Lue ..... Charlotte
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G. Steven Clay McRae ..... Winston-Salem
Tonia Elizabeth Medrick ..... Surfside Beach, South Carolina
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John Kenneth Moser ..... Winston-Salem
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Luis John Olivera ..... Fayetteville
Stephanie Osborne-Rodgers ..... Greensboro
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Edgar Moore Page ..... Durham
Glenn Ronald Page ..... Fuquay-Varina
James Derek Page ..... Buies Creek
Stephen James Paluch ..... Massillon, Ohio
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Leanora Gamble Timberlake Parks ..... Charlotte
John Alfred Parris ..... Raleigh
Elizabeth Pasquine ..... Charlotte
Louis Patalano, IV ..... Cary
Jennifer McKay Patterson ..... Charlotte
Shelley Ryan Pearce ..... Lenoir
Stuart J. Pearson ..... Charlotte
Melanie Gleiman Phelps ..... Holly Springs
Amy Elaine Pickle ..... Durham
Caroline Collins Pickup ..... Greensboro
Richard Clay Plunkett ..... Burlington
Donald Richard Pocock ..... Asheville
William Misenheimer Polk ..... Durham
Craig H. Popalis ..... High Point
Sandra Teresa McGarity Postell ..... Carrboro
Saroya L. Powell ..... Durham
Jennifer L. Price ..... Charlotte
Cindi Marie Quay ..... Wilmington
Nina Francesca Raba ..... Chapel Hill
Susan Jennifer Rader ..... Raleigh
Carl Jason Ralston ..... Statesville
Georgianna Rasmussen ..... Wake Forest
Shelley Suzanne Read ..... Raleigh
Oliver Middleton Read, IV ..... Winston-Salem
Kerry Elisabeth Reichs ..... Charlotte
Allen F. Reid II ..... Charlottesville, Virginia
Lisa Anne Wagner Reynolds ..... Durham
Matthew Duvall Rhoad ..... Raleigh
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Elizabeth Cheek Rives ..... Chapel Hill
Julie Ann Roan ..... Charlotte
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Keisha Nicole Roberson ..... Durham
Paul Allen Roberts ..... Cary
William Christopher Roberts ..... Greenville

Regina Shae Roberts ..... Raeford
Edward Bryant Kemp Roberts III ..... Raleigh
Andrew Jonathan Rogers ..... Winston-Salem
Kimberly Elisabeth Rollins ..... Raleigh
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Diane Harris Rupprecht ..... Durham
Lianna Louise Saleeby ..... Raleigh
Ross Edwin Sallade ..... Newport News, Virginia
Logan Everett Sawyer III ..... Chapel Hill
Lucian Paul Sbarra ..... Winston-Salem
John Paul Schifano ..... Holly Springs
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Thomas Hamilton Segars ..... Hartwell, Georgia
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Tara Weiscarger Seidel ..... Morrisville
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Jocelyn Heather Shoemaker ..... Athens, Georgia
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Dana Edward Simpson ..... Asheboro
George L. Simpson, IV ..... Raleigh
Chadwick D. Smith ..... Durham
Jeffrey Morgan Smith ..... Cary
David D. Smyth ..... Chapel Hill
Laura Millicent Snead ..... Greensboro
Ketan P. Soni ..... Charlotte
Theresa Lillian Spawn ..... Jacksonville
Andrew Tyler Spence ..... Charlotte
Elizabeth Ann Stanek ..... Cary
Rachel Victoria Steinwender ..... Durham
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Teresa D. Stewart ..... Winston-Salem
Matthew Alan Stockdale ..... Mocksville
Phillip John Strach ..... Angier
Kristina Allen Street ..... Johnson City, Tennessee
Thomas Barrett Street ..... Pinehurst
Meredith Regan Summerlin ..... Raleigh
Watsi Mateenya Sutton ..... Durham
James E. Tanner III ..... Carrboro
Dahr Joseph Tanoury ..... Raleigh
Luvi Taroc-Valino ..... Raleigh
Angel Lavette Taylor ..... Durham
Daniel Lee Tedrick ..... Charlotte
Jolie Amie Tenholder ..... Charlotte

James Richard Theuer ..... Winston-Salem
Robert Nelson Thigpen ..... Buies Creek
Charles Allen Thomas ..... Wilson
Nancy Payne Thomas ..... Greensboro
Pamela Murrell Thombs ..... Winston-Salem
Brian J. Thompson ..... Greensboro
Edward L. Timberlake, Jr. ..... Winston-Salem
Ashley Davidson Tison ..... Chapel Hill
William Taylor Tricomi ..... Charlotte
Brendon Keir Tukey ..... Carrboro
Joseph Peyton Tunstall III ..... Washington
Frances P. Turner ..... Chapel Hill
Jason Nolan Tuttle ..... Raleigh
Melanie Samson Tuttle ..... Greensboro
Stephen J. Tytran ..... Raleigh
Shiva Vafai ..... West Columbia, South Carolina
Bradley T. Van Hoy ..... Huntersville
Shannon Leigh Vandiver ..... Huntersville
Angela Darlene Vandivier ..... Emerald Isle
Lisa Khim Vira ..... Chapel Hill
Charles Malcolm Viser ..... Charlotte
David Eric Wagner ..... Cary
Wendy Sue Walker ..... Reidsville
Steven Williams Walker ..... Charlotte
Thomas Sterling Wall ..... Cheltenham, Maryland
LaVenettra Ultreese Walls ..... Durham
Karen Ann Wandel ..... Cornelius
Cameron Todd Ware ..... Chapel Hill
Ahmad Shariyf Washington ..... Chapel Hill
Joann Akiko Waters ..... Greensboro
Anita Stephenson Watkins ..... Raleigh
Rush P. Watson ..... Charlotte
Wendy Michelle Watts ..... Carthage
Randi Beth Weiss ..... Lewisville
Amy Renee Welch ..... Durham
Christopher James Welch ..... Winston-Salem
Don R. Wells ..... Clayton
Christopher Mitchell West ..... Raleigh
William Ray West, Jr. ..... Fayetteville
Travis Nathanael Wheeler ..... Smithfield
Antoan Makoni Whidbee ..... Elizabeth City
James Russell White ..... Seaboard
N. Morgan Whitney, Jr. ..... Graham
Jerry Lynn Wilkins, Jr. ..... Wilmington
Christopher Michael Willett ..... Carrboro
Candice Elaine Williams ..... Charlotte
Kathryn A. Williams ..... Raleigh
Stephen M. Williams ..... Raleigh
Todd McKinnon Williams ..... Boone
Brandi M. Williamson ..... Washington, District of Columbia
Dannielle Denise Williard ..... Winston-Salem

Jason Robert Wilson ..... Chapel Hill
Wendy Pitcher Wilson ..... Wake Forest
Amanda Lynn Wilson ..... Rockingham
Elizabeth J. Wolfenden ..... Chapel Hill
Jason Staff Wood ..... Raleigh
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David Neal Woods ..... Lenoir
Thomas M. Woodward ..... Charleston, West Virginia
Patrick Sloan Wooten ..... Durham
Benjamin Lockwood Worley ..... Raleigh
James Crymes Wrenn, Jr. ..... Oxford
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Guilford Mattern York ..... Raleigh
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Michael David Youth ..... East Patchogue, New York
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Eddyth Maurleen Worley Zuniga ..... Goldsboro

Given over my hand and seal of the Board of Law Examiners this the 29th day of August, 2000.

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 8th day of September, 2000 and said persons have been issued a license certificate.

FEBRUARY 2000 NORTH CAROLINA BAR EXAMINATION

Linda Elise Capobianco ..... Jensen Beach, Florida
Robert Lee Carson III ..... Studio City, California
Lorraine Wilson Greaves ..... River Ridge, Louisiana
Heather R. Kushner ..... Charlotte
Laurie Faith Lassiter ..... Asheville
Nana A. Mah'moud ..... Columbia, South Carolina
Susan Oh ..... Holly Springs
Mark David Pflug ..... Charlotte
Sammi Lynnette Renken ..... Winston-Salem
Julia Baughman Vining ..... Apex

JULY 2000 NORTH CAROLINA BAR EXAMINATION

Steven Maynard Adams ..... Chapel Hill
Curtis Hudson Allen III ..... Garner
Amy Elizabeth Bonifield ..... Durham
Gary Thomas Bruce ..... Asheville

Michael Ralph Casey ..... Estes Park, Colorado
Nanette Rae Williams Crews ..... Rocky Mount
Michael T. Cronin ..... Charlotte
Catharine Wildenthal Cummer ..... Chapel Hill
Beverly Rae Dart ..... Chapel Hill
Joel W. Davis ..... Randleman
William S. Dove ..... Charlotte
Sharon S. Dove ..... Charlotte
Donna Welch Edwards ..... Charlotte
Michael C. Eubanks ..... Brevard
Kevin Berry Ginsberg ..... Chapel Hill
Kenneth I. Helfing ..... Charlotte
David Alan Henson ..... Brevard
Catherine L. Hess ..... Cornelius
Robin L. Jacobs ..... Asheville
Margaret Toms King ..... Bryson City
William Harding Latham ..... Columbia, South Carolina
Julie Ann Locascio ..... Chapel Hill
Tamika D. Lynch ..... Charlotte
Jessica Mollie Marlies ..... Greensboro
Christian Scott Mathis ..... Raleigh
Judith A. Minnes McLeod ..... Charlotte
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Preston O. Odom III ..... Huntersville
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Lea Catherine St. John Ritzen ..... Asheville
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Jason Matthew Sneed ..... Olathe, Kansas
William Wayne Stewart, Jr. ..... Raleigh
Blake Warren Thomas ..... Sherrills Ford
Arthur Edward Tilley ..... Mableton, Georgia
James Whittaker Vaughan ..... Chapel Hill
Angelique Regail Vincent ..... Rock Hill
Raye Ward ..... Chapel Hill
Robin Kelly Whitlock Smith ..... Cary
Yongzhi Yang ..... Chapel Hill

Given over my hand and seal of the Board of Law Examiners this the 12th day of September, 2000.

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 18th day of August, 2000 and said person has been issued a license certificate.

JULY 2000 NORTH CAROLINA BAR EXAMINATION

James William Haldin ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 18th day of September, 2000.

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 22nd day of September, 2000 and said person has been issued a license certificate.

JULY 2000 NORTH CAROLINA BAR EXAMINATION

Joel M. Bondurant, Jr. ..... Greenville, South Carolina
Robert Alexander Broadie ..... Thomasville
Blair E. Cody III ..... Hickory
Amy Lorrelle Elliott ..... Suffolk, Virginia
Elizabeth Anne Kane ..... Chapel Hill
Shonnese D. Stanback ..... Durham
John Richard Sutton, Jr. ..... Candler

Given over my hand and seal of the Board of Law Examiners this the 2nd day of October, 2000.

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 as of the 22nd day of September 2000 and said persons have been issued a certificate of this Board:

Michelle Marie Memena Price ..... Applied from the State of West Virginia
Eric D. Welsh ..... Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 2nd day of October, 2000.

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 BOBBY J. ALLRED, A. LEONARD ALLRED, *ET AL.*, FROM THE DECISION OF THE RANDOLPH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1995 AND 1996

No. 73PA98

(Filed 8 October 1999)

1. Taxation— ad valorem—Property Tax Commission—valuation adjustment—statutory limitations

The State Property Tax Commission, while sitting in its appellate capacity as the State Board of Equalization and Review, is subject to the same limitations set forth in N.C.G.S. §§ 105-286 and 105-287 as apply to county tax assessors, boards and commissioners in adjusting appraised values of real property for ad valorem tax purposes.

2. Taxation— ad valorem—Property Tax Commission—property valuation—independent appraiser

The Property Tax Commission's reliance on an independent appraiser's collateral determination of the value of petitioners' property, without challenge or correlation to the county's schedules of values or rules of application, violated the requirement of N.C.G.S. § 105-287 that any permissible increase or decrease in the appraised value of real property be calculated using the schedules and standards established by the county.

3. Taxation— ad valorem—valuation adjustment—sale after octennial valuation

The Property Tax Commission erred in its conclusion that a sale of property which occurs subsequent to the octennial valuation of that property for ad valorem taxation is statutorily sufficient to justify a valuation adjustment in a non-octennial or non-horizontal adjustment year.

4. Taxation— ad valorem—valuation adjustment—factor not listed in statute

As used in N.C.G.S. § 105-287, the language "a factor other than one listed in subsection (b)" which would allow "an increase or decrease in the value of the property" would include, for example, a rezoning, a relocation of a road or utility, or other such occurrence directly affecting the specific property which falls outside the control of the owner and is subject to analysis and appraisal under the established schedules of values, standards and rules.

Justices MARTIN, WAINWRIGHT and FREEMAN did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 128 N.C. App. 604, 496 S.E.2d 405 (1998), affirming an order entered 15 October 1996 by the Property Tax Commission, sitting as the State Board of Equalization and Review. Heard in the Supreme Court 13 October 1998.

Keziah, Gates & Samet, L.L.P., by Steven H. Bouldin and Andrew S. Lasine, for petitioner-appellees Bobby Allred, Leonard Allred, Carl Allred, and Evelyn Allred Ward.

Gavin, Cox, Pugh and Gavin, by Alan V. Pugh and Richard L. Cox, for respondent-appellant Randolph County.

North Carolina Association of County Commissioners, by James B. Blackburn, III, General Counsel, amicus curiae.

LAKE, Justice.

The issues raised here on review are ones of first impression. The primary issue is whether the State Property Tax Commission (the Commission), while sitting in its appellate capacity as the State Board of Equalization and Review pursuant to N.C.G.S. § 105-290(a),

is subject to the same statutory limitations as a county tax assessor (assessor) in adjusting appraised values of real property for ad valorem tax purposes. Secondarily, respondent Randolph County questions whether the sale of property occurring subsequent to that property's octennial tax valuation is a factor which supports the reconsideration and potential adjustment of that property's valuation. For the reasons set forth below, we conclude that the Commission's appellate authority is limited to the same extent as an assessor's and that a post-octennial valuation sale is not a statutorily permissive basis for adjusting a property's tax valuation.

In December of 1992, Gai-Tronics Corporation (Gai-Tronics) purchased an industrial building and tract of land located in Randolph County, North Carolina, from a competitor, Gulton Industries, Inc. (Gulton), for $1,777,000. On 1 January 1993, the Randolph County Tax Department (the County) appraised the real property at $1,825,790, pursuant to the octennial general reappraisal provided for under N.C.G.S. § 105-286. Gai-Tronics did not appeal the appraisal or the associated tax assessment. In November 1993, approximately eleven months after the County's octennial general reappraisal, Bobby J. Allred, A. Leonard Allred, Carl L. Allred and Evelyn Allred Ward (petitioners) purchased the property from Gai-Tronics for $1,200,000. The property received the same appraisal in 1994 as it had in 1993, and the petitioners did not appeal the 1994 tax assessment.

On 1 January 1995, the property valuation was increased $13,050, to $1,838,840, pursuant to N.C.G.S. § 105-287(a). The increase resulted from an addition to the square footage of the building on the property and the correction of a clerical error made in the calculation of the acreage as part of the 1993 valuation. Petitioners appealed the amended appraisal to the Randolph County Board of Equalization and Review (Randolph Board) in 1995 and again in 1996. The Randolph Board denied both appeals based on its findings that the amended valuation did not contain any errors or misapplication of the schedules, standards and rules used in the reappraisal.

In 1995, petitioners appealed the Randolph Board decision to the Commission. Petitioners likewise appealed the 1996 Randolph Board decision and made a formal application for a hearing before the Commission. The Commission consolidated the 1995 and 1996 appeals in an August 1996 hearing.

The Commission heard testimony from petitioners' appraisal expert, who valued the tract in question as of October 1993 at

$1,348,210. The expert's opinion was based on a cost approach, a direct sales approach and an income approach. Petitioners' expert also opined that the 1992 sale of the property from Gulton to their competitor Gai-Tronics may have included assets other than the real property and, therefore, may not have been reflective of the property's "true value" and may have distorted the 1993 octennial valuation. The County's evidence included the testimony of the commercial and industrial appraiser for the County, who testified that he had reviewed the County's valuation using the schedule of values adopted by Randolph County for use in the 1993 octennial valuation, and in his opinion, the value was accurate and calculated consistently with other similar properties in Randolph County.

The Commission determined there was no evidence presented that the County's 1993 and 1994 appraisals were calculated arbitrarily or incorrectly. However, the Commission did conclude that the 1995 and 1996 valuations were arbitrary and in excess of the property's true value and, relying on the expert opinion offered by petitioners, ordered a reduction in valuation of the property to $1,348,210. On appeal, the Court of Appeals affirmed the Commission's revaluation.

Subchapter II of chapter 105 of our General Statutes, the "Machinery Act" (the Act), provides the statutory parameters for the listing and appraisal of property and the assessment and collection of property taxes by counties and municipalities. The paramount purpose of a revaluation for tax purposes is to attain equalization of values, and throughout the Act there are procedures and controls for the timing and calculation of property valuations which help to ensure that equalization. Examples include sections such as 105-284 (establishing uniform assessment standards), 105-286 (establishing scheduled octennial valuations and horizontal valuations based on uniform geographic or category adjustments), 105-287 (limiting valuation adjustments between general valuations) and 105-317 (requiring uniform schedules of values, standards and rules be applied countywide). The rules outlined in these sections are designed to promote horizontal equity between owners of similar properties, limit discretionary valuation and ensure reliability to the ad valorem tax process which allows taxpayers and counties to plan and budget accordingly.

The Act also provides taxpayers with numerous opportunities to be heard and to have property valuations reviewed throughout the appraisal and assessment process. Section 105-317 requires notice of public hearings regarding proposed schedules, standards and rules to

be used in appraising real property. Section 105-322 requires that taxpayers have an opportunity to be heard at meetings held by county boards to discuss the listing and appraisal of property. Taxpayers may also appeal county board decisions regarding proposed schedules, standards and rules to the Commission under section 105-317 and appeal decisions concerning the listing, appraisal or assessment of property to the Commission under section 105-290.

The Commission's duty to hear and adjudicate appeals applies to "property that has been fraudulently or improperly assessed through error or otherwise" and requires the Commission "to investigate the same, and if error, inequality, or fraud is found to exist, to take such proceedings and to make such orders as to correct the same." *King v. Baldwin*, 276 N.C. 316, 323, 172 S.E.2d 12, 17 (1970). The Commission sits as an appellate body with authority to examine witnesses and documents, conduct investigations, hear and consider evidence, make findings of fact and reach conclusions of law. N.C.G.S. § 105-290(b), (d) (1997). The Commission then enters "an order (incorporating the findings and conclusions) reducing, increasing, or confirming the valuation or valuations appealed or listing or removing from the tax lists the property whose listing has been appealed." N.C.G.S. § 105-290(b)(3). Thus, the Commission has "general supervisory power over the valuation and taxation of property throughout the State and authority to correct improper assessments." *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972) (citing N.C.G.S. § 105-275).

[1] As evidenced by the above statutory and substantive references, the Commission has clearly been granted the authority to adjust property valuations appropriately raised on appeal. The question raised here on appeal is whether the Commission's authority to adjust property valuations is limited, as the tax assessor's is, by sections 105-286 and 105-287 of the Act.

The administrative authority to establish and adjust property valuations in order to attain and maintain equalization throughout a county is outlined in sections 105-286 and 105-287. Section 105-286 requires each county every eighth year to revalue and assess, as of January first, all real property, at its "true value" in money, for ad valorem tax purposes. The "true value," as defined by section 105-283, is

> the price estimated in terms of money at which the property would change hands between a willing and financially able buyer

> and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C.G.S. § 105-283 (1997). In determining the true value, it is the duty of the assessor to see that "[u]niform schedules of values, standards, and rules to be used in appraising real property at its true value and at its present-use value are prepared and are sufficiently detailed to enable those making appraisals to adhere to them in appraising real property." N.C.G.S. § 105-317(b)(1) (1997).

Each county is required to review the octennial reappraisal of its properties after four years and to determine whether a "fourth-year horizontal adjustment" is required to bring countywide values into line with then true values. N.C.G.S. § 105-286(b) (1997). In years in which a general reappraisal or horizontal adjustment is not made, adjustments to appraised values are made in accordance with section 105-287. Statutorily permissible adjustments can be made to:

(1) Correct a clerical or mathematical error;

(2) Correct an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment; or

(3) Recognize an increase or decrease in the value of the property resulting from a factor other than one listed in subsection (b).

N.C.G.S. § 105-287(a) (1995) (amended 1997). Increases or decreases in value which specifically cannot be recognized in years in which there is not a general reappraisal or horizontal adjustment of real property are:

(1) Normal, physical depreciation of improvements;

(2) Inflation, deflation, or other economic changes affecting the county in general; or

(3) Betterments to the property . . . .

N.C.G.S. § 105-287(b). The application of the restrictions imposed by section 105-287 serves to maintain horizontal equity between owners of similar property despite economic changes which may occur in the period between the octennial revaluations required by section

105-286. If an increase or decrease in the appraised value of real property is provided for under section 105-287, it "shall be made in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment." N.C.G.S. § 105-287(c).

The importance of sections 105-286 and 105-287, as the cornerstones within which property valuations can be established and adjusted, is evidenced by the following specific statutory admonitions that valuations may not be adjusted on a case-by-case basis unless a change is permissible under those sections: "In years in which real property within a county is not subject to appraisal or reappraisal under [G.S. 105-286] (a) or (b), . . . or under G.S. 105-287, it *shall* be listed at the value assigned when last appraised under [G.S. 105-286] or under G.S. 105-287." N.C.G.S. § 105-286(c) (emphasis added). A county board of equalization and review (county board) has the authority to "[i]ncrease or reduce the appraised value of any property that, in the board's opinion, shall have been listed and appraised at a figure that is below or above the [true value] . . .; however, the board *shall not* change the appraised value of any real property from that at which it was appraised for the preceding year except in accordance with the terms of G.S. 105-286 and 105-287." N.C.G.S. § 105-322(g)(1)(c) (1997) (emphasis added). Likewise, the statute granting the authority of a board of county commissioners (county commissioners) to adjust abstracts and tax records provides that "[n]o appraisal or reappraisal shall be made . . . unless it could have been made by the board of equalization and review had the same facts been brought to the attention of that board [in accordance with G.S. 105-286 and 105-287]." N.C.G.S. § 105-325(a)(6)(b) (1997).

In the case *sub judice*, the Commission concluded the property valuation and adjustment limitations of sections 105-286 and 105-287 apply only to the assessor's authority to determine a property's valuation and are not applicable to the Commission or to county boards. During a colloquy with counsel, the chairman of the Commission stated, "the county assessor may only make adjustments for the reasons listed [in section 105-287] . . . . We are not constrained by the provisions of 105-287 because we are not an assessor. . . . It's not a constraint on the Property Tax Commission or a Board of E[qualization] and R[eview] or even the county commissioners if they sit as a Board of E[qualization] and R[eview]." At another point during the hearing, the chairman repeated his understanding that the county

"Board of Equalization and Review doesn't have the same constraints as the county assessor." Contrary to the Commission's conclusions, these statements are in direct conflict with the statutory language of section 105-322, which provides that "the board *shall not* change the appraised value of any real property from that at which it was appraised for the preceding year except in accordance with the terms of G.S. 105-286 and 105-287." N.C.G.S. § 105-322(g)(1)(c) (emphasis added).

The rationale for constraining the authority of a county board, under section 105-322, and county commissioners, under section 105-325, to the same extent as the assessor is intuitively obvious in light of the objectives of the Act. If the county board or commissioners had authority to make adjustments to property valuations which could not be made by an assessor, not only would the assessor's valuation process become meaningless and taxpayers be encouraged to pursue unconstrained review by the county board or commissioners, but the goals of objectivity and countywide equalization pervasive throughout the Act would be jeopardized by subjective, unrestricted, case-by-case valuation.

In keeping with the objectives behind the consistent application of the property valuation controls in sections 105-286 and 105-287, and recognizing the legislative emphasis placed on the importance of the guidelines in these sections as evidenced by their reference throughout the Act, we do not concur in the conclusion of the Court of Appeals that there was "no legislative intent to limit the Commission's appellate authority by the restrictions set out in section 105-287(b)." *In re Appeal of Allred*, 128 N.C. App. 604, 608, 496 S.E.2d 405, 407 (1998). Nowhere in the Act is there language to suggest that the legislature conferred original jurisdiction upon the Commission to make adjustments to appraisals or assessments of a taxpayer's property in a manner which would circumvent the statutory procedural process at the county level or exceed the strict statutory authority granted to county assessors, county boards and county commissioners. To construe the statutory authority of the Commission, when it sits in an appellate capacity as a board of review, as extending beyond that of the administrative authorities below it would invalidate the integrity of the local system of appraisal and appeals and undermine the efficiency and equalization goals of the Act. We therefore conclude that the Commission's authority to issue an order reducing, increasing or confirming the valuation or valuations appealed, or listing or removing from the tax lists the

property which has been appealed, is subject to the same statutory parameters as assessors, county boards and county commissioners.

In light of our conclusion above, we review whether the Commission exceeded its authority in adjusting petitioners' property valuation in the case *sub judice*. "The administrative decisions of the Property Tax Commission, whether with respect to the schedule of values or the appraisal of property, are always subject to judicial review after administrative procedures have been exhausted." *Brock v. N.C. Property Tax Comm'n*, 290 N.C. 731, 737, 228 S.E.2d 254, 258 (1976). The controlling judicial review statute for appeals from the Commission is section 105-345.2, which provides in part:

> The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 105-345.2(b) (1997).

The conclusions of the Commission appealed by the County were based in part on the finding of fact stating that "[t]he Tax Assessor was arbitrary in the tax assessments of the subject property for the years 1995 and 1996 for . . . failing to consider the November 1993 sale to the Taxpayers from the previous owner." As a result of this finding, and relying substantially on the appraisal value determined by petitioners' appraisal expert and the 1993 sale, the Commission ordered the reduction of the petitioners' property's valuation from $1,838,840 to $1,348,210. We hold that the Commission erred both in its conclusion that a sale which occurs subsequent to an octennial valuation is statutorily sufficient to justify a valuation adjust-

ment in a non-octennial or non-horizontal adjustment year and in its reliance upon the independent assessor's determination of the property's valuation.

[2] As to the latter, the administrative authority to establish and adjust property valuations is fundamentally outlined in the previously cited and summarized sections of 105-286 and 105-287. In establishing octennial valuations or horizontal adjustments within a county, the assessor is required to see that "[u]niform schedules of values, standards, and rules to be used in appraising real property at its true value . . . are prepared and are sufficiently detailed to enable those making appraisals to adhere to them in appraising real property." N.C.G.S. § 105-317(b)(1). Additionally, any permissible increase or decrease in the appraised value of real property provided for under section 105-287 "*shall* be made in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment." N.C.G.S. § 105-287(c) (emphasis added). Applying these statutory mandates, the Commission's reliance upon an independent appraiser's collateral determination of the petitioners' property value, without challenge or correlation to the County's schedules of value or the application of those schedules to the property, was in violation of the statutory requirement of section 105-287 that any permissible increase or decrease in the appraised value of real property be calculated using the schedules and standards established by the County.

The use of schedules of values and rules of application not only makes the valuation of a substantial number of parcels of property feasible, but also ensures objective and consistent countywide property valuations and corollary equity in property tax liability. The commercial and industrial appraiser for the County, Marcus Frick, testified that the value of petitioners' 1995 appraisal was based on the correct application of the appraisal standards adopted by the Randolph County Commissioners, pursuant to section 105-317, for the 1993 octennial valuation. He also testified that petitioners' property was valued in the same manner as other similar properties in Randolph County and that it was not the County's practice to increase or decrease the County's octennial valuation of a taxpayer's property based on subsequent sales. Mr. Frick's testimony was further supported by the schedules generated by the County's "Computer Assisted Land Pricing Table" (CALP Table). These were submitted during the hearing as "Exhibit F" and substantiated the County's valuation of petitioners' property with detailed calculations

applying factors for components such as construction type, fire resistance, type of space utilization, heating and air conditioning, sprinkler systems, and age of the building.

Petitioners did not present any evidence challenging the accuracy or legality of the schedules, standards and rules published and adopted pursuant to section 105-317 and used by the County in its octennial valuation, and petitioners did not present any evidence of "misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment." N.C.G.S. 105-287(a)(2). Petitioners also did not present any evidence of how the 1992 sale between Gulton and Gai-Tronics impacted the property's 1993 octennial valuation. Specifically, petitioners have not taken the position that either the unchallenged 1993 and 1994 valuations or the 1995 and 1996 amended valuations resulted from any failure by the County or its appraiser to provide for a method by which each of the valuation factors designated in subsections 105-317(a)(1) and (2) could be considered and valued through the use of the uniform schedules of values, standards and rules, or that such valuations resulted from any failure to properly apply such schedules so constituted to the subject property. The County had a statutory obligation to use its adopted schedules of values in making any adjustments to the valuation of petitioners' property which were permissible under section 105-287. In keeping with our holding that the Commission's authority to adjust property valuations is limited to the same statutory considerations and restraints as the County, the Commission, acting in its appellate capacity as a board of review, was obligated to do the same.

[3],[4] With regard to the Commission's consideration of a post-octennial valuation sale, the Act provides that "[i]n years in which real property within a county is not subject to appraisal or reappraisal under [G.S. 105-286] (a) *or* (b), . . . *or* under G.S. 105-287, it *shall* be listed at the value assigned when last appraised under [G.S. 105-286] or under G.S. 105-287." N.C.G.S. § 105-286(c) (emphasis added). Therefore, unless petitioners' property was subject to an adjustment provided for under section 105-287, their property should have been listed at the value assigned during the 1993 octennial valuation until the next octennial valuation or the four-year countywide horizontal adjustment. As previously stated, adjustments can be made under section 105-287 to correct clerical or mathematical errors; to correct for an appraisal error resulting from a misapplication of the schedules, standards and rules used in the county's

most recent general reappraisal or horizontal adjustment; or to recognize an increase or decrease in the value of the property resulting from a factor other than one listed in subsection (b) of section 105-287, such as depreciation of improvements, inflation, deflation, or other economic changes affecting the county in general. N.C.G.S. § 105-287(a), (b). Considering the language of section 105-287 specifically, and in conjunction with other pertinent and directly related sections of the Act and its overall purpose, we conclude that "a factor other than one listed in subsection (b)," which would allow for "an increase or decrease in the value of the property," would include, for example, a rezoning, a relocation of a road or utility, or other such occurrence directly affecting the specific property, which falls outside the control of the owner and is subject to analysis and appraisal under the established schedules of values, standards and rules.

Petitioners contend, and the Commission concluded, that the County used an "arbitrary or illegal method of valuation by failing to consider the November 1993 sale to the Taxpayers" in determining petitioners' 1995 and 1996 valuations. The Court of Appeals also concluded that the "respondent's assessor improperly . . . disregarded the 1993 arms-length sale in conducting the 1995 and 1996 tax assessments of petitioners' property." *In re Appeal of Allred*, 128 N.C. App. at 610, 496 S.E.2d at 408. These conclusions fail to recognize the significance of an octennial valuation and necessarily presume that taxpayers are entitled to annual revaluation based on individual independent appraisals and current market trends. This presumption would allow for case-by-case valuation and is contradictory to the statutory mandate that "[i]n years in which real property within a county is not subject to appraisal or reappraisal under [G.S. 105-286] (a) or (b), . . . or under G.S. 105-287, it *shall* be listed at the value assigned when last appraised under [G.S. 105-286] or under G.S. 105-287." N.C.G.S. § 105-286(c) (emphasis added). Petitioners were not entitled to a complete "revaluation" of their property in 1995 and 1996. Petitioners' property was valued in January 1993, along with all other properties in Randolph County, and their 1995 and 1996 listings were equivalent to the 1993 valuation of $1,825,790, with the exception of a minor statutorily permissible increase of $13,050. The County was statutorily obligated, in accord with section 105-286(c), to list petitioners' property at the 1993 valuation, plus the adjustment of $13,050, to attain the 1995 and 1996 listing of $1,838,840, and the Commission is not authorized to unilaterally change or disregard the statutorily mandated process.

Petitioners' attempt to classify post-octennial sales data as a statutorily permissible basis for valuation adjustment under section 105-287 is not only impractical and contrary to the equitable objectives of the Act, but directly impinges upon the statutory requirement that any adjustment made to a general valuation be made "in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment." N.C.G.S. § 105-287(c). While a sale of property by its owner *may* reflect the property's value at a given point in time, we conclude that such occurrence is not "a factor" from which an increase or decrease in value results within the meaning of section 105-287(a)(3). A sale is not a cause of change in value resulting from a source independent from the owner which can be processed by correct application of the schedules of values, standards and rules which are in place for uniform application to all taxpayers. The types of increases or decreases the legislature has specifically enumerated as being permitted under section 105-287 are susceptible to and may be made by the correct application of the county's schedules, standards and rules.

As a practical matter, adjustments to a property's valuation each time a sale occurs, which are higher or lower than the property's octennial or horizontal valuation, would cause an unmanageable burden on county resources. Additionally, it would create inequity between those taxpayers who sell between general reappraisals and those who do not, either to the advantage or disadvantage of the seller, depending upon the terms of the sale. This would result in the type of arbitrary treatment specifically intended to be avoided by the Act and would be contrary to the statutory mandate that all property in a county be valued at its true value as of the general reappraisal date. Had the petitioners' property been sold for an amount higher than their octennial valuation, they would have been well within their rights to challenge any attempt by the County to make a related increase in their property's tax valuation. Both the taxpayer and the county receive the protective benefits of the restrictive language of sections 105-286 and 105-287.

The decision by the Commission, affirmed by the Court of Appeals, to assume authority beyond that granted to the County by N.C.G.S. § 105-287, and the conclusion that the County used an arbitrary and illegal method of valuing petitioners' real property by not considering sales data from a post-octennial valuation sale, disrupt the equitable administration and valuation that characterizes North Carolina's system of ad valorem taxation and creates the potential for

manipulation of valuation on a case-by-case basis. We, therefore, reverse the decision of the Court of Appeals and remand to that court for further remand to the Property Tax Commission for its redetermination in a manner consistent with this opinion.

REVERSED AND REMANDED.

Justices MARTIN, WAINWRIGHT and FREEMAN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JERRY LEE HAMILTON

No. 385A97

(Filed 8 October 1999)

1. Appeal and Error— exclusion of evidence—failure to make offer of proof—significance obvious from record

Defendant did not waive appellate review of the exclusion of evidence by failing to make an offer of proof where the significance of the evidence was obvious from the record.

2. Evidence— witness as perpetrator—prior knife threat—exclusion not error

In a prosecution for first-degree murder of a victim who was stabbed to death, the trial court did not err by precluding defendant from questioning a State's witness about a knife threat made by the witness on a police officer ten years earlier in order to identify and implicate the witness as the perpetrator of the murder where the modus operandi were different in that there were no unusual facts surrounding the prior knife threat that were also present in the circumstances surrounding the victim's death; the evidence does not point directly to the guilt of the State's witness; and the evidence would create, at most, only a speculative inference that the witness killed the victim. N.C.G.S. § 8C-1, Rule 404(b).

3. Appeal and Error— preservation of issues—argument not presented at trial

Defendant failed to preserve for review his argument that a prior knife threat by a State's witness was admissible for

impeachment purposes where all of the discussion about this evidence at trial centered around Rule 404(b), and defendant failed to make this argument at trial.

4. Sentencing— capital sentencing—mitigating circumstance—no significant criminal history—refusal to submit

The trial court did not err by refusing to submit in a capital sentencing proceeding, over defendant's objection, the State's requested (f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity where the State presented evidence of, and defendant stipulated to, convictions for second-degree murder and second-degree rape. N.C.G.S. § 15A-2000(f)(1).

5. Sentencing— capital sentencing—death sentence not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant was convicted on the basis of premeditation and deliberation, the jury found as an aggravating circumstance that defendant had previously been convicted of felonies involving violence to the person, N.C.G.S. § 15A-2000(e)(3), and the evidence showed that defendant stabbed the victim numerous times.

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

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Walker (R.G., Jr.), J., on 5 March 1997 in Superior Court, Richmond County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 8 March 1999.

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

Marshall L. Dayan for defendant-appellant.

MARTIN, Justice.

On 19 February 1996 defendant Jerry Lee Hamilton (defendant) was indicted for the murder of Joy Jones Goebel (Goebel). Defendant was tried capitally at the 10 February 1997 Criminal Session of Superior Court, Richmond County. 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: According to the testimony of defendant's nephew, Johnny Ray Knight (Knight), defendant and Knight went to Jimmy's Lounge and Game Room on Battley Dairy Road in Richmond County, North Carolina, around 7:00 p.m. on 17 December 1994. Defendant and Knight drank beer and played pool until 2:00 a.m., when the owner, Jimmy Freeman (Freeman), announced it was closing time. Defendant and Knight left the bar together and stood outside in the parking lot.

At this time Goebel arrived in the parking lot, spoke briefly with defendant and Knight, and entered the bar to purchase beer. Freeman, however, refused to sell Goebel beer because it was after closing time. Goebel asked Freeman if they were still selling beer in South Carolina. Freeman told her that he did not think so. Goebel left the bar and went outside to the parking lot where defendant and Knight were loitering. Defendant, Knight, and Goebel left the parking lot and walked down Battley Dairy Road discussing whether they could still purchase beer in South Carolina.

As Freeman closed the bar, Knight came running back and asked if anyone was going toward South Carolina who could give them a ride. Freeman said no. Freeman asked Knight who was with him and Knight replied defendant and Goebel. Knight then rejoined defendant and Goebel.

While defendant, Goebel, and Knight were walking together, Knight began looking for a can to use to smoke crack cocaine until Goebel told Knight that she had a glass pipe they could use. They then stopped walking and proceeded into a clearing in the woods off Battley Dairy Road to smoke crack cocaine. Knight recalled smoking the first rock but could not remember who smoked the second. Knight testified that defendant smoked a cocaine rock in the early morning hours of 18 December 1994.

After smoking crack cocaine, Knight and Goebel started kissing and decided to have sex. Knight testified that he had a knife in his pants and that he stuck it in the ground before having sex with Goebel. While Goebel and Knight were having sex, Knight noticed that defendant was standing to his right.

When Knight finished having sex with Goebel, he put his pants back on, lit a cigarette, and sat by a pine tree near the road. When Knight looked back, he saw what appeared to be defendant having sex with Goebel. Knight testified, "[Goebel] was lyin' on her back with her legs open, and [defendant] was standin' there playing with hisself [sic], rubbing hisself [sic] up and down on her or something." When Knight looked back a second time, he saw Goebel on her hands and knees and defendant behind her with his pants down.

Shortly thereafter, Knight heard Goebel scream. Knight turned back and saw defendant, with Knight's knife in his hand, struggling with Goebel. Goebel kicked defendant and knocked the knife out of his hand. Defendant then hit Goebel in the mouth, and she fell back. Defendant grabbed the knife and stabbed Goebel repeatedly. At one point, defendant stabbed Goebel so deeply that the knife would not come out of her body. Defendant had to use two hands to jerk the knife out, causing Goebel's body to lift off the ground. Knight could not recall how many times defendant stabbed Goebel but indicated that he believed she was dead because she did not appear to be breathing.

Knight testified that defendant complained he had hurt his hand and that defendant used Goebel's blood-soaked shirt to wrap around his hand. Defendant told Knight to help him pull Goebel's body further into the woods. Defendant also told Knight that if either of them got caught, he should take the blame and not mention the other's name. Knight further testified that he became frustrated at defendant's demands for Knight to make sure Goebel was dead, so he picked up a stick and struck Goebel in the head several times. As defendant and Knight left the scene, defendant held the knife, and Knight picked up Goebel's shoes and pants.

As they walked home, Knight threw Goebel's pants and shoes into a pond, and defendant took the knife, wiped it clean with Goebel's shirt, handed it to Knight, and told Knight to bury it. Knight stomped the knife into the ground. When defendant arrived home, he put Goebel's shirt in a trash barrel and burned it.

Dr. Thomas Clark, a forensic pathologist with the Office of the Chief Medical Examiner, performed Goebel's autopsy. Dr. Clark testified that there were two blunt-force injuries to Goebel's head and thirty-two sharp-force injuries, or stab wounds, to Goebel's head, back, chest, and abdomen. Three of the sharp-force injuries had the

potential to be rapidly fatal. Dr. Clark opined that multiple stab wounds caused Goebel's death.

At trial defendant offered evidence to show that he was not with Knight and Goebel when Goebel was murdered. Defendant admitted that he went to Jimmy's Lounge and Game Room with Knight on 17 December 1994 and that he played pool and drank beer until closing time. Defendant testified that, as he left the bar, he grabbed the door and shut it on his hand. Defendant further testified that he and Knight were standing outside the bar when Goebel arrived in the parking lot. Defendant did not remember seeing her go inside the bar, but recalled that she was not there long before she came back outside and stated that Freeman would not sell her any beer. Defendant, Knight, and Goebel walked down the road away from the bar. Defendant stated that the three of them stopped walking when defendant said he was going home because his hand was hurting. Defendant left Knight and Goebel and went home.

Defendant introduced the testimony of two witnesses, Shawn Ponds (Ponds) and Joseph Staton (Staton), to offer evidence that Knight killed Goebel. Ponds and Staton both knew Knight and were in jail with Knight after Goebel was murdered.

Ponds testified that Knight told him the story of how he beat Goebel in the head and repeatedly stabbed her. Staton testified that, in late December 1994 or early January 1995, Knight told him that he had killed Goebel and described hitting her in the face with a stick, knocking out some of her teeth, and then stabbing her in the chest several times. Knight allegedly told Staton the same story in late February 1995. According to Staton, Knight never mentioned that defendant was involved in the murder. Staton further testified that Knight told him the Sheriff's Department had threatened Knight with the death penalty and that Knight said he "wasn't going to do it by himself" and indicated he would blame it on someone.

GUILT-INNOCENCE PHASE

By assignment of error, defendant contends the trial court erred in granting the State's motion *in limine* to preclude defendant, by and through his counsel, from questioning Knight about a prior knife threat in 1987. Defendant argues that, under Rule 404(b), Knight's 1987 knife threat was relevant to show the identity of the person who murdered Goebel. N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1998).

Alternatively, defendant contends that evidence of Knight's knife threat was admissible for impeachment purposes.

At trial, the State made an oral motion *in limine* to prohibit defendant from cross-examining Knight about a 1987 knife threat on a police officer which did not result in a conviction against Knight. The trial court ruled that such evidence was not "admissible under any of the avenues of admission that are made available in 404(b)."

[1] We first consider whether defendant waived appellate review by failing to make an offer of proof at trial for the record.

> "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." "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record."

State v. 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)) (citation omitted); *see also State v. Anderson*, 350 N.C. 152, 176, 513 S.E.2d 296, 310-11 (1999); *State v. Cheek*, 307 N.C. 552, 561, 299 S.E.2d 633, 639 (1983); *State v. Fletcher*, 279 N.C. 85, 99, 181 S.E.2d 405, 414 (1971).

Although the record does not contain an offer of what Knight's response might have been to defendant's proposed question, the significance of the evidence is obvious from the record. Defendant's apparent purpose under Rule 404(b) was to use Knight's answer to identify and implicate Knight as the perpetrator of the Goebel murder. Consequently, we turn to the merits of defendant's first argument.

[2] Under Rule 404(b):

> 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).

General principles of relevancy govern the "admissibility of evidence of the guilt of one other than the defendant." *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 280 (1987). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Evidence that someone other than defendant committed the crime for which defendant is charged generally "is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party." *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279. "[S]uch evidence must tend to *both* implicate another *and* be inconsistent with the guilt of the defendant." *Id.* at 667, 351 S.E.2d at 279-80.

Evidence of other crimes on the issue of identity can be offered when the *modus operandi* of the other crime and the crime which is the subject of the current trial are " 'similar enough to make it likely that the same person committed both crimes.' " *State v. Hoffman*, 349 N.C. 167, 183-84, 505 S.E.2d 80, 90 (1998) (quoting *State v. Carter*, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995)), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 522 (1999). However, 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. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983); *see also State v. Green*, 321 N.C. 594, 603, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988); *State v. Riddick*, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986).

In the instant case, the record reveals no unusual facts surrounding the knife threat that were also present in the circumstances surrounding Goebel's death. Thus, any answer elicited from Knight on cross-examination about the 1987 knife threat would create, at best, a speculative inference that Knight killed Goebel—an inference that does not "point directly" to the guilt of Knight. *See Cotton*, 318 N.C. at 667, 351 S.E.2d at 279. Accordingly, the trial court did not err by excluding evidence of Knight's 1987 knife threat pursuant to Rule 404(b).

[3] Alternatively, defendant argues that evidence concerning Knight's 1987 knife threat was admissible for impeachment purposes.

"In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or

motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1).

At trial defendant failed to indicate that he wanted to elicit information concerning Knight's 1987 knife threat for impeachment purposes. All discussion on this issue centered around Rule 404(b).

> COURT: Before we bring the jury in there has been some indication that the defense might seek to ask a question of the State's witness that they contend is admissible under 404(b). You want to make an oral motion with regard to that[?]
>
> MR. GWYN [prosecutor]: Yes, sir. It has come to my attention over the luncheon recess that the defense in its cross examination of Mr. Knight is going to attempt to cross examine him on some ten year or older knife assault or an attempted knife assault that the defense apparently is contending is somehow a part of a planned scheme that somehow fits under Rule of Evidence 404(b). I think it would be entirely prejudicial in its intent. Having just learned it, I can't have filed a written motion, Your Honor. I apologize for making this an oral motion, but I think it does substantial damage to the case of the State at this point for even the question to be asked. So I ask out of the presence of the jurors for the Court to consider the motion in limine and rule upon it, believing that even if the question is asked it would be unfair and do irreparable damage to the ability of the jury to fairly hear the case and try the case. I can't see how quite frankly something that happened ten years ago for which there is no conviction that I'm able to find or the defense at this point is able to is part of a plan or scheme to do anything.
>
> COURT: I understand your concern. Mr. Sharpe, do you want to be heard?
>
> MR. SHARPE [defense counsel]: Well, I think we ought to put it on the record what will probably be the question put to Mr. Knight will be: Did he pull a knife on Officer Prevatte in 1987? That of course is over ten years from this point in time, but it's not over ten years from the December, 1994, point in time.
>
> COURT: Anything else?
>
> MR. SHARPE: No, Your Honor.

> COURT: State's oral motion in limine is allowed. Counsel is instructed not to ask that question. Court finds it would not be admissible under any of the avenues of admission that are made available in 404(b).

On appeal, defendant, for the first time, argues that Knight's testimony concerning the 1987 knife threat was offered for impeachment purposes. Because defendant failed to make this argument at trial, he cannot " 'swap horses between courts in order to get a better mount in the Supreme Court.' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Additionally, defendant's assignment of error for this issue addresses Rule 404(b), not impeachment. Our scope of appellate review is limited to those issues set out in the record on appeal. N.C. R. App. P. 10(a); *State v. Williamson*, 333 N.C. 128, 138, 423 S.E.2d 766, 771 (1992). Accordingly, defendant's alternative argument is not properly presented for our consideration.

SENTENCING PROCEEDING

[4] In his next assignment of error, defendant contends that the trial court erred in not submitting, over defendant's objection, the State's requested (f)(1) mitigating circumstance: "The defendant had no significant history of prior criminal activity." *See* N.C.G.S. § 15A-2000(f)(1) (1997).

At the charge conference, the State requested that the trial court submit the (f)(1) statutory mitigating circumstance. Defendant opposed the State's request. The trial court denied the State's request and stated:

> COURT: I'm not going to give that. That just makes no sense to me. The State's aggravating factor is that he has two prior violent felony convictions and then instruct the jury they can consider that he has no significant criminal history when there is evidence from the first phase that he has at least one other conviction other than those two that are being sought by the State as aggravating factors. I'll not give that.

In determining whether to submit the (f)(1) statutory mitigating circumstance, "the trial court is required to determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity. If the trial court makes such a determination, the mitigating circumstance must then be submitted to the jury." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988).

The trial court has no discretion in determining whether to submit a mitigating circumstance once it determines that a jury could reasonably find the mitigating circumstance. *Id.* at 142, 367 S.E.2d at 604 (construing N.C.G.S. § 15A-2000(b)).

During the sentencing proceeding, the State presented evidence of, and defendant stipulated to, convictions for second-degree rape and second-degree murder. The State's evidence indicated that, in 1988, defendant pulled a knife on a fifteen-year-old girl, hit her several times in the face, and raped her twice in North Carolina and twice in South Carolina. Defendant pled guilty to two charges of second-degree rape related to the rapes in North Carolina. The State also presented evidence that, in 1974, defendant aimed a shotgun at Sam Gerald and said, "I'm going to kill that son-of-a-bitch standing there." The State's evidence showed that Gerald was getting out of a car when defendant aimed the gun at him and that Gerald had not provoked defendant in any way. As Gerald tried to get back in the car to leave, defendant shot and killed him. Defendant pled guilty to second-degree murder. Additionally, during the guilt-innocence phase of the instant case, defendant testified that he had been convicted in 1987 of misdemeanor assault on a female and misdemeanor escape.

Despite the evidence presented concerning defendant's prior criminal activity, defendant's own stipulations to the prior convictions, and defendant's objection to the State's request for the (f)(1) mitigating circumstance, defendant argues on appeal that his criminal history was such that a rational juror could conclude there was no significant history of prior criminal activity. We disagree.

In *State v. McNeil*, 350 N.C. 657, —— S.E.2d —— (1999), this Court held that a prior criminal history including a violent felony involving death is significant for purposes of N.C.G.S. § 15A-2000(f)(1). *Id.* at 684, —— S.E.2d at ——. Likewise, in the present case, defendant's prior criminal history included a conviction for second-degree murder. Accordingly, defendant's argument that the trial court erred by failing to submit the (f)(1) mitigating circumstance is without merit.

PRESERVATION ISSUES

Defendant raised the following two issues for the purposes of permitting this Court to reexamine its prior holdings and preserving the issues for any possible further judicial review: (1) the trial court erred in instructing that jurors should find nonstatutory mitigating circumstances only if they find those circumstances to have mitigat-

ing value; and (2) the trial court erred in instructing that each juror "may," rather than "must," consider any mitigating circumstance or circumstances the juror determined to exist by a preponderance of the evidence in deciding sentencing Issues Three and Four. We have previously considered and rejected defendant's arguments and find no compelling reason to depart from our prior holdings. Therefore, we reject these assignments of error.

PROPORTIONALITY REVIEW

Having found no error in either the guilt-innocence phase of defendant's trial or the capital sentencing proceeding, we turn, pursuant to N.C.G.S. § 15A-2000(d)(2), to the statutory duties reserved for this Court in capital cases. We must determine whether: (1) the record supports the jury's finding of any aggravating circumstances upon which the sentencing court based its sentence of death; (2) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) 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).

In the present case, defendant was convicted of first-degree murder on the basis of premeditation and deliberation. The jury found the aggravating circumstance that defendant had been previously convicted of felonies involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3). In mitigation, one or more jurors found three statutory mitigating circumstances: the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); the victim was a voluntary participant in defendant's homicidal conduct, N.C.G.S. § 15A-2000(f)(3); and 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). One or more jurors also found the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). The jury did not find that any of the three nonstatutory mitigating circumstances submitted had mitigating value. After thoroughly examining the record, transcript, and briefs, as well as defendant's stipulations, we conclude that the evidence fully supports the aggravating circumstance found by the jury in this case. Further, there is no indication that the sentence of death was imposed under the influence of any arbitrary considerations. We turn now to our final statutory duty of proportionality review.

[5] In the 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). "One purpose of proportionality review 'is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *State v. Atkins*, 349 N.C. 62, 114, 505 S.E.2d 97, 129 (1998) (quoting *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)), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 1036 (1999). We have found the death sentence to be disproportionate in seven cases. *See 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*, 522 U.S. 900, 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). We conclude that this case is not substantially similar to any case in which this Court has found the death sentence disproportionate.

In *Benson*, *Stokes*, *Rogers*, and *Jackson*, the defendants either pled guilty or were convicted solely on the basis of the felony murder rule. In the instant case, however, defendant was convicted of first-degree murder on the basis of premeditation and deliberation. "[A] finding of premeditation and deliberation indicates 'a more calculated and cold-blooded crime.' " *State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994) (quoting *State v. Lee*, 335 N.C. 244, 297, 439 S.E.2d 547, 575, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994)), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995).

Furthermore, in the present case, the jury found as an aggravating circumstance that defendant had previously been convicted of felonies involving violence to the person, N.C.G.S. § 15A-2000(e)(3). "[T]here are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to sustain death sentences." *State v. Warren*, 347 N.C. 309, 328, 492 S.E.2d 609, 619 (1997), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998). The (e)(3) aggravating circumstance, which the instant jury found, is among them. *See State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995); *see also State*

v. Wooten, 344 N.C. 316, 474 S.E.2d 360 (1996), *cert. denied*, 520 U.S. 1127, 137 L. Ed. 2d 348 (1997); *State v. Lyons*, 343 N.C. 1, 468 S.E.2d 204, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996); *State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802 (1994), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995); *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). In none of the cases in which this Court has found the death penalty disproportionate has the jury found the aggravating circumstance that the defendant had been previously convicted of a felony involving the use of violence to the person. *See State v. Peterson*, 350 N.C. 518, ——, 516 S.E.2d 131, 143-44 (1999); *State v. Murillo*, 349 N.C. 573, 613, 509 S.E.2d 752, 775 (1998); *Harris*, 338 N.C. at 161, 449 S.E.2d at 387; *State v. Rose*, 335 N.C. 301, 351, 439 S.E.2d 518, 546, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994).

It is also proper to compare this case to cases in which this Court has found the death penalty to be proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. This Court considers all the cases in the pool of similar cases when engaging in proportionality review. However, as we have previously stated, "we will not undertake to discuss or cite all of those cases each time we carry out the duty." *Id.* Nonetheless, we conclude that the present case is more similar to cases in which we have found a sentence of death proportionate than to those in which we have found a sentence of death disproportionate.

The jury's finding of the prior conviction of felonies involving violence to the person, N.C.G.S. § 15A-2000(e)(3), is a significant factor in finding the death sentence proportionate. *See, e.g., State v. Strickland*, 346 N.C. 443, 468-70, 488 S.E.2d 194, 209-10 (1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 757 (1998); *Harris*, 338 N.C. at 161, 449 S.E.2d at 387; *State v. Artis*, 325 N.C. 278, 338-44, 384 S.E.2d 470, 504-08 (1989); *Brown*, 320 N.C. at 214, 358 S.E.2d at 27.

Whether a sentence of death is "disproportionate in a particular case 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). Thus, based upon the characteristics of this defendant and the crime he committed, we are convinced that the sentence of death recommended by the jury and ordered by the trial court in the instant case is not disproportionate.

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

NO ERROR.

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

SARA LEE CORPORATION v. STEPHEN DOWELL CARTER

No. 271PA98

(Filed 8 October 1999)

1. Unfair Trade Practices— self-dealing by employee

Defendant's fraudulent acts and breach of fiduciary duty by self-dealing business activities wherein he sold computer parts and services to his employer from companies owned by him without disclosing his interest in those companies constituted unfair or deceptive acts "in or affecting commerce" within the meaning of N.C.G.S. § 75-1.1(a). Defendant's mere employee status at the time he committed these acts does not safeguard him from liability under N.C.G.S. § 75-1.1.

2. Workers' Compensation— constructive trust on benefits— employee's self-dealing

Where defendant employee engaged in fraud, breach of fiduciary duty and deceptive acts or practices by his self-dealing business activities wherein he sold computer parts and services to plaintiff employer from companies owned by him without disclosing his interest in those companies, the language of N.C.G.S. § 97-21 declaring that workers' compensation benefits are "exempt from all claims of creditors" did not prohibit the trial court from imposing a constructive trust in favor of plaintiff on defendant's workers' compensation benefits, since the holder of beneficial title of a constructive trust is not a "creditor" within the meaning of that statute. Although the injury sustained by plaintiff was unrelated to defendant's fraudulent conduct, his employment, from which his right to compensation arises, was tainted in its entirety by the extensive fraudulent abuse of his

fiduciary relationship with plaintiff employer, and the trial court had the authority to determine that the financial benefit to which defendant was entitled under his workers' compensation claim should be placed in a constructive trust in favor of the employer whom he defrauded.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 129 N.C. App. 464, 500 S.E.2d 732 (1998), affirming in part, vacating in part, and remanding a judgment entered by DeRamus, J., on 12 December 1996 in Superior Court, Forsyth County. Heard in the Supreme Court 8 February 1999.

Kilpatrick Stockton LLP, by Daniel R. Taylor, Jr., and Louis W. Doherty, for plaintiff-appellant.

Elliot, Pishko, Gelbin & Morgan, P.A., by David C. Pishko, for defendant-appellee.

ORR, Justice.

This action arises out of a suit brought by Sara Lee Corporation ("Sara Lee"), alleging, *inter alia*, that defendant, plaintiff's former employee, committed fraud, breach of fiduciary duty, and unfair and deceptive practices. The trial court ruled in plaintiff's favor and awarded Sara Lee $322,729.20 in damages for defendant's self-dealing and fraudulent conduct; $170,036.30 for salary and benefits that defendant received during his employment with Sara Lee; treble damages on both of these amounts pursuant to N.C.G.S. § 75-16; prejudgment interest; and Sara Lee's attorneys' fees and costs.

The record reflects the following events out of which this case arises.

Defendant worked as a "Service Manager" at ComputerLand in Winston-Salem, where he visited and serviced certain ComputerLand customers, including Sara Lee. In 1988, Mr. Gene Cain, defendant's contact at Sara Lee, approached defendant about servicing Sara Lee in an individual capacity. At that time, defendant was still employed by ComputerLand and, thus, initially declined this offer. However, at some point thereafter, defendant did perform the requested service work for Sara Lee.

On 2 January 1989, Sara Lee hired defendant to work as an "Information Center Service Administrator" in the Sara Lee Knit Products Division. When defendant began working at Sara Lee, he signed a form indicating that he had received a copy of Sara Lee's code of conduct and that he would comply with the policies contained therein. Specifically, Sara Lee's code of conduct contained a provision prohibiting an employee from engaging in undisclosed self-dealing with another entity that supplied products or services to Sara Lee.

At Sara Lee, defendant was responsible for the maintenance and repair of personal computers. Defendant's job description specifically provided that he would "develop[] and maintain[] relationships with vendors to provide [Sara Lee Knit Products] with the best possible pricing, availability, and support of hardware and services." Defendant was authorized and entrusted to order and purchase computer parts at the lowest possible prices.

During his employment with Sara Lee, but unknown to his employer, defendant developed four separate businesses (referred to by the trial court as "the Carter Enterprises" and consisting of C Square Consulting, Computer Care, Micro Computer Services, and PC Technologies) through which he engaged in self-dealing by supplying Sara Lee with computer parts and services at allegedly excessive cost while concealing his interest in these businesses. Sara Lee paid a total of $495,431.54 to defendant's businesses for parts and services.

Separate from and unrelated to defendant's self-dealing enterprises, defendant suffered a closed head injury when he fell at work on 8 July 1992. He subsequently filed a workers' compensation claim with the Industrial Commission. On 25 September 1992, Sara Lee terminated defendant's employment after investigating his self-dealing transactions. On 13 January 1993, the North Carolina Industrial Commission approved a Form 21 agreement for compensation for disability entered into by plaintiff Sara Lee and defendant. Pursuant to the Form 21 agreement, the parties stipulated that defendant sustained a closed head injury that arose out of and in the course of his employment and was, thus, disabled. Sara Lee agreed to pay temporary total disability benefits to defendant. The Industrial Commission conducted an evidentiary hearing on 20-21 May 1996 wherein Sara Lee asserted, in part, that the Commission should set aside the Form 21 award because of defendant's alleged misrepresentation or fraud. Sara Lee also submitted that it was "entitled to a credit for any bene-

fits paid and to be paid against any amount [defendant] is determined to owe [Sara Lee] in any criminal or civil proceeding." As of the date of the original appeal of this case before the Court of Appeals, the Industrial Commission had not issued a ruling regarding defendant's receipt of workers' compensation benefits.

After discovering defendant's fraudulent acts, plaintiff Sara Lee filed this action against defendant on 14 February 1995 in Superior Court, Forsyth County, alleging breach of fiduciary duty, fraud, constructive fraud, conversion, and unfair and deceptive practices. Plaintiff sought both compensatory and punitive damages, treble damages under N.C.G.S. § 75-1.1, the imposition of a constructive trust, and attorneys' fees.

After the presentation of extensive evidence, the trial court made findings that "[t]he transactions between Sara Lee and the Carter Enterprises were not open, fair and honest. In fact, the clear, cogent, and convincing evidence is, to the contrary, that [defendant] used his position of trust at Sara Lee to make profits on transactions involving the Carter Enterprises without disclosing his financial interest in the Carter Enterprises to his superiors at Sara Lee."

The Court of Appeals affirmed the trial court's conclusion that "[d]efendant breached his fiduciary duty by selling computer parts to Sara Lee without disclosing his interest in the companies supplying these parts." *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 471, 500 S.E.2d 732, 737 (1998). In addition, the trial court found that "[t]he representations made by [defendant] were false, intentional, made with the intent that they be relied upon by Sara Lee, were in fact relied upon by Sara Lee and resulted in damage and injury being sustained by Sara Lee." Thus, the trial court determined that Sara Lee sustained damages in the amount of $322,729.20 as a result of defendant's fraudulent acts.

In its judgment, the trial court concluded that defendant "engaged in actual fraud and unfair and deceptive trade practices prior to, and actual fraud, constructive fraud, breach of fiduciary duty and unfair and deceptive trade practices throughout, the time that he was employed by . . . Sara Lee Corporation from January 2, 1989 until September 25, 1992." In addition, the trial court concluded that defendant owed a fiduciary duty to Sara Lee with respect to his role in recommending the purchase and ordering of computer parts and related services for Sara Lee and that defendant breached that fiduciary duty and engaged in constructive fraud throughout the time that

he was employed by Sara Lee. The trial court ordered that a constructive trust for the benefit of Sara Lee be imposed over any workers' compensation benefits that defendant receives or has received for the closed head injury.

The Court of Appeals affirmed the trial court's determination that defendant had breached his duty to plaintiff and had engaged in fraud against plaintiff, but held that defendant's conduct did not fall within the scope of unfair and deceptive acts or practices under chapter 75 of the North Carolina General Statutes (chapter 75) because defendant was an employee at the time he defrauded Sara Lee. In its reasoning, the Court of Appeals relied on the proposition articulated in *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 289 S.E.2d 118, *disc. rev. denied*, 305 N.C. 759, 292 S.E.2d 574 (1982), that "employer-employee relationships do not fall within the intended scope of G.S. 75-1.1." *Id.* at 448, 289 S.E.2d at 119-20. Thus, the Court of Appeals vacated the trial court's award of treble damages and attorneys' fees which were granted pursuant to chapter 75. Moreover, the Court of Appeals ruled that the provisions of N.C.G.S. § 97-21, which provide in part that workers' compensation benefits are "exempt from all claims of creditors," precluded the imposition of a constructive trust on defendant's workers' compensation benefits. N.C.G.S. § 97-21 (Supp. 1998).

In this appeal, plaintiff contends (1) that the Court of Appeals erred in not applying N.C.G.S. § 75-1.1 to defendant's conduct in this case even though an "employee" may have participated in the transactions, and (2) that the Court of Appeals misinterpreted the provisions of N.C.G.S. § 97-21 in holding that a constructive trust may not be imposed on workers' compensation benefits. We shall address each of these arguments in turn.

[1] Although the Court of Appeals' opinion addressed only the question of whether an employer-employee relationship removes the case from the scope of N.C.G.S. § 75-1.1, defendant's assignment of error to the Court of Appeals challenges the trial court's conclusion of law that N.C.G.S. § 75-1.1 applied to the defendant's acts at issue. Therefore, it is necessary for us to determine if defendant's fraudulent acts and his breach of fiduciary duty constitute unfair and deceptive acts or practices under N.C.G.S. § 75-1.1 (the Act), which provides, in pertinent part: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1(a) (1994). In analyzing an allegedly unfair and deceptive act or practice under the Act, we must first determine whether the act or practice

falls within the purview of section 75-1.1 as the legislature intended. Because defendant does not dispute the trial court's finding that his actions were fraudulent, defendant's acts were conclusively "unfair or deceptive." *See Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975). Thus, in the present case, we must next decide whether the activities and transactions between defendant and Sara Lee giving rise to this cause of action were "in or affecting commerce." *See Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

In *Bhatti v. Buckland*, 328 N.C. 240, 400 S.E.2d 440 (1991), we quoted with approval a decision by our Court of Appeals: " 'The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State[,] and [it] *applies to dealings between buyers and sellers at all levels of commerce.*' " *Id.* at 245, 400 S.E.2d at 443-44 (quoting *United Va. Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 319-20, 339 S.E.2d 90, 93 (1986)) (alterations in original). However, "we have not limited the applicability of N.C.G.S. § 75-1.1 to cases involving consumers only. After all, unfair trade practices involving only businesses affect the consumer as well." *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988) (citation omitted).

" 'Commerce' in its broadest sense comprehends intercourse for the purposes of trade in any form." *Johnson*, 300 N.C. at 261, 266 S.E.2d at 620. In the context of unfair and deceptive acts or practices, this Court has provided additional guidance by stating that " '[b]usiness activities' is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991).

Although the Act is subject to a reasonably broad interpretation in determining its scope, some exceptions have been carved out. For example, the Act provides that "[f]or purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b).

In the case *sub judice*, defendant engaged in self-dealing business activities wherein he sold computer parts and services to his

employer from companies owned by him. Moreover, the trial court found that "Sara Lee employees were not adequately and properly informed that [defendant] had any interest in or was receiving any payments from C Square Consulting, Computer Care, Micro Computer Services or PC Technologies ('Carter Enterprises') on an on-going basis."

The trial court specifically found that "[t]he parts sales and computer and cable service transactions between [plaintiff] and the Carter Enterprises were unethical and fraudulent, and they affected commerce," and that "[defendant's] self-dealing conduct and receipt of compensation and benefits from Sara Lee while engaged in this egregious breach of his fiduciary duty and fraud was unethical and fraudulent and affected commerce."

After thoroughly reviewing the record on appeal, we conclude that the transactions at issue were "in or affecting commerce" and thus fall within the scope of the Act. There is uncontradicted evidence in this case that defendant sold computer parts and services, through his various enterprises, to plaintiff. Trusting that these were legitimate transactions secured at competitive prices in the marketplace, plaintiff regularly conducted business with the companies in which defendant had an interest. In this case, defendant and plaintiff clearly engaged in buyer-seller relations in a business setting, and thus, we hold that defendant's fraudulent actions fall within the ambit of the statutory prohibition of unfair and deceptive acts or practices as determined by the trial court.

Having determined that defendant's conduct is covered by N.C.G.S. § 75-1.1, we must now consider whether the reasoning in *Buie* precludes the applicability of the Act to this case, as the Court of Appeals concluded. The facts of *Buie* are distinguishable from the facts at bar in that the plaintiff in *Buie* attempted to recover punitive damages under N.C.G.S. § 75-1.1 based on the allegedly retaliatory termination of plaintiff for his pursuit of workers' compensation benefits. *Buie*, 56 N.C. App. 445, 289 S.E.2d 118. The Court of Appeals held:

> Unlike buyer-seller relationships, we find that employer-employee relationships do not fall within the intended scope of G.S. 75-1.1 . . . . Employment practices fall within the purview of other statutes adopted for that express purpose.

Id. at 448, 289 S.E.2d at 119-20.

Although this Court is not bound by the decision in *Buie*, we find *Buie* neither applicable nor instructive in deciding the case before us. The Court of Appeals erred in relying on *Buie* and holding that because defendant was an employee at the time he committed the unfair and deceptive acts or practices, N.C.G.S. § 75-1.1 does not apply to this case. To the contrary, having already characterized defendant's conduct as buyer-seller transactions that fall squarely within the Act's intended reach, we conclude that defendant's relationship to plaintiff as an employee, under these facts, does not preclude applicability of N.C.G.S. § 75-1.1 to this case. Even though defendant was an employee, he nevertheless engaged in self-dealing conduct and "business activities." N.C.G.S. § 75-1.1(b). On these facts, defendant's mere employee status at the time he committed these acts does not safeguard him from liability under the Act. Therefore, because the trial court correctly applied N.C.G.S. § 75-1.1 to the facts at hand, we reverse the Court of Appeals on this issue.

[2] Turning to the second issue before this Court, plaintiff argues that the Court of Appeals misinterpreted N.C.G.S. § 97-21 in holding that the trial court could not impose a constructive trust on any workers' compensation benefits received by defendant. N.C.G.S. § 97-21 provides, in pertinent part:

> No claim for compensation under this Article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

N.C.G.S. § 97-21, para. 1 (Supp. 1998). The Court of Appeals reasoned that this statutory language precluded the court from using the equitable device of imposing a constructive trust on defendant's workers' compensation benefits. We disagree.

In this case, the overwhelming evidence presented at trial led the trial court to conclude, *inter alia*, that defendant engaged in fraud, breach of fiduciary duty, and unfair and deceptive acts or practices. The trial court then ordered that "a constructive trust for the benefit of [plaintiff] is hereby imposed over any and all workers[']compensation benefits that [defendant] is or shall be entitled to receive" and that "a constructive trust for the benefit of [plaintiff] is hereby imposed over any and all long term disability benefits that [defendant] is or shall be entitled to receive."

" 'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired

in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.' " *Johnson v. Stevenson*, 269 N.C. 200, 203, 152 S.E.2d 214, 217 (1967) (quoting *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919) (Cardozo, J.)). "Courts of equity will impose a constructive trust to prevent the unjust enrichment of the holder of the legal title to property acquired through a breach of duty, fraud, or other circumstances which make it inequitable for him to retain it against the claim of the beneficiary of the constructive trust." *Cline v. Cline*, 297 N.C. 336, 343-44, 255 S.E.2d 399, 404 (1979). " '[A] constructive trust ordinarily arises out of the existence of fraud, actual or presumptive—usually involving the violation of a confidential or fiduciary relation—in view of which equity transfers the beneficial title to some person other than the holder of the legal title.' " *Leatherman v. Leatherman*, 297 N.C. 618, 621-22, 256 S.E.2d 793, 795-96 (1979) (quoting *Bowen v. Darden*, 241 N.C. 11, 13-14, 84 S.E.2d 289, 292 (1954)).

In this case, the Court of Appeals held that a constructive trust was not available because of the language of N.C.G.S. § 97-21 declaring that workers' compensation benefits are "exempt from all claims of creditors." However, we find that such language does not preclude the trial court from imposing the equitable remedy of a constructive trust to the specific facts of this case.

When interpreting the meaning of a statute, we must first look to the language of the statute itself. This Court has stated that " '[w]hen language used in the statute is clear and unambiguous, this Court must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning.' " *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996) (quoting *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995)). Here, the plain language of the statute does not give rise to an interpretation exempting benefits from being held in a constructive trust. The statute merely provides that creditors may not reach the workers' compensation benefits. We do not consider plaintiff, a holder of beneficial title of a constructive trust, to be a "creditor" within the meaning of N.C.G.S. § 97-21. Had the legislature intended to exclude equitable processes from the statute, it would have said so; "the absence of any express intent and the strained interpretation necessary to reach the result urged upon us by [defendant] indicate that such was not [the legislature's] intent." *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 425, 276 S.E.2d 422, 436 (1981).

For example, in N.C.G.S. § 58-24-85, concerning general regulations of business and fraternal benefit societies, the legislature provided:

> No money or other benefit, charity, relief or aid to be paid, provided or rendered by any society, shall be liable to attachment, garnishment or other process, or to be seized, taken, appropriated or applied by *any legal or equitable process* or operation of law to pay any debt or liability of a member or beneficiary . . . .

N.C.G.S. § 58-24-85 (1994) (emphasis added). Thus, the legislature has drafted statutes expressly exempting equitable remedies from the powers of the court when that is its intention. The legislature did not do so in N.C.G.S. § 97-21. " 'Where the legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself.' " *Upchurch v. Hudson Funeral Home, Inc.*, 263 N.C. 560, 565, 140 S.E.2d 17, 21 (1965) (quoting 50 Am. Jur. *Statutes* § 432, at 453 (1944)). Therefore, we hold that in the absence of clear and specific language precluding the trial court from imposing an equitable remedy, we will not assume that the legislature intended to do so.

We note, however, in reaching this result that the Industrial Commission, at least prior to this suit, had not decided whether to set aside the Form 21 agreement entered into by Sara Lee and defendant and approved by the Industrial Commission. Further, defendant argued before this Court that Sara Lee knew about defendant's fraudulent activities at the time it agreed to the Form 21 terms. However, under this extraordinary and unique set of facts, we cannot say that the trial court erred. Although the injury sustained by defendant was unrelated to his fraudulent conduct, his employment, from which his right to compensation arises, was tainted in its entirety by the extensive fraudulent abuse of his fiduciary relationship with his employer, Sara Lee. As such, the trial court had the authority to determine that the financial benefit to which defendant was entitled under his workers' compensation claim should be placed in a constructive trust for the benefit of the employer whom he defrauded.

It is a long-standing principle that "[w]hen equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion." *Roberts v. Madison County Realtors*

Ass'n, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996). In the case *sub judice*, the trial court properly exercised its discretion in ordering that defendant's workers' compensation benefits be placed in a constructive trust for the benefit of plaintiff Sara Lee.

We therefore reverse the Court of Appeals' rulings.

REVERSED.

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

BETH M. SHARP v. THADDEUS PENDER SHARP, III, THADDEUS PENDER SHARP, JR., ALAN D. SHARP, SHARP FARMS, A NORTH CAROLINA PARTNERSHIP, COMPOSED OF THADDEUS PENDER SHARP, JR. AND ALAN D. SHARP, PARTNERS; AND SHARP FARMS INC., A NORTH CAROLINA CORPORATION

No. 223A99

(Filed 8 October 1999)

Divorce— equitable distribution—third party—constructive trust—jury trial

A Court of Appeals decision is reversed for the reason stated in the dissenting opinion in the Court of Appeals that a third party to an equitable distribution action does not have a constitutional right to a jury trial on a claim seeking imposition of a constructive trust on property to which the third party holds legal title.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. 125, 514 S.E.2d 312 (1999), reversing an order signed 16 March 1998 by Patterson, J., in District Court, Wilson County. Heard in the Supreme Court 20 September 1999.

Reid, Lewis, Deese, Nance & Person, L.L.P., by Renny W. Deese; and Daughtry, Woodard, Lawrence & Starling, L.L.P., by Stephen C. Woodard, Jr., for plaintiff-appellant.

Walter L. Hinson, P.A., by Walter L. Hinson and Lisa T. Rabon, for defendant-appellees Thaddeus Pender Sharp, Jr.; Alan D. Sharp; Sharp Farms; and Sharp Farms, Inc.

PER CURIAM.

For the reasons stated in the dissenting opinion of Judge Timmons-Goodson, the decision of the Court of Appeals is reversed.

REVERSED.

DELORES D. ROBINSON v. STATE OF NORTH CAROLINA, EAST CAROLINA UNIVERSITY

No. 203A99

(Filed 8 October 1999)

State— tort claim—breach of duty and proximate cause—insufficient evidence

A Court of Appeals decision affirming an order of the Industrial Commission awarding damages to plaintiff in a tort claim action for injuries received when a light fixture fell on her head in a building owned by defendant ECU is reversed for the reason stated in the dissenting opinion in the Court of Appeals that plaintiff's evidence was insufficient to show that defendant's employee breached a duty to plaintiff or that any alleged breach of duty was the proximate cause of plaintiff's injury.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. ——, 514 S.E.2d 301 (1999), affirming a decision and order of the North Carolina Industrial Commission entered 10 March 1998. Heard in the Supreme Court 17 September 1999.

Gray, Newell & Johnson, L.L.P., by S. Camille Payton and Mark V.L. Gray, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Don Wright, Assistant Attorney General, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion of Eagles, C.J., the decision of the Court of Appeals, which affirmed the decision and order of the Industrial Commission, is reversed. This case is

remanded to the Court of Appeals for further remand to the Industrial Commission for entry of judgment in favor of defendant State of North Carolina, East Carolina University.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. CHARLES CARLO CINTRON

No. 190A99

(Filed 8 October 1999)

Homicide— first-degree murder—second-degree instruction not required

A Court of Appeals decision that the trial court erred in a first-degree murder prosecution by failing to instruct the jury on the lesser-included offense of second-degree murder is reversed for the reason stated in the dissenting opinion in the Court of Appeals that there was no evidence to support a finding by the jury that the murder was not premeditated and deliberate.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 132 N.C. App. 605, 513 S.E.2d 794 (1999), holding that the trial court erred by not instructing on the lesser-included offense of second-degree murder, thus vacating the judgment entered 7 October 1997 by Martin (Jerry Cash), J., in Superior Court, Guilford County, and ordering a new trial. Heard in the Supreme Court 20 September 1999.

Michael F. Easley, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State-appellant.

Malcolm Ray Hunter, Jr., Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Lewis, the decision of the Court of Appeals is reversed.

REVERSED.

WILTON B. PARKER, SHIRLEY K. PARKER, RANDY PARKER, JANET T. PARKER, GARY PARKER, DIANE P. PARKER, KEITH PARKER, DARLENE W. PARKER, JAMES ALAN PARKER, ANN D. PARKER, KEITH SLOCUM, EUGENE BARBOUR, DIXIE BARBOUR, VERNON THOMPSON, PATRICIA THOMPSON, DELBERT ALLEN, JR., DEBORAH BLACKMON, BETTIE C. UPCHURCH, GLENN TWIGG, ADMINISTRATOR OF THE ESTATE OF PHARO TWIGG, DELLA T. TWIGG, THOMAS EARL TOOLE, MAYRLENE TOOLE, CHRISTINE P. THOMPSON, LAURCEY MASSENGILL, CHARLIE MATTHEWS AND LORRAINE MATTHEWS v. W. TERRY BAREFOOT AND RITA J. BAREFOOT

No. 408A98

(Filed 8 October 1999)

Nuisance— hog farm—state-of-the-art technology not defense—instruction not required

A Court of Appeals decision is reversed for the reason stated in the dissenting opinion in the Court of Appeals that the evidence in a nuisance action against the operators of an industrial hog farm did not require the trial court to give plaintiffs' requested instruction that the law does not recognize as a defense to a claim of nuisance that defendants used the best technical knowledge available at the time to avoid or alleviate the nuisance.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 130 N.C. App. 18, 502 S.E.2d 42 (1998), finding error in the instruction given to the jury by Manning, J., and subsequent judgment entered 24 September 1996 in Superior Court, Johnston County, and ordering a new trial. Heard in the Supreme Court 13 April 1999.

Morgan, Reeves & Gilchrist, by Robert B. Morgan and Mary Morgan Reeves, for plaintiff-appellees.

Bode, Call & Stroupe, L.L.P., by John V. Hunter III and Diana E. Ricketts; and Narron, O'Hale & Whittington, by John P. O'Hale, for defendant-appellants.

PER CURIAM.

For the reasons stated in the dissent of Judge John Martin in the Court of Appeals, the opinion of the Court of Appeals is reversed.

REVERSED.

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

EUGENE R. FURR v. FONVILLE MORISEY REALTY, INC., KOEPPEL TENER RIGUARDI, INC., AND REGENCY PARK CORPORATION

No. 425PA98

(Filed 8 October 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 130 N.C. App. 541, 503 S.E.2d 401 (1998), dismissing plaintiff's appeal from a 13 December 1994 order entered by Hight, J., in Superior Court, Wake County, and affirming orders entered 10 April 1995 by Thompson, J., and 10 February 1997 by Farmer, J., in Superior Court, Wake County. Heard in the Supreme Court 17 September 1999.

Kirk, Kirk, Gwynn & Howell, L.L.P., by Joseph T. Howell, for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Charles E. Nichols, Jr., and S. Nicole Taylor, for defendant-appellee Fonville Morisey Realty, Inc.

Bode, Call & Stroupe, L.L.P., by V. Lane Wharton, Jr., and Robert V. Bode, for defendant-appellee Koeppel Tener Riguardi, Inc.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Elizabeth L. Riley and Pressly M. Millen, for defendant-appellant Regency Park Corporation.

Allen and Pinnix, P.A., by Noel L. Allen, on behalf of North Carolina State Board of Certified Public Accountant Examiners and North Carolina Board of Architecture, amici curiae.

Bailey & Dixon, L.L.P., by Carson Carmichael, III, on behalf of North Carolina Licensing Board for General Contractors, amicus curiae.

Bailey & Dixon, L.L.P., by Carson Carmichael, III, on behalf of North Carolina Board of Pharmacy, amicus curiae.

Michael F. Easley, Attorney General, by Thomas R. Miller, Special Deputy Attorney General, Legal Counsel to the North Carolina Real Estate Commission, and Blackwell M. Brogden, Jr., Chief Deputy Legal Counsel to the North Carolina Real Estate Commission, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

JAMES R. PITTMAN, EMPLOYEE v. INTERNATIONAL PAPER COMPANY, EMPLOYER, WAUSAU INSURANCE COMPANY, CARRIER

No. 86A99

(Filed 8 October 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 132 N.C. App. 151, 510 S.E.2d 705 (1999), affirming an opinion and award entered by the North Carolina Industrial Commission on 26 September 1997. Heard in the Supreme Court 15 September 1999.

Gillespie & Higgins, by James B. Gillespie, Jr., for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Gregory M. Willis, for defendant-appellants.

PER CURIAM.

AFFIRMED.

IN RE DAVENPORT

[351 N.C. 43 (1999)]

IN THE MATTER OF: JEREMY D. DAVENPORT, A JUVENILE

No. 111A99

(Filed 8 October 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 132 N.C. App. 234, 517 S.E.2d 687 (1999), affirming an oral juvenile disposition and commitment order entered 25 April 1997 by Cole, J., in District Court, Perquimans County. Heard in the Supreme Court 15 September 1999.

Michael F. Easley, Attorney General, by Bruce S. Ambrose, Assistant Attorney General, for the State.

Donna Shore Forbes for juvenile-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. JOHN HENRY McALLISTER, JR.

No. 135A99

(Filed 8 October 1999)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 132 N.C. App. 300, 511 S.E.2d 660 (1999), finding no error in a judgment entered 12 September 1997 by Llewellyn, J., in Superior Court, Pender County. Heard in the Supreme Court 15 September 1999.

Michael F. Easley, Attorney General, by Amy R. Gillespie, Assistant Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

PER CURIAM.

AFFIRMED.

AMERICAN CONTINENTAL INSURANCE COMPANY v. PHICO INSURANCE COMPANY

No. 147A99

(Filed 8 October 1999)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 132 N.C. App. 430, 512 S.E.2d 490 (1999), affirming in part, reversing in part and remanding a judgment entered by Cashwell, J., on 20 April 1998 in Superior Court, Wake County. Heard in the Supreme Court 17 September 1999.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael E. Weddington and James Y. Kerr, II, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Richard T. Boyette and Kari R. Johnson, for defendant-appellant.

PER CURIAM.

AFFIRMED.

WANDA J. CHOATE, EMPLOYEE v. SARA LEE PRODUCTS, EMPLOYER; SELF/CONSTITUTION STATE SERVICES, CARRIER

No. 208A99

(Filed 8 October 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. 14, 514 S.E.2d 529 (1999), reversing and remanding an opinion and award entered by the North Carolina Industrial Commission on 7 February 1997. Heard in the Supreme Court 17 September 1999.

Donaldson & Black, P.A., by Jay A. Gervasi, Jr., for plaintiff-appellee.

Orbock Bowden Ruark & Dillard, P.C., by Barbara E. Ruark, for defendant-appellants.

PER CURIAM.

AFFIRMED.

NIECA TIMOUR v. PITT COUNTY MEMORIAL HOSPITAL, INC., A NORTH CAROLINA CORPORATION

No. 3PA99

(Filed 8 October 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 131 N.C. App. 548, 508 S.E.2d 329 (1998), reversing and remanding an order entered 9 April 1997 by Duke, J., in Superior Court, Pitt County. Heard in the Supreme Court 13 September 1999.

Anne K. O'Connell and Jeffrey S. Miller for plaintiff-appellee.

Harris, Shields, Creech and Ward, P.A., by R. Brittain Blackerby and Mary V. Ringwalt, for defendant-appellant.

Elizabeth F. Kuniholm, President, North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

AFFIRMED.

Justices MARTIN and WAINWRIGHT did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAMEY J.C. CHEEK

No. 577A97

(Filed 5 November 1999)

1. Constitutional Law— informant—identity—disclosure not required

The trial court did not err in denying defendant's motion to require the State to disclose the identity of an informant who notified the police of the hiding place of a codefendant who defendant contended coerced him to take part in a kidnapping and murder where there was no showing or indication in the record that the informant was interested in exchanging information for reward money, or that the informant was either a participant in or a witness to the kidnapping and murder or was a witness to defendant's alleged coercion by the codefendant.

2. Criminal Law— duress—not murder defense—diary lost by State

Duress is not a defense to murder in this state; therefore, defendant was not denied a fair trial on a murder charge because the State lost and could not provide to defendant a diary of a deceased accomplice which purportedly supported defendant's contention that the accomplice was a violent person and that defendant participated in the murder because of coercion and duress by the accomplice.

3. Discovery; Criminal Law— duress—diary lost by State—fair trial not denied

Defendant was not denied a fair trial on kidnapping and robbery charges because the State lost and could not provide to defendant pursuant to his discovery request the diary of a deceased accomplice which defendant contended supported his defense that he acted under coercion and duress by the accomplice where the record shows that, during the extended course of the crimes against the victim, defendant had several opportunities to report that he had been forced by duress to commit these crimes and to seek help but failed to do so, and the trial court correctly concluded that the diary contained no evidence tending to show that the accomplice exercised active and immediate coercion over defendant at the time they committed any of the crimes against the victim.

4. Confessions and Incriminating Statements— voluntariness—lack of sleep and food—consumption of drugs and alcohol

Statements defendant made to the police were not involuntary and inadmissible because defendant had not slept or eaten during the two days prior to his arrest and had consumed drugs and alcohol during that time where defendant did not present any evidence that indicates that he was impaired or intoxicated at the time he made the statements, and the trial court's findings support the conclusion that defendant's statements were made in the absence of police coercion.

5. Evidence— subsequent crime or act—motive, intent, plan and modus operandi

In a prosecution of defendant for the first-degree murder and armed robbery of a taxicab driver, evidence concerning defendant's robbery five days later of a Shoney's restaurant and a second cab driver who took defendant and his accomplice to the restaurant was relevant and admissible to show defendant's motive, intent, plan and modus operandi in the robbery of the cab driver in this case where the victims in both cases were taxicab drivers who initially picked up defendant and his accomplice as customers; both drivers were forced out of their cabs at gunpoint and their cabs were stolen; and the gun used by defendant and his accomplice in the robbery and murder of the first driver was the same gun used to rob the restaurant and the second driver.

6. Jury— capital sentencing—jury selection—questions—acting in concert, aiding and abetting, felony murder—not improper stake-out

The State was not improperly permitted to "stake-out" prospective jurors in this capital case and bias them in favor of a sentencing decision of death by asking those jurors questions regarding their abilities to follow the law on acting in concert, aiding and abetting, and the felony murder rule where the State's questions contained an accurate summary of the law, the State merely asked whether the prospective jurors would be able to follow the law, and nothing in the record suggests that the State was inquiring how a prospective juror would be inclined to vote under a given set of facts.

7. Evidence— impeachment—exclusion of testimony

Defendant was not erroneously prevented from impeaching the investigating officer's testimony by the trial court's sustaining of the State's objections to certain questions asked the officer where the evidence defendant desired to elicit was already before the jury, and defendant's questions would not in fact serve to impeach the officer.

8. Evidence— expert testimony—capacity to form intent—leading question—other testimony

The trial court did not err in sustaining the State's objection to defense counsel's question "as phrased" to an expert witness in pharmacology concerning whether defendant's drug use and sleep deprivation precluded him from formulating a plan with another individual to kidnap and rob a cab driver because the question was a leading question. Moreover, defendant was not deprived of the opportunity to present evidence relevant to the issue of defendant's capacity to form the specific intent to commit the crimes charged where the record shows that the witness thereafter had the opportunity to, and did in fact, give his opinion as to defendant's ability to make and carry out plans.

9. Evidence— hearsay—corroboration—exclusion not prejudicial

Defendant was not prejudiced by the trial court's exclusion of an officer's hearsay testimony about a codefendant's statements to a confidential informant concerning the robbery of a restaurant where defendant contended that the statements would corroborate his assertion that the codefendant committed the robbery alone, but testimony by the officer on voir dire showed that the codefendant indicated that he did not act alone in committing the robbery.

10. Criminal Law— duress—gun ownership by codefendant—stipulation—violence by codefendant—irrelevancy

The trial court did not err by excluding evidence that the codefendant owned a gun, offered by defendant to show that defendant acted under duress by the codefendant in a kidnapping and robbery, where it was stipulated that the bullet fired into the victim's head came from the codefendant's gun and that the gun was recovered beside the codefendant's body. Furthermore, evidence of the codefendant's acts of violence toward a third party and a letter from the codefendant stating his preference for sui-

cide over prison was not relevant to defendant's defense of duress since evidence that the codefendant was a violent person was not sufficient to show that the codefendant exercised active and immediate coercion over defendant at the times they committed the crimes.

11. Criminal Law— mere presence—instruction not warranted

Defendant was not entitled to an instruction on "mere presence" with regard to charges of first-degree kidnapping and armed robbery where the evidence showed that defendant actively participated in those crimes.

12. Homicide— first-degree murder—voluntary intoxication—instruction not warranted

The trial court did not err by refusing to give defendant's requested instruction on "drugged condition," or voluntary intoxication, with regard to a first-degree murder charge in that defendant failed to present sufficient evidence from which a jury could conclude that defendant was so intoxicated that he was "utterly incapable" of forming the specific intent to commit first-degree murder where the evidence was conflicting as to whether defendant took any drugs on the day of the murder, but the evidence showed that defendant had the ability to drive the victim's cab for a distance of over fifty miles after the victim was kidnapped, and defendant had the capacity to discuss with police, in detail, the events which occurred both before and after defendant arrived in the city in which the victim was killed.

13. Sentencing— capital sentencing—aggravating circumstances—course of robbery and kidnapping

The trial court did not err in submitting two separate (e)(5) aggravating circumstances, that the murder was committed during the course of a robbery and that it was committed during the course of a kidnapping, where the State presented distinct evidence that defendant committed each of those crimes during the course of the murder. N.C.G.S. § 15A-2000(e)(5).

14. Sentencing— capital sentencing—aggravating circumstances—heinous, atrocious, or cruel

Medical evidence supported the trial court's submission of the (e)(9) aggravating circumstance that the murder of a cab drive was especially heinous, atrocious, or cruel where the cause of death was carbon monoxide poisoning from a fire, and the evi-

dence was sufficient for the jury to find that the victim was alive when her taxicab was set on fire and was aware of her impending death. N.C.G.S. § 15A-2000(e)(9).

15. Sentencing— capital sentencing—mitigating circumstances—subsumption by other mitigating circumstances

The trial court did not err by refusing to submit defendant's requested nonstatutory mitigating circumstance in a capital sentencing proceeding that a codefendant initiated the plan that led to the kidnapping of the murder victim where the court correctly ruled that this circumstance was subsumed by the (f)(4) minor participation and (f)(5) duress mitigating circumstances submitted to the jury. N.C.G.S. § 15A-2000(f)(4) and (f)(5).

16. Sentencing— capital sentencing—mitigating circumstances—peremptory instruction—conflicting evidence

The trial court did not err by refusing to peremptorily instruct the jury on the (f)(2) mitigating circumstance that defendant was under the influence of a mental or emotional disturbance and the (f)(6) impaired capacity mitigating circumstance where testimony by defendant's psychiatric expert supporting those circumstances based on his interview of defendant was contradicted by a statement defendant made to a law officer and by defendant's testimony at trial. N.C.G.S. § 15A-2000(f)(2).

17. Sentencing— capital sentencing—mitigating circumstances—peremptory instruction—conflicting evidence

The trial court did not err in refusing to give a peremptory instruction on the (f)(5) mitigating circumstance that defendant acted under duress or under the domination of another person where defendant's evidence that he acted only out of fear of a codefendant was undermined by evidence showing defendant's efforts to reunite with the codefendant once they were separated after the murder. N.C.G.S. § 15A-2000(f)(5).

18. Sentencing— capital sentencing—Issue Three—unanimity—inquiry by jury—instruction

The trial court did not err in instructing the jury in a capital sentencing proceeding that it must either unanimously answer "yes" or "no" to the question presented in Issue Three of the Issues and Recommendation as to Punishment form. Furthermore, when the jury asked during deliberations whether it could

strike the word "unanimous" from Issue Three but did not inquire into the result of its failure to reach a unanimous verdict, the trial court did not err by again instructing the jury that Issue Three required a unanimous answer without also instructing the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court.

19. Sentencing— capital sentencing—refusal to declare hung jury—failure to give statutory instruction

The trial court did not err by refusing to declare the jury deadlocked or "hung" on a sentencing recommendation in a capital sentencing proceeding after the jury had deliberated nine hours without reaching a decision on Issue Three where the jury never deliberated longer than two hours and thirty-seven minutes without a break; the jury did not indicate that it was deadlocked or was not making progress in its deliberations; and the State and defendant had presented a substantial quantity of evidence in a lengthy trial. Nor did the trial court commit plain error by failing to instruct the jury on the failure to reach a verdict or on each juror's individual responsibility as set out in N.C.G.S. § 15A-1235.

20. Sentencing— capital sentencing—death penalty—proportionality

A sentence of death imposed upon defendant for first-degree murder of a taxicab driver was not excessive or disproportionate where the jury convicted defendant under the theories of premeditation and deliberation and felony murder; the jury found as aggravating circumstances that (1) the murder was committed while defendant was engaged in the commission of a robbery, (2) the murder was committed while defendant was engaged in the commission of a kidnapping, and (3) the murder was especially heinous, atrocious, or cruel; defendant was also convicted of armed robbery and first-degree kidnapping; and defendant exhibited no remorse after the killing.

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

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Strickland, J., on 3 July 1997 in Superior Court, New Hanover 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

was allowed by the Supreme Court on 15 September 1998. Heard in the Supreme Court 14 April 1999.

Michael F. Easley, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State.

Margaret Creasy Ciardella for defendant-appellant.

LAKE, Justice.

On 15 July 1996, defendant was indicted for first-degree murder; on 12 August 1996, he was indicted for robbery with a dangerous weapon; and on 19 May 1997, he was indicted for first-degree kidnapping. Defendant was tried capitally to a jury at the 9 June 1997 Criminal Session of Superior Court, New Hanover 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 robbery with a dangerous weapon and first-degree kidnapping. Following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction. On 3 July 1997, the trial court sentenced defendant to death. The trial court also sentenced defendant to a consecutive sentence of sixty-four to eighty-six months' imprisonment for the robbery conviction and to a consecutive sentence of seventy-three to ninety-seven months' imprisonment for the kidnapping conviction. Defendant appealed his conviction for first-degree murder and his sentence of death to this Court as of right. On 15 September 1998, this Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the remaining convictions.

At trial, the State's evidence tended to show that on 21 June 1996, at approximately 12:25 p.m., defendant and Tom Nelson entered the taxicab of Ms. Barbara Oxendine at the Piney Green Shopping Center in Jacksonville, North Carolina. She drove defendant and Nelson to a bar in Jacksonville. Upon arriving at the rear of the bar, Nelson pointed a gun at Ms. Oxendine and ordered her to get out of the car. Nelson struck Ms. Oxendine in the head, and defendant and Nelson bound her with flex ties. Defendant put Ms. Oxendine either in the backseat or in the trunk of the cab. Defendant and Nelson then drove the cab to Wilmington, North Carolina.

Upon arriving in Wilmington, defendant and Nelson stopped at a grocery store where Nelson purchased beer, paper towels and lighter fluid. Defendant remained in the cab outside of the store while

Nelson went inside. After leaving the grocery store, Nelson told defendant they were going to shoot Ms. Oxendine and burn her in the car.

At approximately 2:00 p.m., Ms. Oxendine's cab was seen in Wilmington, in the area of the Sophie West Florist Shop on Market Street, near New Centre Drive and Sigmon Road. A waitress at Hooters restaurant in Wilmington, Rachael Frisbie, testified that she took an order from defendant and Nelson that same day. Ms. Frisbie testified that the two men asked her for directions to the hospital and asked her to call a cab for them. Their restaurant receipt, which was time-stamped at 2:23 p.m., showed that their order was "a pint of beer and a Coke." Ms. Frisbie also testified that the restaurant's clock was kept five minutes fast.

Cabdriver Billy Shirer testified that at 2:26 p.m. on 21 June 1996, he picked up two men at Hooters restaurant and drove them to New Hanover Hospital. While defendant and Nelson were riding to the hospital in Shirer's cab, firefighters were en route to a burning taxicab just off of Sigmon Road; the fire was first reported at 2:28 p.m. The burning cab was near Hooters restaurant located on the corner of Market Street and New Centre Drive diagonally across Market Street from the Sophie West Florist Shop.

Firefighters responding to the fire had difficulty extinguishing the fire. Once the fire was extinguished, a fireman discovered a body in the trunk of the cab; the body was later identified as Ms. Oxendine's. Charcoal-lighter cans were found in the driver's seat and on the ground beside the front passenger door, along with a beer bottle which still had condensation on it. An SBI expert in the cause and origin of fires testified that, in all probability, a flammable liquid had been poured across the front floorboard and between Ms. Oxendine's legs in the trunk.

An autopsy performed on 22 June 1996 on Ms. Oxendine revealed extensive burns to the skin of the abdomen, legs and arms as well as to the face and head. Charring obscured a gunshot wound to her head. Soot was present in the victim's nose, mouth, trachea and lungs. This indicated that notwithstanding the bullet wound to her head, Ms. Oxendine was alive when the fire started. The level of carbon monoxide in the victim's blood gases also indicated that Ms. Oxendine was alive when the fire began. The cause of Ms. Oxendine's death was determined to be carbon monoxide poisoning.

Shortly before 9:30 p.m. on Wednesday, 26 June 1996, Nelson and defendant hailed a cab and directed the driver, Tom Newton, to go to a Shoney's restaurant in Jacksonville. When the cab arrived at Shoney's, defendant remained in the cab and initiated a conversation with the driver concerning the Wilmington shooting and inquired whether the police had any suspects. Meanwhile, Nelson had entered the restaurant and robbed the cashier at gunpoint. Nelson came out of Shoney's, got back into the cab and forced the driver out at gunpoint. After the driver got out of the cab, defendant got into the driver's seat and drove away. The cabdriver and restaurant employees flagged down the police, and the police then immediately pursued the stolen cab. The cabdriver witnessed Nelson firing shots at the police. The cab was then stopped by traffic, and defendant and Nelson fled the cab. The police proceeded to chase defendant and Nelson on foot, and at this point, another shot was fired at police. After this final shot, defendant and Nelson succeeded in escaping from the police.

At trial, Shawn Kronstedt testified that he spent the night of 26 June 1996 in the same trailer as defendant. Kronstedt testified that defendant discussed the Shoney's robbery and bragged about eluding the police. Defendant also referred to Nelson as defendant's partner. On the morning of 27 June 1996, Kronstedt's employer, Patrick Pappenfuse, arrived to deliver Kronstedt's paycheck. Defendant introduced himself to Pappenfuse and began telling him about the Shoney's robbery and the shootout with police. Defendant bragged that the police were afraid of him. Defendant told Pappenfuse that he had a partner and that they were going to meet later in the day at the Yellow Rose Saloon. Pappenfuse left the trailer and called Sheriff Edward Brown of the Onslow County Sheriff's Department. The sheriff and Pappenfuse subsequently met, and Pappenfuse relayed the information to the sheriff.

On 28 June 1996, law enforcement officers went to the Yellow Rose Saloon to search for Nelson and defendant, and thereafter searched the trailer where Pappenfuse had spoken with defendant. The police found a cutout of a newspaper article about the Shoney's robbery. The officers then met behind the Yellow Rose Saloon to wait for a tracking dog to search a wooded area. While waiting, Sheriff Brown heard a shot fired and saw two men run from a trailer behind the saloon. After an exchange of gunfire, officers found the body of Nelson lying in the roadway. He had committed suicide. Defendant escaped into the wooded area but surrendered to officers twelve hours later.

[1] In his first assignment of error, defendant contends that the trial court committed reversible error in denying defendant's motion to disclose the identity of the informant who notified the police as to where his codefendant, Tom Nelson, was hiding. Defendant also argues in this assignment of error that the trial court erred in failing to compel the State to provide a copy of the "diary" kept by Nelson. Finally, once it was apparent that the diary was lost, defendant contends that the trial court erred in refusing to sanction the State for its failure to preserve and disclose exculpatory evidence pursuant to N.C.G.S. § 15A-910.

In this case, defendant based his defense to the murder and kidnapping charges on the theory that he was an unwilling participant who accompanied Nelson as a result of his fear of Nelson. Defendant learned during discovery that a confidential informant telephoned the Onslow County police and asked whether there was a reward for information about the robbery of Shoney's restaurant. The informant then indicated that Nelson committed the robbery and that he acted alone. Defendant contends that the informant's testimony was material to defendant's trial since defendant claims that he would not have been involved in the kidnapping and murder of Ms. Oxendine if he had not been subject to duress by Nelson.

The United States Supreme Court has held that in determining whether a defendant has a right to disclosure of an informant's identity, a court must consider the particular circumstances of each case such as "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro v. United States*, 353 U.S. 53, 62, 1 L. Ed. 2d 639, 646 (1957). This Court has examined the holding in *Roviaro*, and has stated:

> "[B]efore the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure."

State v. Williams, 319 N.C. 73, 83-84, 352 S.E.2d 428, 435 (1987) (quoting *State v. Watson*, 303 N.C. 533, 537, 279 S.E.2d 580, 582 (1981)). Additionally, this Court has ruled that the disclosure of an informant's identity "is required where the informer directly participates in the alleged crime so as to make him a material witness on the issue of guilt or innocence." *State v. Ketchie*, 286 N.C. 387, 390, 211 S.E.2d 207, 209 (1975).

There is no showing or indication from all the evidence of record that the informant in this case was interested in anything other than exchanging information for money, or that the informant was either a participant in or a witness to the kidnapping and murder of Ms. Oxendine or was a witness to defendant's alleged duress by Nelson. Because there is no showing or indication from the evidence that the informant was involved in any of the alleged crimes, and because defendant has failed to show how the informant could serve as a material witness as to defendant's guilt or innocence, the trial court correctly denied defendant's motion to reveal the informant's identity.

Defendant also contends that the trial court erred in denying his discovery motion in which he requested that the State turn over a diary maintained by Nelson that was in the possession of Jacksonville law enforcement officers. On 9 June 1997, the trial court conducted an evidentiary hearing on the contents and relevancy of Nelson's diary. Amanda Beck, Nelson's girlfriend, testified during this hearing that law enforcement officers had approached her and asked if she had evidence regarding Nelson. She gave Nelson's diary to a deputy from the Onslow County Sheriff's Department. At some time after that, Ms. Beck telephoned the sheriff's office to inquire about the diary. She testified that she could not remember when she called or to whom she talked, but that she was told "that it was lost; that they couldn't find it."

When asked if she had read any of the contents of Nelson's diary, Ms. Beck stated:

> He wrote about a robbery at a convenience store. There was a police officer in the convenience store and a couple of their people. He got mad because the police officer was there, and he hates police officers, and it went on to say that he bashed [the officer] in the head with a claw hammer.

Then, during cross-examination, Ms. Beck testified:

> That's what I really remember, you know, pretty much. After I read the story about the police officer and how he felt toward police officers, I kind of felt sick, like he could actually be that crazy to do things like that, even in his head, so I didn't read any more.

Counsel for defendant then began direct examination of Onslow County Sheriff Brown. Defendant's counsel questioned how the sher-

iff's department obtained the diary, and the following colloquy ensued:

> Q. Do you recall a conversation with [Ms. Beck] about [Nelson's] diary, among other things?
>
> A. She called me, called the office, on July 1, 1996, to tell me she had found a diary that belonged to Tom Nelson and that there was some bad things in it and maybe I needed to look at it.
>
> Q. What, if anything, did you do, as a result of that conversation?
>
> A. I sent a Deputy Thomas Gagnon out to her place at Yellow Rose Saloon to pick up the diary.
>
> Q. Did he give her a receipt for it, as far as you're aware?
>
> A. I don't know. He brought it back to me. I don't know whether there was a receipt given to her or not.
>
> Q. Did you establish a chain of custody on the item?
>
> A. From him to myself. From her to him, I don't have any chain of custody.
>
> Q. Okay. What did you do after looking at—let me rephrase that. Did you have occasion to read the diary?
>
> A. I looked through the diary to see if there was anything that would have been relative to law enforcement. I was not going to plunder in his life, even after his death, but I was interested in anything that might clear up any crimes that he may have committed.

As to Nelson's entry describing hitting a police officer in the head with a hammer, Sheriff Brown testified:

> If my memory serves me correct, he mentioned killing one [police officer], knocking him in the head with a hammer and the hammer sticking in the skull, and he couldn't get the skull out, I mean get the hammer out of the skull, and some other activity that went on there. The best I can remember, he related about stealing a new car.

Sheriff Brown explained how he used Nelson's journal entry in his search for information regarding unsolved crimes:

> A. . . . I said to myself, I'll check it out. I don't remember what state it was at, or whether it even mentioned a state, but I believe

I did call where he was from, or where he was in prison at, to see if they had any such crime as that committed done, and was told if they would have had something like that they would have remembered it.

Q. Where was he in prison at?

A. I want to say Virginia or somewhere upstate. I don't remember, exactly, but I do remember calling, and I was told if they would have had a crime committed that bizarre, they would have remembered it.

Q. But it wouldn't necessarily have been in the state he had been in prison, would it?

A. Well, when you—it would have been in the state he had been in prison in, or you run a PIN message asking for any type murder fitting that description and did not get a reply.

Q. What did you run a PIN message on?

A. The murder, describing the murder of an officer or a deputy or reserve offer [sic] getting hit in the head with a hammer and the hammer being stuck in the head because he said he couldn't pull it out.

Q. You only ran that—did you run that throughout all the states?

A. Best I remember, I ran it on the PIN machine to see if we could get anybody anywhere. I never did get a reply back on that.

Finally, Sheriff Brown testified that he did not return the diary to the other evidence because there appeared to be nothing in the diary "relative to law enforcement." When asked why the diary had not been returned to Ms. Beck, Sheriff Brown explained:

I thought it had been given back to Miss Beck. Matter of fact, I have turned my office drawers and everything upside-down trying to find it. I thought it had been given back to her.

The trial court then proceeded to enter findings of fact and a conclusion of law. Among these findings, the court stated "that from the testimony of both Sheriff Brown and Amanda Beck at this hearing, there is nothing contained in the diary that would be of benefit to the defendant in this case in the nature of exculpation." The trial court then concluded:

> [T]he diary is of no exculpatory effect insofar as this defendant is concerned. Based upon the foregoing findings of fact and conclusion of law, it is the order of this Court that the failure to locate said diary is not fatal and that the defendant's motion to dismiss the charges against the defendant be and the same is hereby denied.

Defendant then requested the trial court to include the finding that Sheriff Brown "admitted that the sheriff's department lost the diary." The trial court denied this request.

The United States Supreme Court has held that suppression by the State of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt/innocence or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). In determining whether evidence is material, the Supreme Court stated:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985). Defendant contends that the Nelson diary was material to defendant's defense because it supported defendant's contention that Nelson was a violent person, which in turn supported defendant's defense that he accompanied Nelson only out of fear. Therefore, defendant asserts that the trial court erroneously concluded that the diary did not contain any exculpatory evidence, and because he was denied access to such evidence, defendant contends his trial was fundamentally unfair.

[2] This contention as it relates to the charge of first-degree murder is inapplicable since duress is not a defense to murder in North Carolina. *State v. Gay*, 334 N.C. 467, 490, 434 S.E.2d 840, 853 (1993). Since defendant may not use duress as a defense to the charge of first-degree murder, the trial court correctly concluded that the diary did not contain any exculpatory evidence which could aid defendant, and it correctly denied the motion to dismiss as to the murder charge. However, the affirmative defense of duress, if proven, would serve as a complete defense to the kidnapping and robbery charges. *See State v. Brock*, 305 N.C. 532, 290 S.E.2d 566 (1982). In order to successfully

invoke the duress defense, a defendant would have to show that his "actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act." *State v. Strickland*, 307 N.C. 274, 299, 298 S.E.2d 645, 661 (1983), *overruled on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

[3] In the case *sub judice*, the record contains no evidence which indicates that defendant participated in the kidnapping and robbery of Oxendine as a result of coercion. During the extended course of the crimes against Oxendine, defendant had several opportunities to report that he had been forced by duress to commit these crimes and to seek help. The record shows that defendant went to New Hanover Hospital after the murder, where he could have sought help, but he failed to do so. There is also evidence that after the 26 June 1996 robbery of Shoney's restaurant, defendant and Nelson separated as they fled the police. Rather than seeking help at that point, defendant voluntarily sought out Nelson's company again. The trial court correctly concluded that the diary contained no evidence tending to show that Nelson exercised active and immediate coercion over defendant at the time they committed any of the crimes against Oxendine. This assignment of error is overruled.

In his next assignment of error, defendant contends that the trial court committed reversible error by denying defendant's motion to suppress and then subsequently admitting into evidence statements that defendant made to the police. Defendant contends that his statements should have been suppressed on the grounds that he had invoked his right to counsel, that the statements were coerced, and that the statements were otherwise made in violation of defendant's constitutional and statutory rights.

Defendant also argues that his statements were not voluntary because at the time of his interrogation, defendant had been awake for almost two days. During this two-day period, defendant had consumed vast quantities of drugs and alcohol and no food, and he had spent ten hours in the woods hiding from the police. Defendant filed his motion to suppress on 4 November 1996, and an evidentiary hearing on defendant's motion was held on 5-7 May 1997. After making findings of fact and conclusions of law, the trial court denied defendant's motion to suppress.

Defendant's assignment of error to this Court challenging the trial court's order provides:

18. The court's denial of defendant's motion to suppress statements defendant allegedly made to the police; on the grounds the court's findings of fact were contrary to the evidence, its conclusion of law was erroneous and its ruling was otherwise in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I, Sections 18, 19, 23, 24, and 27 of the North Carolina Constitution, and was in violation of North Carolina statutory and common law.

In this assignment of error, defendant has failed to specifically except to any of the trial court's findings of fact relating to this motion. Defendant has additionally failed to identify in his brief which of the trial court's thirty-one findings of fact are not supported by the evidence. Therefore, this Court's review of this assignment of error is limited to whether the trial court's findings of fact support its conclusions of law. *State v. Watkins*, 337 N.C. 437, 438, 446 S.E.2d 67, 68 (1994).

We have carefully reviewed each of the trial court's findings, including its findings relating to defendant's arrest, custody and the circumstances thereof; defendant's *Miranda* rights being given; defendant's acknowledgment that he understood these rights; the findings of fact with respect to the robbery of Shoney's restaurant as related by defendant; and those regarding defendant's request for a lawyer. On this basis, we conclude that the trial court's findings of fact fully support its conclusions of law that defendant's statements were freely, voluntarily and understandingly made and that none of defendant's federal or state constitutional rights were violated by his arrest, detention, interrogation or statements.

[4] With regard to defendant's assertion that his statements were not voluntary because he had not slept or eaten during the two days prior to his arrest and that he had consumed drugs and alcohol during that time, we note that the United States Supreme Court has declined to create a constitutional requirement that defendants must confess their crimes "only when totally rational and properly motivated," in the absence of any official coercion by the State. *Colorado v. Connelly*, 479 U.S. 157, 166, 93 L. Ed. 2d 473, 484 (1986). Additionally, this Court has consistently held "that 'police coercion is a necessary predicate to a determination that a waiver or statement was not given voluntarily,' and without police coercion, the question of voluntariness does not arise within the meaning of the Due Process Clause of the Fourteenth Amendment." *State v. Morganherring*, 350 N.C. 701,

722, 517 S.E.2d 622, 635 (1999) (quoting *State v. McKoy*, 323 N.C. 1, 21-22, 372 S.E.2d 12, 23 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990)).

Defendant has not presented any evidence that demonstrates or indicates that he was impaired or intoxicated at the time he made the statements. Additionally, the trial court's findings of fact support the conclusion that defendant's statements were made in the absence of police coercion. This assignment of error is overruled.

[5] In his next assignment of error, defendant contends that the trial court committed reversible error by denying defendant's motion to exclude all evidence concerning the Shoney's robbery that occurred five days after the victim was killed in this case. Prior to trial, defendant filed a motion *in limine* to prohibit the State from introducing evidence regarding the subsequent robbery of Shoney's restaurant. The trial court heard arguments on that motion and subsequently denied it.

Rule 404(b) of North Carolina's Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

N.C.G.S. § 8C-1, Rule 404(b) (1998). This Court has ruled that the list of purposes for which evidence of other crimes is admissible is "neither exclusive nor exhaustive." *State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Additionally, this Court has held that evidence of other crimes "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. 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).

In this case, the circumstances surrounding the subsequent robbery of Shoney's restaurant and Newton indicate that defendant and Nelson used the same method of operation as in the robbery of Ms. Oxendine. In both cases, the victims were taxicab drivers who ini-

tially picked up defendant and Nelson as customers. Also, in both incidents, the cabdrivers were then taken by surprise and forced out of their cabs at gunpoint, and then both vehicles were stolen. The gun that defendant and Nelson used in their robbery and murder of Oxendine was the same gun that they used to rob the restaurant and Newton. Accordingly, the evidence surrounding the robbery of Shoney's restaurant and Newton, as well as the circumstances immediately preceding and following those robberies, was relevant to show defendant's motive, intent, plan and *modus operandi* in the robbery of Ms. Oxendine. Because this evidence is relevant to facts other than defendant's propensity to commit the crime, this assignment of error is overruled.

[6] In his next assignment of error, defendant contends that the trial court committed reversible error in allowing the State to question prospective jurors regarding their willingness to convict defendant and to sentence him to death under a given set of facts. Defendant argues that the jury-selection process in this case failed to meet the constitutional requirements of fairness because the State was allowed to improperly "stake out" the jurors and bias them in favor of a sentencing decision of death.

During *voir dire*, the State explained the general legal concepts of first-degree murder to prospective jurors, and then the prosecutor asked:

> I know I'm throwing a lot of terms at you, but do you feel like that you could follow the law as His Honor gives it to you and—if you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—that you could return a verdict of guilty on that?

Further into jury selection, the following exchange occurred:

> [PROSECUTOR]: Do you understand that? Mr. Newman, would that cause you any problem, the fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?
>
> JUROR NUMBER TWO: Yeah, I can see how it would be so.

[PROSECUTOR]: Can you follow the law as His Honor gives it to you on that issue?

JUROR NUMBER TWO: Uh-huh.

[PROSECUTOR]: Am I making myself clear on that? So you feel like that you could follow the law as His Honor gives it to you under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match, or whatever the cause of death may have been, that someone else may have actually done that?

At the time the State asked these questions, juror number five and juror number six were on the panel. The State repeated these questions throughout *voir dire* and asked very similar questions to other panels from which jurors were chosen. Defendant argues that these questions were improper because, at trial, the State presented evidence and argued that codefendant Nelson struck the victim in the head, that Nelson pulled the trigger and shot the victim, and that Nelson lit the match that set the cab on fire while the victim was in the trunk.

"In reviewing any *voir dire* questions, this Court examines the entire record of the *voir dire*, rather than isolated questions." *State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997). The trial court has a great deal of discretion in monitoring the propriety of questions asked by counsel during *voir dire*, and the standard of review on this issue is whether the trial court abused its discretion and whether that abuse resulted in harmful prejudice to the defendant. *Id.*

With regard to defendant's contention that the State was allowed to ask impermissible questions during *voir dire*, this Court has consistently upheld the following rule:

> "Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. In the first place, such questions are confusing to the average juror who at that stage of the trial has heard no evidence and has not been instructed on the applicable law. More importantly, such questions tend to 'stake out' the juror and cause him to pledge himself to a future course of action. This the law neither contemplates

> nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts."

Id. at 202, 491 S.E.2d at 647 (quoting *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976)). Additionally, "[h]ypothetical questions that seek to indoctrinate jurors regarding potential issues before the evidence has been introduced and before jurors have been instructed on applicable principles of law are similarly impermissible. *Id.* at 203, 491 S.E.2d at 647.

In *State v. Bond*, 345 N.C. 1, 478 S.E.2d 163 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997), this Court ruled permissible the following *voir dire* question: "Would any of you feel like simply because [the defendant] did not pull the trigger, you could not consider the death penalty and follow the law concerning the death penalty?" *Id.* at 14, 478 S.E.2d at 169. The trial court in that case did not abuse its discretion since evidence of defendant's status as an accessory was uncontroverted, and the State was inquiring as to whether prospective jurors had the ability to impose a death sentence upon a defendant who served as an accessory to first-degree murder. *Id.* at 17, 478 S.E.2d at 171. The State correctly explained the applicable law to the panel of jurors, and at no point did the State use hypothetical examples, but rather phrased its questions in terms of facts alleged to be proved. *Id.*

In this case, we have reviewed the entire *voir dire* as reflected in the record and conclude that the trial court did not abuse its discretion in allowing the State's questions regarding prospective jurors' abilities to follow the law on acting in concert, aiding and abetting, and the felony murder rule. The State's questions contained an accurate summary of North Carolina law, and the State merely asked whether the prospective jurors would be able to follow the law. There is nothing in the record to suggest that the State was inquiring how a prospective juror would be inclined to vote under a given set of facts. This assignment of error is overruled.

In his next assignment of error, defendant contends that the trial court committed reversible error when it sustained several of the State's objections to admissible and relevant evidence. At the outset, we note that this Court has long held that:

> "A trial court's ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect. *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981). Even if the complaining party can show that the trial court erred in its ruling, relief ordinarily will not be granted absent a showing of prejudice. N.C.G.S. § 15A-1443(a) (1983)."

State v. Mickey, 347 N.C. 508, 520, 495 S.E.2d 669, 676 (quoting *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988)), *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 106 (1998).

[7] First, defendant contends that the trial court erroneously sustained the State's objections to testimony offered by defendant in his attempt to impeach Detective Rodney Simmons, the officer in charge of the investigation conducted by the Wilmington Police Department. On the day defendant was arrested, he was interrogated by Detective Brian Pettus of the Wilmington Police Department. Defendant told Pettus that he waited for Nelson behind Hooters restaurant for approximately twenty minutes. Defendant contends that it was during this time that Nelson killed Ms. Oxendine. At trial, defendant called Simmons for direct examination and asked Simmons whether the police attempted to verify defendant's statements to Pettus in which he stated that he was outside Hooters restaurant during the time Nelson was supposedly killing Ms. Oxendine. The State objected to this line of questioning by defendant, and the trial court ultimately sustained the State's objections.

Defendant argues that Simmons' testimony was relevant for impeachment purposes because, during the State's case-in-chief, the State asked Simmons:

> Q. What processing, if any, did you do of the Hooters patio or the parking lot, or any area of Hooters?
>
> A. On the day of the incident, I did nothing.

Defendant sought to impeach Simmons through evidence which tended to show that Detective Simmons walked from the crime scene to the patio at Hooters, tried to ascertain from the Hooters' manager which waitress was serving on the patio the day of the murder, and took photographs of the area outside Hooters and the surrounding area. Defendant contends that all of these actions illustrate that Simmons did in fact know that defendant told Pettus that he waited

for Nelson behind Hooters. Because defendant's questions were relevant for impeaching Simmons, defendant argues the trial court erred in sustaining the State's objection.

However, after reviewing the record and transcript, we cannot conclude that defendant's questions would in fact serve to impeach Simmons. Defendant's argument fails to reveal the full context of Simmons' testimony during the State's direct examination:

> Q. . . . Detective Simmons, after June 21st, 1996, when did you first hear of the defendant, Mr. Cheek?
>
> A. It was approximately a week later.
>
> Q. What processing, if any, did you do of the Hooters patio or the parking lot, or any area of Hooters?
>
> A. On the day of the incident, I did nothing.
>
> Q. After you learned of Mr. Cheek, what did you do, as far as processing the Hooters?

In response to this last question, Detective Simmons testified that once he learned about defendant, he inquired of the Hooters' manager as to who would have worked on the patio the day in question. Detective Simmons also testified that he took photographs of the restaurant. Thus, based on this testimony, the evidence defendant desired to elicit was before the jury, and we cannot conclude that defendant was erroneously prevented from impeaching Simmons' testimony. Accordingly, we cannot conclude that defendant suffered prejudice as a result of the trial court sustaining the State's objections.

[8] Second, defendant contends that the trial court erred in sustaining the State's objection when counsel for defendant asked defendant's expert witness, Dr. Everette Ellinwood, an expert in pharmacology, the following question:

> Q. Do you feel Mr. Cheek's drug use, sleep deprivation and intense feeling that he needed to get to Wilmington, precluded him from being able to formulate a plan with another individual to kidnap and rob a cabdriver?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: As phrased, that is sustained.

Defendant contends that because the trial court sustained the State's objection to that question, defendant was deprived of the opportunity to present evidence relevant to the issue of defendant's capacity to form the specific intent to commit the crimes charged. This Court has held that "an expert witness may testify concerning the defendant's ability to make and carry out plans, and the jury may consider such evidence when determining if defendant had the ability to form a specific intent." *State v. Lynch*, 340 N.C. 435, 467, 459 S.E.2d 679, 695 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996).

We conclude that the trial court correctly sustained defense counsel's question "as phrased" since it was a leading question. A review of the record reveals that Dr. Ellinwood had an opportunity to, and did in fact, give his opinion as to defendant's ability to make and carry out plans. During defendant's direct examination of Dr. Ellinwood, the following colloquy occurred:

> Q. Sir, when an individual is suffering the effects of hallucinative drugs and alcohol and, possibly, other drugs, do they often become focused on just one task?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Overruled, if he can answer.
>
> THE WITNESS: Certainly with stimulant drugs, one can become very stereotyped in their thinking. In other words, it's an intense pursuit of one or two things, totally excluding other relevancies.
>
> Q. What drugs would that be?
>
> A. That would be cocaine, methamphetamine, primarily.
>
> Q. In your opinion, sir, based on your interview and your education and training, do you have an opinion as to whether Jamey Cheek had the mental ability to formulate a plan with another individual to kidnap and rob a cabdriver?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Overruled.
>
> Q. If you can just answer if you have an opinion as to that matter.
>
> A. I don't have an opinion.

Based on the foregoing testimony, we cannot conclude that defendant's expert was not permitted to give his opinion regarding defendant's inability to formulate a plan with Nelson.

Third, defendant contends that the trial court erred in excluding evidence concerning Nelson's conduct. However, in his discussion as to this particular portion of this assignment of error, defendant fails to refer to any specific ruling made by the trial court. Additionally, defendant does not provide any citations to the record or transcript. Because defendant does not present this portion of this assignment of error in a way for this Court to give it meaningful review, we conclude defendant has abandoned his argument under this assignment of error. N.C. R. App. P. 28(a); *see also State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

[9] Fourth, because the trial court denied defendant's motion to compel the State to reveal the identity of the confidential informant, defendant filed a notice of intent to introduce hearsay statements. Defendant attempted to present to the jury the statements made by the confidential informant as corroborative evidence of defendant's statements that Nelson was a violent person, which in turn supported defendant's duress defense. Further, defendant also wanted to introduce those statements to corroborate defendant's assertion that Nelson robbed Shoney's without defendant's assistance or knowledge.

Following defendant's notice of intent to introduce hearsay, the State filed a motion *in limine* to exclude all evidence as to what Nelson allegedly told the confidential informant. The trial court granted the State's motion *in limine*, and then defendant requested the opportunity to make an offer of proof. The trial court initially denied defendant's offer of proof, but later reversed itself. Consequently, defendant conducted a *voir dire* of Detective Paul Harrington outside the jury's presence.

During direct examination on *voir dire*, Detective Harrington described the circumstances surrounding his meeting with the confidential informant who led the police to Nelson. Defendant's direct examination of Harrington concluded with the following colloquy:

> Q. So, because of that information that you received, you were looking for Tom Nelson the night of the shootout at the Yellow Rose Saloon, is that correct?
>
> A. That's incorrect.

Q. You were not looking for Tom Nelson that night?

A. We were looking for two people that night.

Q. Was Tom Nelson one of those two people?

A. Yes, he was.

[DEFENSE COUNSEL]: Thank you, that's all the questions I have.

However, during the State's cross-examination of Detective Harrington, the following ensued:

Q. What did he [the informant] tell you?

A. He stated that Tom stated that he did the robbery himself but that he had someone outside, watching his back.

Q. What robbery was he talking about?

A. He was talking about the Shoney's robbery.

Q. Okay. And that—what did Tom tell him, other than he had done the Shoney's robbery?

A. That he had someone outside, watching his back.

Q. Okay. Outside what?

A. Outside the restaurant, watching his back.

Defendant asserts that the statements made to the confidential informant should have been admitted as corroborative evidence that Nelson committed the Shoney's robbery alone. However, because the evidence indicates that Nelson did not act alone when he robbed Shoney's, we cannot conclude that defendant suffered prejudice as a result of the trial court's ruling.

Fifth, defendant argues further that the trial court erred in repeatedly denying defendant's attempts to present evidence supporting his contentions that Nelson was a violent person, which would in turn corroborate defendant's contentions that he was justified in his fear of Nelson. In addition to the statements that Nelson made to the informant, defendant attempted to present evidence of Nelson's diary. For the reasons stated above, as well as for the reasons stated in our discussion of defendant's first assignment of error, we conclude that the trial court correctly sustained the State's objections to the admission of this evidence.

[10] Finally, defendant contends that the trial court prevented him from introducing evidence, through the testimony of Amanda Beck, Nelson's girlfriend, that Nelson owned a gun and that Ms. Beck had seen him shoot the gun at Shawn Kronstedt. Additionally, defendant sought to introduce a letter written by Nelson to Ms. Beck in which Nelson indicated that he would rather die than be caught by the police. Defendant contends that this evidence was relevant to defendant's affirmative defense of duress and that he only accompanied Nelson as a result of fear.

In this regard, there was never a factual dispute that Nelson owned a gun and used it in the kidnapping and robbery of Oxendine. During the State's case-in-chief, the State, with defendant's agreement, presented a stipulation that the bullet fired into Oxendine's head came from Nelson's gun, and that the same gun was eventually recovered beside Nelson's body. With regard to defendant's attempt to introduce evidence of Nelson's acts of violence towards Kronstedt, as well as Nelson's letter stating his preference of suicide over prison, this evidence is not relevant to defendant's duress defense. As we have previously stated, in order for defendant to successfully invoke a duress defense, defendant would have to present evidence that he feared he would "suffer immediate death or serious bodily injury if he did not so act." *State v. Strickland*, 307 N.C. at 299, 298 S.E.2d at 661. For the reasons discussed in our consideration of defendant's first assignment of error, evidence that serves only to demonstrate that Nelson was a violent person is not sufficient, in light of the State's evidence in this case, to show that Nelson exercised active and immediate coercion over defendant at the times they committed the crimes against Oxendine. This assignment of error is overruled.

In his next assignment of error, defendant asserts that the trial court erroneously denied his specific requests for jury instructions on (1) "mere presence" with regard to the charges of first-degree kidnapping and robbery, and (2) "drugged condition" with regard to the first-degree murder charge. Defendant argues that the instructions he requested were both correct and supported by the evidence, and that the trial court's denial amounted to reversible constitutional error.

[11] This Court has held that a court must give a requested instruction if it is a correct statement of the law and is supported by the evidence. *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). In

the case *sub judice*, the evidence fully shows that defendant actively and intelligently participated in the kidnapping and robbery of Ms. Oxendine. The evidence indicates that defendant held the victim while Nelson bound her hands, that defendant drove the stolen taxi, and that defendant put the unconscious victim in either the backseat or the trunk of the taxi. Defendant conceded that he did take part in these activities. However, defendant argued at trial that he was not criminally liable for his actions since his participation was coerced. Thus, all that was left for the jury to determine was whether defendant's acts were willing or unwilling.

Under the "mere presence" doctrine, the fact that defendant was present " 'at the scene of the 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.' " *State v. Ligon*, 332 N.C. 224, 242, 420 S.E.2d 136, 146 (1992) (quoting *State v. Sanders*, 288 N.C. 285, 290, 218 S.E.2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 47 L. Ed. 2d 102 (1976)). However, there is undisputed evidence that defendant did actively participate in the kidnapping and robbery of the victim and thus could not have been "merely present" at the scene of the crime. Since defendant admits that he did participate in the robbery and kidnapping of the victim, defendant is not entitled to an instruction on "mere presence."

[12] With regard to defendant's contention that the trial court erroneously deprived him of an instruction on voluntary intoxication as a defense to the first-degree murder charge, this Court has repeatedly stated:

> 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).

State v. Billings, 348 N.C. 169, 182-83, 500 S.E.2d 423, 431, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 431 (1998).

Defendant testified on direct examination that on the morning of Oxendine's murder:

> I got up, I took a shower. I had bought two hits of acid earlier, tooken [sic] one that night, and I took the other one after I got out of the shower.

On cross-examination, defendant and the prosecutor engaged in the following colloquy:

> A. Yeah. In the morning when Tom [Nelson] freaked out, it killed my buzz.
>
> Q. Excuse me?
>
> A. When Tom freaked out at Friends, it would, I guess you say, ruined my high or killed my buzz. When you're high or on drugs, if you get shocked real bad, your buzz goes away quick.
>
> Q. You mean when Tom was bludgeoning Miss Oxendine behind the Friends Lounge, it killed your buzz?
>
> A. When—what I'm saying is, when Tom pulled out a gun and started acting crazy, I wasn't no longer high.
>
> Q. So he sobered you up?
>
> A. Yeah.

Additionally, Detective Brian Pettus of the Wilmington Police Department testified that when he questioned defendant, defendant told him that he had not taken any drugs the day of the murder. Regardless of this conflicting testimony, the evidence has established that defendant had the ability to drive the stolen cab from Jacksonville to Wilmington, which is a distance of approximately fifty-one miles. The evidence also shows that defendant had the capacity to discuss with the police, in detail, the events which occurred before and after defendant arrived in Wilmington. Based on

these facts, we cannot conclude that defendant produced sufficient evidence from which a jury could conclude that defendant was so intoxicated that he was "utterly incapable" of forming the specific intent to commit first-degree murder. *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987). This assignment of error is overruled.

[13] In his next assignment of error, defendant contends that the trial court erred in submitting two separate (e)(5) aggravating circumstances, that the murder was committed during the course of a robbery and that it was committed during the course of a kidnapping. N.C.G.S. § 15A-2000(e)(5) (1997). The jury found this aggravating circumstance twice, once for robbery and once for kidnapping. This Court has recently reaffirmed that N.C.G.S. § 15A-2000(e) allows for " 'the submission of separate aggravating circumstances pursuant to the same statutory subsection if the evidence supporting each is distinct and separate.' " *State v. Trull*, 349 N.C. 428, 454, 509 S.E.2d 178, 195 (1998) (quoting *State v. Bond*, 345 N.C. at 34, 478 S.E.2d at 181), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 80 (1999). Additionally, this Court has specifically ruled that a trial court may allow multiple submission of the (e)(5) aggravating circumstance. *Id.* Since the State presented distinct evidence that defendant committed both robbery and kidnapping against the victim during the course of the murder, we conclude the trial court properly submitted the (e)(5) circumstance twice.

[14] Under this same assignment of error, defendant also contends that the trial court erred in submitting the (e)(9) aggravating circumstance, that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). Defendant argues that the (e)(9) aggravating circumstance should not have been admitted because the evidence was insufficient to show that the murder was especially heinous, atrocious, or cruel.

In considering when the (e)(9) aggravating circumstance may be submitted, this Court has stated:

> Killings which are physically agonizing for the victim or which are in some other way dehumanizing, or killings which are less violent but involve the infliction of psychological torture, including placing the victim in agony in his last moments, aware of, but helpless to prevent, impending death, are two more types of murders warranting submission of the circumstance.

State v. Syriani, 333 N.C. 350, 391, 428 S.E.2d 118, 140, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). In the present case, Dr. Thomas Clark, the doctor who performed the autopsy on Ms. Oxendine's corpse, testified that he believed she was alive when her taxicab was set on fire. The State questioned Dr. Clark as follows:

> Q. What did that tell you, when you found soot in her air passages and her nose?
>
> A. The presence of this soot shows that she was alive at the time the fire began.
>
> Q. Now, were some tests done to determine her carbon monoxide level?
>
> A. Yes.
>
> Q. Why was that done?
>
> A. Carbon monoxide is also a byproduct of incomplete combustion, meaning that, whenever there's a fire that isn't burning completely, which is most fires, it makes soot and carbon monoxide. . . . The significance of this is that the presence of a carbon monoxide saturation of greater than 70 percent shows me that this woman was alive at the beginning of the fire and died as a result of the fire because, in order to get a carbon monoxide saturation that high, you have to be breathing and your heart has to be beating, and you cannot live with a carbon monoxide of greater than 70 percent. So you have to be alive to get it, and it is fatal 100 percent of the time.
>
> . . . .
>
> Q. Okay. Thank you. Dr. Clark, based on the autopsy of Barbara Oxendine, do you have an opinion as to the cause of death?
>
> A. Yes, I do.
>
> Q. What is that opinion?
>
> A. Death was due to carbon monoxide poisoning.
>
> Q. By that, you're referring to fire?
>
> A. That's correct.

The record does not contain definitive evidence showing that Ms. Oxendine was conscious when she was transported to Wilmington and when the fire began. Counsel for defendant questioned Dr. Clark

as to what impact the gunshot wound may have had on Ms. Oxendine's consciousness:

> Q. Dr. Clark, the bullet wound that you found in Miss Oxendine, that would have been, within a few minutes, a fatal wound, would it not?
>
> A. It would have been fatal, not necessarily a few minutes, and that's a difficult question, because it depends on exactly what you consider to be death. It's clear that she was breathing at the time that the fire started. I don't know exactly when the gunshot wound occurred, in relation to the beginning of the fire, and I don't know how long it may have been there. It is conceivable, without the fire, that she could have lived, meaning breathing and with a heartbeat, some several hours. That's unlikely. It was probably a much shorter time. It's also possible that it was fatal, or it would have been fatal in a shorter time.
>
> Q. In your opinion, sir, would it have rendered her unconscious?
>
> A. It is likely that it would have rendered her unconscious, but I cannot say for sure. It did not directly injure any part of the brain that result—that would have resulted in a loss of consciousness, but it is likely that it indirectly injured those parts of the brain.
>
> Q. And your findings are that, basically, it was ingesting smoke that caused her death?
>
> A. That is correct.

In determining whether evidence is sufficient to support the (e)(9) aggravating circumstance, that evidence should be "viewed in the light most favorable to the State." *State v. Anderson*, 350 N.C. 152, 186, 513 S.E.2d 296, 316 (1999). Based upon the foregoing testimony, we conclude that the evidence, although not conclusive, was sufficient for a jury to find that not only was the victim alive when the taxicab was set on fire, but that she was aware of her impending death. Therefore, the trial court did not err in submitting this aggravating circumstance to the jury. This assignment of error is overruled.

In his next assignment of error, defendant contends that the trial court committed reversible error by failing to submit one of defendant's requested nonstatutory mitigating circumstances that was supported by evidence in the record. Defendant also contends that the trial court erred in denying defendant's request for a peremptory instruction on three statutory mitigating circumstances.

[15] First, the trial court declined to give the following proposed nonstatutory mitigating circumstance: "Nelson initiated the plan that led to kidnapping Barbara Oxendine." The basis for the trial court's refusal to submit this circumstance was that it was subsumed in the (f)(4) and (f)(5) statutory circumstances. The trial court did submit, at defendant's request, the (f)(4) mitigating circumstance, that "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). Defendant also requested the trial court to submit the (f)(5) statutory mitigating circumstance, that "defendant acted under duress or under the domination of another person." N.C.G.S. § 15A-2000(f)(5). The trial court separated this circumstance into two separate mitigators, thus submitting it in the form of two mitigating circumstances. Additionally, the trial court submitted twenty-four nonstatutory mitigating circumstances which defendant requested.

This Court has ruled that "[i]f a proposed nonstatutory mitigating circumstance is subsumed in other statutory or nonstatutory mitigating circumstances which are submitted, it is not error for the trial court to refuse to submit it." *State v. Richmond*, 347 N.C. 412, 438, 495 S.E.2d 677, 691, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 88 (1998). We conclude that the trial court correctly ruled that the nonstatutory mitigating circumstance that "Nelson initiated the plan that led to kidnapping Barbara Oxendine" was subsumed in other mitigating circumstances submitted to the jury.

[16] With regard to the trial court's refusal to peremptorily instruct the jury as to the statutory mitigating circumstances, this Court has held that a " 'trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted and manifestly credible evidence.' " *Id.* at 440, 495 S.E.2d at 692 (quoting *State v. McLaughlin*, 341 N.C. 426, 449, 462 S.E.2d 1, 13 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996)).

Defendant argues that the trial court should have given a peremptory instruction on the (f)(2) statutory mitigating circumstance, that defendant was under the influence of a mental or emotional disturbance at the time of the murder. Defendant also argues that the trial court should have peremptorily instructed the jury on the (f)(6) circumstance, that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law

was impaired. In support of these two circumstances, defendant's expert witness, Dr. Ellinwood, a psychiatrist with a concentration on the effects of stimulant abuse, engaged in the following colloquy with defendant's counsel:

> Q. In your opinion, sir, based on your interview and your education and training, do you have an opinion as to whether Jamey Cheek had the mental ability to formulate a plan with another individual to kidnap and rob a cabdriver?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Overruled.
>
> Q. If you can just answer if you have an opinion as to that matter.
>
> A. I don't have an opinion.

Defendant's counsel repeated this line of questioning again on redirect examination of Dr. Ellinwood:

> Q. Sir, do you have an opinion, satisfactory to yourself, about Mr. Cheek's mental ability to make plans that morning?
>
> A. I think he was extremely—
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Well, that calls for a yes or no.
>
> THE WITNESS: Yes.
>
> THE COURT: You may explain your answer.
>
> THE WITNESS: I think he was extremely confused. His memory, immediate memory, ongoing memory, was greatly impaired. He didn't even remember, according to my interview with him, why he was at the Navy hospital, and that's when Tom [Nelson] showed up, he states, and told him he would take care of things. Mr. Cheek stated he already had a ride to Wilmington with someone who had a truck, and there was no reason for him to formulate a kidnapping intent.
>
> . . . .
>
> THE WITNESS: So basically, I think he was very confused, and Mr. Nelson came along and said, I will take care of things.

Dr. Ellinwood also stated that his expert opinion was entirely based on his interview with defendant. Dr. Ellinwood's testimony directly conflicts with evidence that defendant told Detective Pettus that he had consumed "one Pepsi at Hooters and he had done no drugs." Additionally, defendant contradicts his claim that he was impaired when he testified that watching Nelson hit the victim with a handgun "killed [his] buzz." Since there is contradictory evidence supporting the (f)(2) and (f)(6) mitigators in this case, we cannot conclude that defendant's evidence was "uncontroverted and manifestly credible" so as to warrant a peremptory instruction.

[17] Defendant also argues that the trial court erred in failing to give a peremptory instruction on the (f)(5) mitigating circumstance, that defendant acted under duress or under the domination of another person, which the trial court submitted to the jury in the form of two statutory mitigating circumstances. Defendant's evidence supporting his contention that he acted only out of fear of Nelson is undermined by the evidence showing defendant's efforts to reunite with Nelson once they were separated after the murder. The trial court did not err in refusing to peremptorily instruct the jury on this issue. Accordingly, this assignment of error is overruled.

[18] In his next assignment of error, defendant contends that the trial court committed reversible error when it instructed the jury as to Issue Three in response to the jury's question as to whether it could strike the word "unanimous" from the language in Issue Three. When the trial court originally instructed the jury on Issue Three, the trial court stated:

> If you unanimously find, beyond a reasonable doubt, that the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, you would answer issue three "yes." If you unanimously fail to so find, you would answer issue three "no." If you answer issue three "no," it will be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer issue three "yes," you must consider issue four.

Those instructions were taken verbatim from the pattern jury instructions on Issue Three, which this Court has repeatedly affirmed. *State v. Keel*, 337 N.C. 469, 493-94, 447 S.E.2d 748, 761-62 (1994), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995).

However, less than two hours after the jury began its sentencing deliberations, the jury sent a written question to the trial court.

Without bringing the jurors into the courtroom, the trial court stated the jury's question for the record:

> The question submitted by the jury is, do you unanimously find, beyond a reasonable doubt—of course, this is the issue three—do you unanimously find, beyond a reasonable doubt, that the mitigating circumstance or circumstances found is or are insufficient to outweigh the aggravating circumstances [sic] circumstance or circumstances found by you? The question was, we could not answer issue three a unanimous "yes." A no answer indicates a verdict of life imprisonment. The recommendation page says, quote, we unanimously agree. And the question is, can we cross out the word unanimous on the recommendation? I believe my instructions were that, relative to issue three, the recommendation must be unanimous.

The trial court then called the jury into the courtroom and instructed the jury that "[i]t is the duty of the jury to unanimously answer issue three." The trial court then noted for the record that the time was "4:55 o'clock p.m." and thus the trial court excused the jurors until the next morning. Once the jurors were excused, defendant objected to the trial court's instruction, and the trial court denied any motion on defendant's part to modify the instructions.

The following morning, the trial court stated that it would reinstruct the jury as to Issue Three. Counsel for defendant asked that the trial court reinstruct the jury on the "whole page" of instructions containing Issue Three. The trial court and defendant's counsel then engaged in the following colloquy:

> [DEFENSE COUNSEL]: Your Honor, they asked if issue three had to be unanimous. Well, it spells it out quite clearly that it does have to be unanimous, but there's other issues that also have to be unanimous, and I'm concerned that if they are questioning whether issue three has to be unanimous when it clearly states so, are they clear that some other issues have to be unanimous? And, unlike a case where you have somebody with several charges and the jury just doesn't question as to what's—could you read the instruction again on possession or something, taking one issue out of context in a sentencing instruction, I think, could be confusing and misleading, and we would ask that the whole instruction be read again. I'm particularly concerned over the fact that they didn't understand unanimity in one issue. Do they understand it in the other issues? I mean, how can you pull—

THE COURT: They referred strictly to issue three, and it says, we cannot answer a unanimous yes. A "no" answer indicates a verdict of life imprisonment. The recommendation page says we unanimously—it says we unanimously. Can we cross out the word unanimous? I am going to readvise what I—

[DEFENSE COUNSEL]: Your Honor, based on that statement, we would ask it be declared a hung jury.

THE COURT: That is denied at this juncture.

[DEFENSE COUNSEL]: Yes, sir. Thank you, sir.

THE COURT: What else do you have?

[DEFENSE COUNSEL]: Nothing, sir.

THE COURT: I don't know what you suggested yesterday, but what I advised them was entirely correct under the law.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: All right. I will pick up and I will read the bottom of 43, that paragraph beginning at the bottom of 43 down to 44, and I will also read the footnote on page six which will clarify any question, which reads, the answers to issue one, three and four, whether affirmative or negative, must be unanimous. I think that will respond to every question each of you had. All right, anything else?

[PROSECUTOR]: Not from the State, Your Honor.

[DEFENSE COUNSEL]: No, sir.

The trial court then called the jurors into the courtroom and instructed them as follows:

> Now, going back to your inquiry yesterday, I gave you an answer and I will further elaborate at this time relative to issue three about which your question revolved. If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. When deciding this issue, each juror should consider any mitigating circumstance or circumstances that the juror determined to exist, by a preponderance of the evidence, in issue two. In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating.

> You should not merely add up the number of aggravating circumstances and mitigating circumstances; rather, you must decide, from all the evidence, what value to give to each circumstance and then weigh the aggravating circumstances so valued against the mitigating circumstances so valued and, finally, determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.
>
> If you unanimously find, beyond a reasonable doubt, that the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, you would answer issue three "yes." If you unanimously fail to so find, you would answer issue three "no." If you answer issue three "no," it would be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer issue three "yes," you must consider issue four. And I state further to you that the answers to issues one, three and four, whether affirmative or negative, must be unanimous.

The trial court then told the jurors that they could return to the jury room and resume deliberations. Once the jurors left, the trial court asked whether there was "[a]nything further from the State or the defendant." Counsel for both the State and the defendant answered in the negative.

Defendant now contends that the trial court erred in its initial instruction that the jury must either unanimously answer "yes" or "no" to the question presented in Issue Three on the "Issues and Recommendation as to Punishment" form. This Court has previously considered this issue and has concluded that a trial court has no duty to instruct a jury that it need not be unanimous in order to answer "no" on the "Issues and Recommendation as to Punishment" form. *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). In *McCarver*, this Court explained the rationale behind the unanimity requirement:

> In a capital sentencing proceeding, any jury recommendation requiring a sentence of death or life imprisonment must be unanimous. N.C. Const. art. I, § 24; N.C.G.S. § 15A-2000(b) (Supp. 1994). The policy reasons for the requirement of jury unanimity are clear. First, the jury unanimity requirement "is an accepted, vital mechanism to ensure that *real* and *full* deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina*, 494

U.S. 433, 452, 108 L. Ed. 2d 369, 387 (1990) (Kennedy, J., concurring) (emphasis added). Second, the jury unanimity requirement prevents the jury from evading its duty to make a sentence recommendation. If jury unanimity is not required, then a jury that was uncomfortable in deciding life and death issues simply could "agree to disagree" and escape its duty to render a decision. This Court has refused to make any ruling which would tend to encourage a jury to avoid its responsibility by any such device. For example, we have expressly stated that a jury instruction that a life sentence would be imposed if a jury could not unanimously agree should never be given because it would be "tantamount to 'an open invitation for the jury to avoid its responsibility and to disagree.' " *State v. Smith*, 305 N.C. 691, 710, 292 S.E.2d 264, 276 (quoting *Justus v. Commonwealth*, 220 Va. 971, 979, 266 S.E.2d 87, 92 (1980)), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983). The jury may not be allowed to arbitrarily or capriciously take any such step which will require the trial court to *impose or reject* a sentence of death. *State v. Pinch*, 306 N.C. 1, 33, 292 S.E.2d 203, 227, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994) [, *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995)]. Thoughtful and *full* deliberation in an effort to achieve unanimity has only a salutary effect on our judicial system: It tends to prevent arbitrary and capricious sentence recommendations.

Since the sentence recommendation, *if any*, must be unanimous under constitutional and statutory provisions, and particularly in light of the overwhelming policy reasons for a unanimity requirement, we conclude 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. That is, the jury should answer Issues One, Three, and Four on the standard form used in capital cases either unanimously "yes" or unanimously "no."

McCarver, 341 N.C. at 389-90, 462 S.E.2d at 39. Most importantly, this Court then emphasized:

If a jury is unable to agree as to Issue One, Issue Two, or Issue Three after a reasonable time, the *trial court* will of course

> be required to acknowledge that fact and itself enter a judgment of imprisonment for life. N.C.G.S. § 15A-2000(b). The *jury* should not be made aware of this state of the law, however, as to inform the jury that its failure to agree on determinative issues will result in a sentence of life imprisonment would be an open invitation to the jury—or a single juror—to avoid its responsibility to *fully* deliberate and to force a recommendation of life by the simple expedient of disagreeing. *State v. Smith*, 305 N.C. at 710, 292 S.E.2d at 276. Thus, it has been our law that even when the jury specifically asks what the ultimate result will be if it fails to reach unanimity, the trial court may only inform the jurors that their inability to reach unanimity "should not be their concern but should simply be reported to the court." *State v. Smith*, 320 N.C. 404, 422, 358 S.E.2d 329, 339 (1987).

McCarver, 341 N.C. at 394, 462 S.E.2d at 42.

Defendant argues that our decision in *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987), controls this issue. In *Smith*, the jury recessed from sentencing deliberations to ask the trial court the following question: "If the jurors' decision is not unanimous, is this automatic life imprisonment or does the jury have to reach a unanimous decision regardless?" *Id.* at 420, 358 S.E.2d at 338. Thus, the jury in *Smith* was inquiring *"into the result of its failure to reach a unanimous verdict."* *Id.* at 422, 358 S.E.2d at 339. This Court therefore concluded in *Smith* "that *upon inquiry by the jury* the trial court must inform the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court." *Id.*

However, the instant case is distinguishable from *Smith* since the jury in this case did not inquire as to the ultimate result in the event that the jurors failed to reach a unanimous decision. This jury merely asked whether the answer to Issue Three must be unanimous. We conclude that the trial court correctly instructed the jurors that Issue Three required a unanimous answer. This assignment of error is overruled.

[19] In his next assignment of error, defendant contends that the trial court erred in failing to declare the jury deadlocked on a sentencing recommendation. The jury began its sentencing deliberations at approximately 3:00 p.m. on 2 July 1997 and continued until approximately 5:00 p.m. that day. It was just before 5:00 p.m. on 2 July 1997 that the jury inquired whether its recommendation as to Issue Three

could be nonunanimous. At this point, the trial court instructed the jury that its answer to Issue Three had to be unanimous, excused the jurors until the following morning and overruled defendant's objection to its instruction. The next morning, 3 July 1997, the trial court denied defendant's motion for a hung jury and reinstructed the jury as to Issue Three. The jury then resumed its deliberations at 9:30 a.m. that morning and took its normal breaks. At 6:50 p.m. on 3 July 1997, defendant again requested the trial court to declare a hung jury and impose the mandatory life sentence. The trial court then called the jury into the courtroom and stated:

> And ladies and gentlemen of the jury, let me make this inquiry, if you will, in the event you want to continue deliberating this evening, we will make some arrangements to have some fast food brought in to you. If you desire to be released and return Monday at 10:00 o'clock a.m. to resume your deliberations, we can also do that. So I make the inquiry. Those who would prefer to continue deliberating, into the evening, raise your hand, if you will. One, two, three, four, five, six, seven, eight, nine, ten, eleven.

Upon this showing, the trial court concluded that a majority of the jurors would rather continue deliberating that day instead of stopping, and the jury was allowed to resume its deliberations. At 8:19 p.m. that evening, 3 July 1997, the jury returned its sentence recommendation of death.

At the time defendant made his second motion to the trial court to declare the jury "hung," the jury had deliberated a total of approximately nine hours over a two-day period. Defendant contends that under the circumstances of this case, nine hours was an unreasonable period of time for the jury to deliberate. Defendant argues that the trial court erred by not instructing the jury as to what it should do in the event it could not reach a unanimous verdict and in failing to instruct as to each juror's individual responsibility as set out in N.C.G.S. § 15A-1235(b).

However, defendant's trial counsel did not request the court to instruct the jury on its failure to reach a verdict, nor did defense counsel request an instruction pursuant to N.C.G.S. § 15A-1235. Therefore, this Court must review the trial court's failure to give such instructions under the plain error rule. *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).

N.C.G.S. § 15A-1235(c) provides:

> If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

N.C.G.S. § 15A-1235(c) (1997). This Court has consistently held that " '[i]t is clearly within the sound discretion of the trial judge as to whether to give an instruction pursuant to N.C.G.S. § 15A-1235(c).' " *State v. Fernandez*, 346 N.C. 1, 22, 484 S.E.2d 350, 363 (1997) (quoting *State v. Williams*, 315 N.C. 310, 326-27, 338 S.E.2d 75, 85 (1986). Evidence in the record reflects that although the jury deliberated for more than nine hours, it never deliberated longer than two hours and thirty-seven minutes without a break. The record is devoid of any evidence which suggests that the jury indicated that it was deadlocked or was not making progress in its deliberations. Finally, this was a lengthy trial where the State and defendant presented a substantial quantity of conflicting evidence. In light of these circumstances, the fact that this jury had not reached unanimity on one issue, Issue Three, after deliberating less than two hours is, we conclude, a characteristic and natural part of the deliberative process in a sentencing proceeding determinative of life or death. Under such circumstances, we cannot conclude that the trial court erred in failing to declare the jury deadlocked or that the trial court erred by not instructing the jury *ex mero motu* as to the provisions set out in N.C.G.S. § 15A-1235. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises nine issues which he concedes have been previously decided contrary to his position by this Court: (1) the trial court erred by failing to prohibit the State from death qualifying the jury; (2) the trial court erred by failing to conduct a *voir dire* of prospective jurors concerning parole eligibility; (3) the trial court erred by failing to strike the death penalty and to eliminate the death penalty in that the North Carolina death penalty is unconstitutional, arbitrary, and discretionary on its face and as applied in this case; (4) the trial court erred in failing to bifurcate the trial; (5) the trial court erred in failing to conduct individual *voir dire* and sequestration of the jury; (6) the trial court erred in instructing the jury that all evidence in both phases of the trial was competent for the jurors' consideration

in that it permitted an unguided, discretionary return of a death sentence based on nonstatutory aggravating circumstances; (7) the trial court's use of the terms "satisfaction" and "satisfy," in defining the burden of proof for applicable mitigating circumstances, made consideration discretionary with the sentencing jurors; (8) the trial court erred in instructing the jury that it could reject a submitted nonstatutory mitigating circumstance if it found that circumstance not to have mitigating value; and (9) the trial court's instructions regarding the mitigating circumstances in Issues Three and Four gave discretion to the jury to reject proven mitigating circumstances.

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 possible further judicial review of this case. 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

Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we must now review the record and determine: (1) whether the evidence supports the aggravating circumstances found by the jury and upon which the sentencing court based its sentence of death; (2) whether the sentence was entered under the influence of passion, prejudice or any other arbitrary factor; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). We have thoroughly reviewed the record, transcript and briefs in this 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 factor. We therefore turn to our final statutory duty of proportionality review.

[20] In the present case, defendant was found guilty of first-degree murder under the theories of premeditation and deliberation and felony murder. He was also convicted of robbery with a dangerous weapon and first-degree kidnapping. Following a capital sentencing proceeding, the jury found the three submitted aggravating circumstances: (i) the murder was committed while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); (ii) the murder was committed while defendant was engaged in the

commission of a kidnapping, N.C.G.S. § 15A-2000(e)(5); and (iii) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The trial court submitted eight statutory mitigating circumstances to the jury, including the "catchall" statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). However, the jury only found two statutory mitigating circumstances, that defendant acted under the domination of another person, N.C.G.S. § 15A-2000(f)(5), and the defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7). Of the twenty-four nonstatutory mitigating circumstances submitted, the jury found ten to exist and have mitigating value.

One purpose of our proportionality review is to "eliminate the possibility that a sentence of death was imposed by the action of an aberrant jury." *State v. Lee*, 335 N.C. 244, 294, 439 S.E.2d 547, 573, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). Another is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). In conducting proportionality review, we 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). This Court has 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*, 522 U.S. 900, 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); and *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. First, the jury convicted defendant under the theory of premeditation and deliberation. This Court has stated 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). The jury in this case also found all three of the aggravating cir-

cumstances submitted. This Court has not found the death penalty disproportionate in any case where the jury has found three aggravating circumstances. *State v. Trull*, 349 N.C. at 458, 509 S.E.2d at 198. Further, of the cases in which this Court has found the death penalty disproportionate, the jury found the especially heinous, atrocious, or cruel aggravating circumstance in only two cases. *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170.

Neither *Stokes* nor *Bondurant* is similar to this case. As we have noted, defendant here was convicted of murder on the basis of premeditation and deliberation as well as under the felony murder rule. The defendant in *Stokes*, however, was convicted solely on the basis of the felony murder rule. In *Bondurant*, the defendant exhibited his remorse, as he "readily spoke with policemen at the hospital, confessing that he fired the shot which killed [the victim]." *Bondurant*, 309 N.C. at 694, 309 S.E.2d at 183. The defendant in the case *sub judice* "did not exhibit the kind of conduct we recognized as ameliorating in *Bondurant*." *State v. Flippen*, 349 N.C. 264, 278, 506 S.E.2d 702, 711 (1998), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 1015 (1999).

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although this Court reviews all of the cases in the pool when engaging in our duty of proportionality review, we have repeatedly stated that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* It suffices to say here that we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence of death disproportionate or to those in which juries have consistently returned recommendations of life imprisonment.

Finally, this Court has noted that similarity of cases is not the last word on the subject of proportionality. *State v. Daniels*, 337 N.C. 243, 287, 446 S.E.2d 298, 325 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). Similarity "merely serves as an initial point of inquiry." *Id.* 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).

Based on the foregoing and the entire record in this case, 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 of prejudicial error.

NO ERROR.

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

FINESSE G. COUCH, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF CARNELL SIMMONS COUCH v. PRIVATE DIAGNOSTIC CLINIC AND DUKE UNIVERSITY

No. 255A99

(Filed 5 November 1999)

Trials— argument of counsel—characterizations of witnesses and counsel as liars—gross impropriety

The trial court erred by not sustaining defendant's objection and by failing to intervene ex mero motu to correct the grossly improper jury argument by plaintiff's counsel that included nineteen explicit characterizations of the defense witnesses and opposing counsel as liars. However, where one Justice did not participate in the consideration or decision of this case, and the remaining six Justices are equally divided on the issue of whether this error was prejudicial to the appealing defendant, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. 93, 515 S.E.2d 30 (1999), affirming in part and reversing in part a judgment entered 3 March 1997 by Tillery, J., in Superior Court, Durham County. Heard in the Supreme Court 13 October 1999.

Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, by Maria P. Sperando, pro hac vice; and Keith A. Bishop, for plaintiff-appellee.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell; and Robinson, Bradshaw & Hinson, P.A., by Everett J. Bowman, Lawrence C. Moore, III, and John M. Conley, for defendant-appellant Duke University.

PER CURIAM.

Justice Freeman did not participate in the consideration or decision of this case. The remaining six members of the Court are of the opinion that plaintiff's counsel, Ms. Maria P. Sperando, engaged in a grossly improper jury argument that included at least nineteen explicit characterizations of the defense witnesses and opposing counsel as liars. The trial court did not sustain defendant's initial objection to this jury argument, nor did the trial court thereafter intervene *ex mero motu* to correct the grossly improper argument.

All members of the Court are of the opinion that the trial court erred by not sustaining defendant's objection and by not intervening *ex mero motu*. Justices Lake, Martin, and Wainwright believe that the error was prejudicial to the appealing defendant and would vote to grant a new trial. Chief Justice Frye and Justices Parker and Orr are of the opinion that the error was not prejudicial to the appealing defendant and would vote to affirm the result reached by the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g., Hayes v. Town of Fairmont*, 350 N.C. 81, 511 S.E.2d 638 (1999); *James v. Rogers*, 231 N.C. 668, 58 S.E.2d 640 (1950).

Furthermore, this Court, being of the opinion that plaintiff's counsel's conduct violated Rule 12 of the General Rules of Practice for the Superior and District Courts and was not in conformity with the Rules of Professional Conduct, remands this cause to the trial court for the determination of an appropriate sanction.

The decision of the Court of Appeals is affirmed without precedential value.

AFFIRMED.

KATHARINE H. STAFFORD v. RENE CHARLES STAFFORD

No. 245A99

(Filed 5 November 1999)

Divorce— date of separation—dismissal of appeal

The decision of the Court of Appeals dismissing plaintiff's appeal from a final divorce judgment is affirmed where both parties contend that the appellate court should determine whether the findings of fact support the date of separation, but the parties have been separated for a period far in excess of one year under either of the different dates contended by the parties.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. 163, 515 S.E.2d 43 (1999), dismissing a "partial judgment" entered by Roda, J., on 23 April 1998 in District Court, Buncombe County. Calendared for argument in the Supreme Court 11 October 1999; determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(d) upon motion of the parties.

No plaintiff-appellee's brief.

Jackson & Jackson, by Phillip T. Jackson, for defendant-appellant.

PER CURIAM.

On 14 May 1996, plaintiff filed a complaint seeking an absolute divorce, and subsequently amended the complaint to include equitable distribution. On 3 March 1998, the absolute divorce action was severed from the remaining issues for hearing purposes with the parties' consent. After granting plaintiff an absolute divorce from defendant, the trial court reserved the remaining issues in the cause for later hearing.

In the instant case, the parties were divorced on 23 April 1998. Neither appellate party contests the validity of the final divorce judgment from which the appeal is taken. However, both parties contend this Court should determine whether the findings of fact support the date of separation. Plaintiff contends, and the trial court found, that the date of separation is the first week of October 1992. In contrast, defendant contends the date of separation is 13 September 1991.

A basis for granting an absolute divorce is that the parties must live separate and apart for one year. *See* N.C.G.S. § 50-6 (1995). Regardless of the date of separation, the parties have been separated for a period far in excess of one year. Therefore, the date of separation has no bearing in this case on the legality of the final divorce judgment. The contested fact concerning the date of separation is an issue in the equitable distribution claim, which can be raised in a later appeal, if any. Thus, this appeal is interlocutory and the decision of the Court of Appeals dismissing plaintiff's appeal is affirmed.

AFFIRMED.

STATE OF NORTH CAROLINA v. CASUAL BIANCA LYONS

No. 239A99

(Filed 5 November 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. 192, —— S.E.2d —— (1999), affirming an order entered on 12 September 1996 by Jones (Abraham Penn), J., in Superior Court, Wake County, denying defendant's motion to suppress evidence. Heard in the Supreme Court 11 October 1999.

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

Lemuel W. Hinton for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA, EX REL. MICHAEL F. EASLEY, ATTORNEY GENERAL, AND EX REL. JONATHAN B. HOWES, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES v. N.G. PURVIS FARMS, INC.

No. 194PA99

(Filed 5 November 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 132 N.C. App. 825, —— S.E.2d —— (1999), reversing an order of contempt entered by Albright, J., on 27 June 1997 in Superior Court, Montgomery County. Heard in the Supreme Court 12 October 1999.

Michael F. Easley, Attorney General, by Philip A. Telfer and Judith Robb Bullock, Special Deputy Attorneys General, for plaintiff-appellant.

Robbins May & Rich LLP, by P. Wayne Robbins and Carol M. White, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

C. C. & J. ENTERPRISES, INC., PETITIONER v. CITY OF ASHEVILLE, RESPONDENT, AND JACKSON PARK/WOOLSEY NEIGHBORHOOD ASSOCIATION, INTERVENOR-RESPONDENT

No. 184PA99

(Filed 5 November 1999)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 132 N.C. App. 550, 512 S.E.2d 766 (1999), affirming an order entered 5 December 1997 by Allen (C. Walter), J., in Superior Court, Buncombe County. Heard in the Supreme Court 13 October 1999.

Ball, Barden, & Bell, P.A., by Stephen L. Barden, III, for petitioner-appellee.

Robert W. Oast, Jr., for respondent-appellant.

Siemens Law Office, P.A., by Jim Siemens, for intervenor-respondent-appellant and -appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

THE KNIGHT PUBLISHING COMPANY, INC.	)	
v.	)	ORDER
THE CHASE MANHATTAN BANK, N.A. AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA	)	

No. 523A98

(Filed 27 September 1999)

The majority holding in *Knight Publ'g Co. v. Chase Manhattan Bank, N.A.*, 131 N.C. App. 257, 506 S.E.2d 728 (1998), *disc. rev. denied*, 350 N.C. 309, —— S.E.2d —— (1999), is found in Judge Walker's concurring in part and dissenting in part opinion. This opinion format is unacceptable. *See Jones v. Asheville Radiological Group*, 350 N.C. 654, 517 S.E.2d 380 (1999).

Accordingly, this case is remanded to the Court of Appeals to modify its opinion.

By the Court in Conference, this the 27th day of September, 1999.

Wainwright, J.
For the Court

BARTLETT v. BARTLETT

No. 285P99

Case below: 133 N.C.App. 444

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

BATTEN v. MEDLIN

No. 378P99

Case below: 134 N.C.App. 184

Petition by plaintiff (Roznowski) for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

BEAVERS v. UNLIMITED TREE SERV.

No. 464P99

Case below: 134 N.C.App. 732

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

BRADLEY v. U.S. PACKAGING, INC.

No. 369P99

Case below: 134 N.C.App. 184

Petition by defendant (U.S. Packaging, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999. Justice Martin recused.

BRISSON v. SANTORIELLO

No. 376PA99

Case below: 134 N.C.App. 65

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1999.

BUCHANAN v. CITY OF THOMASVILLE

No. 410P99

Case below: 134 N.C.App. 731

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

BUCKINGHAM v. BUCKINGHAM

No. 365P99

Case below: 134 N.C.App. 82

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

BURNS v. GRANNY SQUIRREL MTN. CLUB HOMEOWNER'S ASS'N

No. 401P99

Case below: 134 N.C.App. 376

Motion by plaintiff for temporary stay denied 27 September 1999. Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999. Petition by plaintiffs for writ of supersedeas denied 7 October 1999.

CAP CARE GRP., INC. v. McDONALD

No. 305P99

Case below: 133 N.C.App. 189

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999. Conditional petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed 7 October 1999.

COLLINS v. DEAN

No. 241P99

Case below: 133 N.C.App. 189

Notice of appeal by defendant pro se (Marcia Dean) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 7 October 1999. Notice of appeal by defendants pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 7 October 1999. Petition by defendant pro se (Marcia Dean) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999.

COOLIDGE v. MAJERCIK

No. 407P99

Case below: 134 N.C.App. 376

Motion by plaintiff for temporary stay denied 3 September 1999. Petition by plaintiff for writ of supersedeas denied 7 October 1999. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999.

CROWDER CONSTR. CO. v. KISER

No. 433P99

Case below: 134 N.C.App. 190

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

CRUMP v. SNEAD

No. 393P99

Case below: 134 N.C.App. 353

Petition by petitioner appellants for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999. Justice Martin recused.

DAVIS v. EMBREE-REED, INC.

No. 458P99

Case below: 135 N.C.App. 80

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

DUKES v. WINSTON-SALEM/FORSYTH COUNTY BD. OF EDUC.

No. 396P99

Case below: 134 N.C.App. 376

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

EASTHAVEN DEV. v. SMITH

No. 398P99

Case below: 134 N.C.App. 498

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

FAULKENBURY v. TEACHERS' AND STATE EMP. RET. SYS. OF N.C.

No. 335P99

Case below: 133 N.C.App. 587

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999. Petition by defendants for writ of supersedeas denied and temporary stay dissolved 7 October 1999. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

FRANCIS v. BEACH MEDICAL CARE

No. 344P99

Case below: 134 N.C.App. 184

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999. Motion by plaintiff to dismiss the appeal for lack of substantial constitutional question allowed 7 October 1999.

GOGGINS v. BALATSIAS

No. 463PA99

Case below: 135 N.C.App. 732

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1999.

HARBORGATE PROP. OWNERS ASS'N v.
MT. LAKE SHORES DEV. CORP.

No. 294P99

Case below: 133 N.C.App. 347

Petition by appellants (James E. and LaVerne Tumlin) discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

HARDY v. MOORE COUNTY

No. 299A99

Case below: 133 N.C.App. 321

Motion by defendants (Wiley Barrett and Phillip I. Ellen) to dismiss appeal denied 25 August 1999. Motion by defendants (Moore County and Moore County Tax Department) to dismiss appeal denied 25 August 1999.

HARRIS v. UNION CAMP CORP.

No. 370P99

Case below: 134 N.C.App. 184

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

HIEB v. LOWERY

No. 448P99

Case below: 134 N.C.App. 1

Petition by Charles G. Monnet, III for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

HOISINGTON v. ZT-WINSTON-SALEM ASSOCS.

No. 339PA99

Case below: 133 N.C.App. 485

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1999. Petition by third party defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1999.

HOLSHOUSER v. SHANNER HOTEL GRP. PROPS. ONE

No. 386A99

Case below: 134 N.C.App. 391

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999. Motion by plaintiff to dismiss appeal denied 7 October 1999.

HUGHES v. CHAPPELL

No. 228P99

Case below: 133 N.C.App. 189

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

HUTELMYER v. COX

No. 319A99

Case below: 133 N.C.App. 364

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

IN RE BAKER

No. 348P99

Case below: 133 N.C.App. 657

Petition by respondent (Heather Baker) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

IN RE DECLARATORY RULING BY N.C. COMM'R OF INS.

No. 368P99

Case below: 134 N.C.App. 23

Motion by respondent to dismiss appeal by petitioners (Employers Health Insurance Company and Blue Cross and Blue Shield of N.C.) for lack of substantial constitutional question allowed 7 October 1999. Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

IN RE ESTATE OF HILL

No. 404P99

Case below: 134 N.C.App. 376

Notice of appeal by petitioner (Thomas Hill) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 4 November 1999. Petition by petitioner (Thomas Hill) for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999. Justice Martin recused.

IN RE ESTATE OF HILL

No. 414P99

Case below: 134 N.C.App. 498

Notice of appeal by petitioner (Thomas Hill) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 4 November 1999. Petition by petitioner (Thomas Hill) for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999. Justice Martin recused.

IN RE T. S.

No. 251P99

Case below: 133 N.C.App. 272

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 7 October 1999. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

JENKINS v. PUBLIC SERVICE CO. OF N.C.

No. 387A99

Case below: 134 N.C.App. 405

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 4 November 1999.

KATH v. H.D.A. ENTERTAINMENT, INC.

No. 395P99

Case below: 134 N.C.App. 376

Petition by defendant (Joel Katz) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

KEY v. BURCHETTE

No. 394P99

Case below: 134 N.C.App. 369

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

LANNING v. FIELDCREST-CANNON, INC.

No. 360PA99

Case below: 134 N.C.App. 53

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1999.

LEACH v. KELLY SPRINGFIELD TIRE CORP.

No. 353P99

Case below: 133 N.C.App. 657

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

LORINOVICH v. K MART CORP.

No. 417P99

Case below: 134 N.C.App. 158

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 November 1999.

McIVER v. SMITH

No. 453PA99

Case below: 134 N.C.App. 583

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1999.

METAXAS v. HENDRICK

No. 185P99

Case below: 132 N.C.App. 586

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

MORGAN v. WESTERN PIEDMONT RADIOLOGY

No. 354P99

Case below: 133 N.C.App. 444

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999.

MUSE v. BRITT

No. 449P99

Case below: 123 N.C.App. 357

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 November 1999.

NICHOLS v. D. J. ROSE, INC.

No. 346P99

Case below: 133 N.C.App. 657

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

PATRICK v. ALLSTATE INS. CO.

No. 149PA99

Case below: 350 N.C. 835

132 N.C.App. 586

Petition by plaintiff for rehearing of the order of this Court allowing defendant's petition for discretionary review for a limited purpose denied 13 September 1999.

PERKINS v. ARKANSAS TRUCKING SERVICES, INC.

No. 422PA99

Case below: 134 N.C.App. 490

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1999.

PERRITT v. ST. PIERRE

No. 266P99

Case below: 133 N.C.App. 190

Petition by defendant (City of Greensboro) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

ROSS v. ROSS

No. 436P99

Case below: 134 N.C.App. 731

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

SCHNITZLEIN v. HARDEE'S FOOD SYSTEMS, INC.

No. 379P99

Case below: 134 N.C.App. 153

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STALEY v. LINGERFELT

No. 402P99

Case below: 134 N.C.App. 294

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. ALLEN

No. 70A86-6

Case below: Halifax County Superior Court

Petition by defendant for writ of certiorari to review the decision of the Superior Court, Halifax County allowed 7 October 1999 for the limited purpose of remanding to the Superior Court, Halifax County, for determination on the merits of defendant's second motion for appropriate relief.

STATE v. ALLISON

No. 415P99

Case below: 125 N.C.App. 616

Petition by plaintiff for writ of certiorari to review the decision and order of the North Carolina Court of Appeals denied 7 October 1999.

STATE v. ANTHONY

No. 342PA99

Case below: 133 N.C.App. 573

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 November 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1999.

STATE v. BAILEY

No. 451P99

Case below: 134 N.C.App. 733

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

STATE v. BATTS

No. 371A99

Case below: 134 N.C.App. 185

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 October 1999.

STATE v. BLANTON

No. 322P99

Case below: 133 N.C.App. 445

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999. Justice Wainwright recused.

STATE v. BOYD

No. 177A83-4

Case below: 350 N.C. 838

Surry County Superior Court

Motion by defendant for stay of execution denied 14 October 1999. Motion by defendant for reconsideration of petition for writ of certiorari dismissed 14 October 1999.

STATE v. BOYD

No. 177A83-5

Case below: Surry County Superior Court

Motion by defendant for temporary stay denied 18 October 1999. Petition by defendant for writ of supersedeas denied 18 October 1999. Petition by defendant for writ of certiorari to review the order of the Superior Court, Surry County, denied 18 October 1999.

STATE v. BROWN

No. 30A81-4

Case below: Moore County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Moore County, denied 7 October 1999. Petition by Attorney General for writ of certiorari to review the order of the Superior Court, Moore County, dismissed as moot 7 October 1999. Motion by Attorney General to vacate stay of execution allowed 7 October 1999.

STATE v. BUCKNER

No. 377P99

Case below: 134 N.C.App. 186

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. CAMPBELL

No. 352P99

Case below: 133 N.C.App. 531

Petition by defendant (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. COASTLAND CORP.

No. 409P99

Case below: 134 N.C.App. 269

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999.

STATE v. COBLE

No. 446PA99

Case below: 134 N.C.App. 607

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 November 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1999.

STATE v. DUGGINS

No. 440P99

Case below: 131 N.C.App. 154

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 November 199.

STATE v. EARHART

No. 372A99

Case below: 134 N.C.App. 130

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 October 1999.

STATE v. ELLIS

No. 359P99

Case below: 130 N.C.App. 596

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999.

STATE v. FITE

No. 231P99

Case below: 132 N.C.App. 823

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999.

STATE v. FULLWOOD

No. 37A86-4

Case below: 349 N.C. 234 and Buncombe County Superior Court

Motion by defendant to reconsider the denial of the petition for writ of certiorari (in light of the Grant of Certiorari in *State v. Sexton* and *State v. Williams*) dismissed 4 November 1999.

STATE v. GALLOP

No. 375P99

Case below: 134 N.C. 186

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. GRAHAM

No. 437P99

Case below: 134 N.C. 731

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 November 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

STATE v. GREEN

No. 385A84-6

No. 385A84-7

Case below: Pitt and Wake County Superior Court

Motion by defendant for stay of execution denied 20 September 1999. Petition by defendant for writ of certiorari to review the order of the Superior Court, Pitt County denied 20 September 1999. Petition by Attorney General for writ of prohibition prohibiting Judge Gregory Weeks from holding a scheduled hearing in Superior Court, Wake County, allowed 23 September 1999. Petition by Attorney General for writ of supersedeas dismissed as moot 23 September 1999. Petition by Attorney General writ of certiorari to review the order of the Superior Court, Pitt County, dismissed as moot 23 September 1999. Motion by Attorney General to lift stay allowed 23 September 1999.

STATE v. GRIGSBY

No. 364PA99

Case below: 134 N.C.App. 315

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 October 1999. Petition by Attorney General for writ of supersedeas allowed 7 October 1999. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1999.

STATE v. HARRIS

No. 444P99

Case below: 135 N.C.App. 734

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1999.

STATE v. HARTMAN

No. 531A94-2

Case below: Northampton Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Northampton County denied 7 October 1999.

STATE v. JONES

No. 395A91-5

Case below: 350 N.C. 822
350 N.C. 843

Petition by defendant to correct misstatements of law and fact in the special order, or, in the alternative to remand for findings necessary to the Court's conclusion of harmless error dismissed 7 October 1999.

STATE v. KEEL

No. 134A93-7

Case below: Edgecombe County Superior Court

Motion by defendant for stay of execution allowed 29 September 1999.

STATE v. LEGRANDE

No. 215A96-4
215A96-5

Case below: Stanly County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Stanly County, denied 4 November 1999. Application by defendant pro se for writ of habeas corpus denied 4 November 1999. Motion by defendant to overturn defendant's convictions and sentence of death denied 4 November 1999. Motion by defendant to impose sanctions denied 4 November 1999. Motion by defendant pro se for a new trial denied 4 November 1999. Motion by defendant pro se for deferral of a new trial denied 4 November 1999. Motions by defendant pro se for dismissal of charges denied 4 November 1999. Petition by next friends of defendant for writ of certiorari to review the order of the Superior Court, Stanly County, denied 4 November 1999.

STATE v. LINSLEY

No. 423P99

Case below: 134 N.C.App. 499

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. LITTLE

No. 329P99

Case below: 133 N.C.App. 601

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 October 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. MACDONALD

No. 380P99

Case below: 134 N.C.App. 187

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999.

STATE v. MARTIN

No. 425A99

Case below: 134 N.C.App. 500

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 October 1999.

STATE v. McCOY

No. 355P99

Case below: 132 N.C.App. 399

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999. Petition by defendant for writ of certiorari to review the orders of the North Carolina Court of Appeals denied 7 October 1999.

STATE v. McGEE

No. 420P99

Case below: 134 N.C.App. 500

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. McHONE

No. 148A91-4

Case below: 350 N.C. 825
346 N.C. 286

Motion by defendant to reconsider denial of a remand for an evidentiary hearing dismissed 7 October 1999.

STATE v. MOORE

No. 556A90-3

Case below: Forsythe County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Forsyth County, allowed 4 November 1999 for the limited purpose of reviewing the following claims, I(A), (B) and (C) and II(B)(1) as set forth at page 4 of Judge Woods' order dated 11 February 1998: I. The trial judge violated Mrs. Moore's federal and state constitutional rights to be present at every stage of her trial, to a public trial, and to due process of law by: (A) giving ex parte admonitions to the jury; (B) having ex parte meetings with the jury and (C) visiting the jury room during deliberations, and II. Mrs. Moore's federal and state constitutional right to due process of law and a fair and impartial jury were violated by prosecutorial misconduct in failing to reveal Ms. Branch's financial and personal ties to juror Rayvon Richardson. All other claims by defendant are hereby denied.

STATE v. OWEN

No. 337P99

Case below: 133 N.C.App. 543

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. PARKER

No. 334P99

Case below: 133 N.C.App. 658

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 October 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. PRETTY

No. 426P99

Case below: 134 N.C.App. 379

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 October 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. QUICK

No. 275P99

Case below: 133 N.C.App. 192

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999.

STATE v. RUDD

No. 421P99

Case below: 134 N.C.App. 500

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. SCOTT

No. 374P99

Case below: 134 N.C.App. 188

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 October 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

STATE v. SEXTON

No. 499A91-4

Case below: Wake County Superior Court

Motion by Attorney General for temporary stay allowed 28 September 1999. Petition by Attorney General for writ of certiorari to review the order of the Superior Court, Wake County, allowed 28 September 1999. Petition by Attorney General for writ of supersedeas allowed 28 September 1999. Motion by defendant to reconsider petitions denied 7 October 1999.

STATE v. SMITH

No. 280P99

Case below: 133 N.C.App. 349

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1999.

STATE v. SOUSA

No. 438P99

Case below: 134 N.C.App. 732

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

STATE v. TAYLOR

No. 362P99

Case below: 134 N.C.App. 188

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 November 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

STATE v. THOMAS

No. 445P99

Case below: 134 N.C.App. 560

Motion by Attorney General to dismiss the appeal for lack of substantial question allowed 4 November 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

STATE v. THOMAS

No. 91A95-3

Case below: 350 N.C. 849
Wake County Superior Court

Motion by defendant for reconsideration of petition for writ of certiorari denied 15 September 1999. Motion by Attorney General to respond denied 15 September 1999.

STATE v. TORAIN

No. 428P99

Case below: 134 N.C.App. 500

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 November 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

STATE v. WALKER

No. 76A95-2

Case below: Guilford County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Guilford County, denied 7 October 1999. Motion by defendant for summary reversal denied 7 October 1999.

STATE v. WHITE

No. 511PA99

Case below: 135 N.C.App. 349

Petition by Attorney General for writ of supersedeas and motion for temporary stay allowed 5 November 1999. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1999.

SURRATT v. SPRINKLE

No. 336P99

Case below: 134 N.C.App. 188

Petition by defendant (Richard Leon Sprinkle) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

TELESCA v. SAS INST., INC.

No. 341P99

Case below: 133 N.C.App. 653

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

THOMAS v. BULLOCK

No. 306P99

Case below: 133 N.C.App. 194

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

THOMPSON v. WATERS

No. 267PA99

Case below: 350 N.C. 851
133 N.C.App. 194

Motion by defendant (Lee County) to withdraw conditional petition allowed 7 October 1999.

TRANSCONTINENTAL GAS PIPE LINE CORP. v. CALCO ENTER.

No. 132P99

Case below: 132 N.C.App. 237

Petition by defendant (N.C. Equipment Co.) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999. Conditional petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 7 October 1999.

TYSON v. HENRY

No. 320P99

Case below: 133 N.C.App. 415

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

VAN SIPE v. SERVICE AMERICA CORP.

No. 265P99

Case below: 133 N.C.App. 194

Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 7 October 1999. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

WEBB v. NASH HOSP., INC.

No. 345P99

Case below: 133 N.C.App. 636

Petition by defendant (Nash Hospitals, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999. Petition by defendants (Williamson and Care Specialists) for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999. Justice Wainwright recused.

WOOD v. SOUTHSIDE OIL CO.

No. 227P99

Case below: 133 N.C.App. 194

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

WRIGHT v. BLUE RIDGE AREA AUTH.

No. 443P99

Case below: 135 N.C.App. 668

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

PETITIONS TO REHEAR

HEARNE v. SHERMAN

No. 309A98

Case below: 350 N.C. 612

Petition by plaintiff for rehearing the decision of this Court pursuant to Rule 31 denied 14 September 1999.

PIAZZA v. LITTLE

No. 193PA98

Case below: 350 N.C. 585

Petition by plaintiff for rehearing the decision of this Court pursuant to Rule 31denied 14 September 1999.

VIRMANI v. PRESBYTERIAN HEALTH SERVICES CORP.

No. 62PA97-2

Case below: 350 N.C. 449

Petition by defendant for rehearing of the decision of this Court pursuant to Rule 31 denied 17 September 1999.

TOWN OF SPENCER v. TOWN OF EAST SPENCER, MAYOR RONNIE ROLLINGS, NAOMIE COWAN, THOMAS MITCHELL, JOHN G. NOBLE, III, JOHN R. RUSTIN, SR., CHRIS SHARPE AND DAVID R. WRAY, ALDERMEN, AND DIANA WILLIAMS COTTON, INTERIM TOWN ADMINISTRATOR

No. 285PA98

(Filed 3 December 1999)

1. **Declaratory Judgments— annexation intent—competing resolutions—prior jurisdiction—justiciable controversy**

The determination of prior jurisdiction raised by competing resolutions of intent to annex territory is a justiciable controversy under the Declaratory Judgment Act.

2. **Cities and Towns— annexation—resolution of intent—area in another municipality—jurisdictional priority**

The elements of N.C.G.S. § 160A-36(b) are applicable to resolutions of intent to annex and are essential elements in the involuntary annexation process so that nonadherence to those elements precludes a finding of substantial compliance with annexation statutes. Therefore, the inclusion of territory already within the boundaries of another municipality in a resolution of intent to annex territory results in the loss of annexation jurisdictional priority to an intervening and competing valid resolution of intent.

Chief Justice FRYE dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 129 N.C. App. 751, 501 S.E.2d 367 (1998), reversing an order granting plaintiff's motion for summary judgment entered by Helms, J., on 19 May 1997 in Superior Court, Rowan County, and remanding for entry of an order of dismissal of plaintiff's action. Heard in the Supreme Court 12 January 1999.

Parker, Poe, Adams & Bernstein, L.L.P., by Anthony Fox and Jason J. Kaus, for plaintiff-appellant.

Ferguson and Scarbrough, P.A., by James E. Scarbrough, for defendant-appellees.

LAKE, Justice.

The issues raised here on review require the interpretation of the North Carolina statutes and case law governing involuntary annexation of unincorporated areas by municipalities. Specifically, the issues are whether the question of priority between two competing municipalities is a "justiciable controversy" under the Declaratory Judgment Act and whether the inclusion of territory within the boundaries of another municipality in a resolution of intent to annex territory results in the loss of annexation jurisdictional priority.

Spencer and East Spencer are neighboring municipalities located in Rowan County, North Carolina. On 22 July 1996, East Spencer adopted a resolution of intent ("East Spencer resolution") declaring East Spencer's intent to annex an additional 133 acres of Rowan County. On 9 September 1996, East Spencer adopted an annexation services plan which slightly modified the description of the area to be annexed, but retained most of the territory described in the original East Spencer resolution. The resolution and the services plan included approximately two acres of territory already within the municipal boundaries of Spencer. On 8 October 1996, Spencer adopted its own resolution of intent ("Spencer resolution") to annex approximately eighty-seven acres of territory in Rowan County, a portion of which overlapped with the area described in the East Spencer resolution.

On 23 October 1996, Spencer filed a complaint in superior court seeking a declaratory judgment that Spencer had prior jurisdiction to annex the territory which both Spencer and East Spencer sought to annex. On 19 May 1997, Spencer's motion for summary judgment was granted based on the contention that the East Spencer resolution violated N.C.G.S. § 160A-36(b)(3) by attempting to annex territory within Spencer's municipal boundaries, and therefore, Spencer had adopted the first valid resolution. East Spencer appealed to the Court of Appeals, which reversed the trial court and held there was not a justiciable controversy under the Declaratory Judgment Act and, therefore, the trial court lacked jurisdiction. The Court of Appeals went on to address the merits of the case and held the East Spencer resolution was not void and could be amended without loss of priority as to the Spencer resolution.

For the reasons stated below, we reverse the Court of Appeals and hold that the determination of prior jurisdiction raised by competing resolutions of intent is a justiciable controversy under the

Declaratory Judgment Act. Additionally, we hold that a resolution of intent to annex territory which includes any territory already within the boundaries of another municipality is void and will lose priority to an intervening and competing valid resolution of intent.

I.

Part 2, article 4A of chapter 160A of the North Carolina General Statutes governs involuntary annexation by cities which have populations of less than five thousand, such as Spencer and East Spencer. The detailed nature of the annexation scheme in part 2 "manifests the legislature's intent to require towns and cities to consider carefully the consequences of involuntary annexation of a particular territory." *Town of Hazelwood v. Town of Waynesville*, 320 N.C. 89, 93, 357 S.E.2d 686, 689 (1987).

An involuntary annexation proceeding is initiated by the adoption of a "resolution of intent" pursuant to section 160A-37. In order to provide ample time for public review and challenge of an annexation proposal, the effective date of the annexation is required to be at least one year from the date of public notice of the area identified for annexation. N.C.G.S. § 160A-37(i), (j) (1998).

[1] In the case *sub judice*, the Court of Appeals' opinion provides a detailed analysis of the difference between a "resolution" and an "ordinance" and the appropriateness of the application of the Declaratory Judgment Act (the Act) to each. Although the opinion is very well reasoned, it overlooks precedent established by this Court that the enactment of a resolution of intent establishes a municipality's "prior jurisdiction" in annexation proceedings involving contested territory with regard to another municipality. *See Town of Hazelwood*, 320 N.C. at 93, 357 S.E.2d at 688. Therefore, a dispute between two municipalities having competing resolutions of intent is, in essence, a dispute over jurisdictional priority, and the Court of Appeals erred in holding this was not a "justiciable controversy" under the Act.

The purpose of the Act is " 'to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations.' " *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964) (quoting *Walker v. Phelps*, 202 N.C. 344, 349, 162 S.E. 727, 729 (1932)). "Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of con-

struction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254 (1996). However, "[t]he enumeration in G.S. 1-254 . . . does not limit or restrict the exercise of the general powers conferred [to courts] in G.S. 1-253 in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." N.C.G.S. § 1-256 (1996). This Court has interpreted section 1-256 as "enlarg[ing] the specific categories mentioned elsewhere in the statute," *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 205, 22 S.E.2d 450, 453 (1942), and the legislature has stated its intent that the Act be liberally construed and administered, N.C.G.S. § 1-264 (1996).

For a court to have jurisdiction under the Act, it is required only " 'that the plaintiff shall allege in his complaint and show at the trial, that a real controversy, arising out of . . . opposing contentions as to . . . respective legal rights and liabilities . . . exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure.' " *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 449, 206 S.E.2d 178, 188 (1974) (quoting *Carolina Power & Light Co. v. Iseley*, 203 N.C. 811, 820, 167 S.E. 56, 61 (1933)). A justiciable controversy exists when litigation to resolve the controversy appears to be unavoidable. *Ferrell v. Department of Transp.*, 334 N.C. 650, 656, 435 S.E.2d 309, 313 (1993).

In its analysis of the controversy between Spencer and East Spencer, the Court of Appeals likened an annexation resolution of intent to a "proposed" but not yet enacted ordinance. *Town of Spencer v. Town of East Spencer*, 129 N.C. App. 751, 756, 501 S.E.2d 367, 371 (1998). Relying on this Court's holding in *City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. 454, 464, 168 S.E.2d 389, 396 (1969), that a proposed ordinance does not present a justiciable controversy under the Act, the Court of Appeals held a resolution of intent also does not present a justiciable controversy. *Town of Spencer*, 129 N.C. App. at 756, 501 S.E.2d at 371. This analysis, however, ignores precedent established by this Court that annexation resolutions of intent are not so ephemeral as a proposed ordinance, since they have substantive legal effect by conclusively determining prior jurisdiction. *See Town of Hazelwood*, 320 N.C. at 93, 357 S.E.2d at 688; *City of Burlington v. Town of Elon College*, 310 N.C. 723, 728, 314 S.E.2d 534, 537 (1984). Precedential cases such as these have established

that the prior jurisdiction to annex territory is determined as of the date of the adoption of a valid resolution of intent. In the case of municipalities with competing resolutions of intent, postponement of the determination of the priority of jurisdictional interests until the completion of the annexation process would result in wasted municipal expense and manpower expended in futile efforts to annex unavailable territory and would delay inevitable litigation regarding a substantial right. This result contravenes the purpose of the Act to expeditiously settle a case and afford relief from uncertainty where litigation appears to be unavoidable.

East Spencer contends that even if disputes between competing resolutions of intent present a justiciable controversy, there was no risk of litigation in this case, as required by the Act. It is an undisputed fact that the East Spencer resolution contained a two-acre tract of land which was within Spencer's municipal boundaries. East Spencer contends the inclusion of the two-acre tract was inadvertent and, had the trial court not entered an injunction, East Spencer would have corrected the resolution. Although the lack of dispute over the ownership of the two acres simplifies analysis of the issue, East Spencer's contention fails to recognize that the justiciable issue in this case is not whether the inclusion of the two acres was inadvertent or whether the resolution would be corrected, but whether East Spencer's jurisdictional priority was impacted by the inclusion of those two acres in its initial resolution of intent. As to this issue, we reverse the Court of Appeals and hold the validity of a resolution of intent to annex land for the purposes of determining prior jurisdiction is a justiciable issue under the Act.

II.

[2] The second issue raised on appeal is one of first impression and questions whether the inclusion of territory already within the boundaries of another municipality in a resolution of intent to annex territory results in the loss of annexation jurisdictional priority to an intervening and competing valid resolution of intent. This question requires interpretation of the statutory requirements of article 4A of chapter 160A, Extension of Corporation Limits, ("the article") and the application of the "prior jurisdiction" rule.

"[T]he prior jurisdiction rule is the majority rule and is applied 'universally' in 'conflicts between two municipalities attempting to assert jurisdiction over the same territory.' " *City of Burlington*, 310 N.C. at 727, 314 S.E.2d at 537 (quoting with approval Comment,

Municipal Corporations: Prior Jurisdiction Rule, 7 Wake Forest L. Rev. 77, 79 (1970)). The rule operates on a "first in time, first in right" principle and provides that among equivalent proceedings relating to the same subject matter, the " 'one which is prior in time is prior in jurisdiction to the exclusion of those subsequently instituted.' " *Id.* (quoting 2 Eugene McQuillin, *Municipal Corporations* § 7.22a (3d ed. 1966) [hereinafter "2 McQuillin"]). The rule applies, generally speaking, to and among proceedings for the municipal incorporation or annexation of a particular territory. *Id.* Under the rule, annexation proceedings begin when a municipality takes " 'the first mandatory public procedural step in the statutory process' " of annexation; the passing of a resolution of intent has been determined to be that first step. *Id.* at 728, 314 S.E.2d at 537 (quoting 2 McQuillin § 7.22a). Additionally, subsequent attempts to annex territory under the prior jurisdiction of another municipality are null and void. *Id.*

This Court has also held that in addition to being first in time, a *valid* resolution which is in compliance with the article is a condition precedent to establishing priority in jurisdiction and a right to annex territory. *See City of Kannapolis v. City of Concord*, 326 N.C. 512, 391 S.E.2d 493 (1990). Although " '[a]bsolute and literal compliance with a statute enacted describing the conditions of annexation is unnecessary; substantial compliance . . . is required.' " *In re City of New Bern*, 278 N.C. 641, 648, 180 S.E.2d 851, 856 (1971) (quoting with approval *State ex rel. Helm v. Town of Benson*, 95 Ariz. 107, 108, 387 P.2d 807, 808 (1963)). "Substantial compliance means compliance with the essential requirements of the Act." *Huntley v. Potter*, 255 N.C. 619, 627, 122 S.E.2d 681, 686 (1961).

As previously noted, it is an undisputed fact in the case *sub judice* that East Spencer's resolution included two acres of territory which were already within Spencer's municipal boundaries. The question is whether the inclusion of that territory, albeit unintentional, precludes a finding of "substantial compliance" with the essential requirements of the statutes, thereby voiding East Spencer's resolution and giving Spencer jurisdictional priority.

The determination of whether there is substantial compliance requires a two-part analysis. First, the court must determine if there is a statutory requirement that the description of territory to be annexed in a resolution of intent does not include territory within another municipality. Second, if there is such a requirement, the court must determine if that requirement is an "essential element" of

annexation, the nonadherence of which precludes a finding of "substantial compliance."

The procedure for involuntary annexation of territory by cities with populations less than 5,000 is contained in part 2 of the article, with the statutory requirements for a resolution of intent outlined in section 160A-37. That section provides in pertinent part:

> (a) Notice of Intent.—Any municipal governing board desiring to annex territory under the provisions of this Part shall first pass a resolution stating the intent of the municipality to consider annexation. Such resolution shall describe the boundaries of the area under consideration and fix a date for a public hearing on the question of annexation, the date for such public hearing to be not less than 45 days and not more than 90 days following passage of the resolution.

N.C.G.S. § 160A-37(a) (1994) (amended 1998).

The statutory requirement that a municipality's resolution "shall describe the boundaries of the area under consideration" does not specify the level of detail required in the boundary description. However, continued reading of the statutory requirements for public notice of a municipality's intent to annex territory lends some guidance on the specificity intended by the legislature. The notice requirements provide:

> (b) Notice of Public Hearing.—The notice of public hearing shall:
>
> (1) Fix the date, hour and place of the public hearing.
>
> (2) Describe clearly the boundaries of the area under consideration, and include a legible map of the area.
>
> (3) State that the report required in G.S. 160A-35 will be available at the office of the municipal clerk at least 30 days prior to the date of the public hearing.
>
> . . . In addition, notice shall be mailed at least four weeks prior to date of the hearing by first class mail, postage prepaid to the owners as shown by the tax records of the county of all freehold interests in real property located within the area to be annexed.

N.C.G.S. § 160A-37(b).

Based on the above, notice "clearly" describing the boundaries of the area under consideration has to be mailed to the owners of freehold interests in the real property located within the area to be annexed at least thirty days before the date of the public hearing. Therefore, taking into consideration that section 160A-37(a) requires the public hearing be held between forty-five and ninety days after passage of the resolution, the "clear" boundary information has to be available not less than fifteen days and not more than sixty days after passage of a resolution of intent.

Further review of the statutory annexation requirements provides clarification of what constitutes a "clear" description of boundaries. "At least 30 days before the date of the public hearing, the governing board shall approve the report provided for in G.S. 160A-35, and shall make it available to the public at the office of the municipal clerk." N.C.G.S. § 160A-37(c). Therefore, if the governing board must approve "the report" provided for in section 160A-35 at least thirty days before the date of the public hearing, the board must review, approve and make the report available to the public sometime between fifteen and sixty days after the passage of the resolution of intent. Looking to the "prerequisites of annexation" and report requirements outlined in section 160A-35, in addition to a map or maps of the municipality and adjacent territory to show the present and proposed boundaries of the municipality, the report "shall include" a statement "that the area to be annexed meets the requirements of G.S. 160A-36." N.C.G.S. § 160A-35(2) (1998).

Proceeding yet further to section 160A-36, one finds the requirements for determining the "character" and suitability of the area to be annexed. It provides in pertinent part that:

> (b) The total area to be annexed *must* meet the following standards:
>
> (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun . . . .
>
> (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.
>
> (3) No part of the area shall be included within the boundary of another incorporated municipality.

N.C.G.S. § 160A-36(b) (1998) (emphasis added). Thus, incorporating the previously cited sequence of statutory requirements, within fifteen to sixty days of the passage of a resolution of intent, the governing board of a municipality must make a statement, in its report to its citizens and those freeholders it proposes to involuntarily annex, that at least one eighth of the external boundaries of the property being annexed is contiguous to the annexing municipality and that no part of the area is included within the boundary of another incorporated municipality. Since these boundary requirements are a mandatory prerequisite to annexation, and are specifically required to be met shortly after the passage of a resolution of intent, it would at least seem incongruous not to apply these same standards to the description of "the boundaries of the area" required as part of the resolution of intent itself in section 160A-37(a).

As additional support for this conclusion, we note the contiguity requirement of section 160A-36(b) provides that the territory must be contiguous "at the time the annexation proceeding is begun." N.C.G.S. § 160A-36(b)(1). Precedent has established that the first procedural step in the annexation process is the passing of a resolution of intent. *City of Burlington*, 310 N.C. at 728, 314 S.E.2d at 537 (quoting 2 McQuillin § 7.22a). The three legislative standards outlined in section 160A-36(b) each relate to the territorial boundaries of the land to be included in an annexation, and each applies to the total area to be annexed. Further, each of these standards require, or dictate by their terms, a preciseness of location, description, distance and measurement with respect to the exterior boundaries of the annexation area. Thus, based on the relationship of these standards, we hold that the requirements that the territory be contiguous, that at least one eighth of the aggregate external boundaries of the area coincide with the municipal boundary and that no part of the area be included within the boundary of another incorporated municipality are all applicable "at the time the annexation proceeding is begun" with a resolution of intent to annex territory.

The question which follows from our determination that the elements of section 160A-36(b) are applicable to resolutions of intent is whether these elements are "essential elements," nonadherence of which would preclude a finding of "substantial compliance" and result in a loss of jurisdictional priority to an intervening competing municipality. This Court has previously held that "contiguity is an essential precondition to the involuntary annexation of outlying territories by cities." *Hawks v. Town of Valdese*, 299 N.C. 1, 5, 261 S.E.2d

90, 93 (1980). Additionally, in *City of Kannapolis*, this Court held contiguity at the time of the adoption of a resolution of intent was "*without question*" an essential requirement of annexation by petition and failure to meet that requirement precluded a showing of substantial compliance with annexation provisions and compelled the holding that the resolution of intent was void. *City of Kannapolis*, 326 N.C. at 517, 391 S.E.2d at 496 (emphasis added). *City of Kannapolis* also considered whether the failure to specify the actual effective date of an annexation in a resolution of intent, as required by section 160A-49(j), precluded substantial compliance. This Court held it was not the specification of the effective date of the annexation that provided a municipality and property owners with a year to reflect on the annexation as required by the statute, but the one-year period itself which was mandated. *Id.* at 518, 391 S.E.2d at 497. Given that the statutory requirement for a one-year period of advance notice had been provided for, and therefore the intent of the statute was met, this Court held the failure to specifically include the actual effective date in the resolution was not an omission of an essential requirement of the statute but was a "slight irregularity." *Id.* at 519, 391 S.E.2d at 497.

Although *City of Kannapolis* is an annexation by petition case, and not an involuntary annexation case, the process for involuntary annexation "is considerably more protracted and deliberate than annexation by petition." *Town of Hazelwood*, 320 N.C. at 90, 357 S.E.2d at 687. In *Hazelwood*, this Court stressed the importance the legislature placed upon municipal planning in involuntary annexation proceedings when it stated that

> the resolution of intent . . . must be accompanied by a detailed report that is the product of deliberate planning. *This annexation scheme manifests the legislature's intent to require towns and cities to consider carefully the consequences of involuntary annexation* of a particular territory, and it indicates the legislature's desire to enable residents of the area under consideration to anticipate and adjust to the proposed annexation. If jurisdiction is asserted by a possibly precipitous resolution of consideration that, by doing little more than laying claim to general areas for possible annexation, precludes annexation of territory within these areas by other municipalities, these aims may be frustrated.

Id. at 93-94, 357 S.E.2d at 689 (emphasis added). In light of the clear legislative intent, as detailed by the statutes and interpreted by this

Court, that involuntary annexation is required to be more detailed and deliberate than that of a voluntary annexation by petition, to conclude that an element of section 160A-36(b) is an "essential element" in the voluntary petition process but is not essential to the involuntary annexation process would defy logic and be contrary to the spirit and intent of the overall annexation scheme.

In determining whether the inclusion of another municipality's territory in a resolution is a fatal flaw in an involuntary annexation, as opposed to a slight irregularity, we find it convincing that the contiguity requirement, found to be an "essential element" of involuntary annexation, is included in section 160A-36(b) along with the requirement that no part of the annexation area be included in the boundary of another municipality. Notwithstanding this finding, the language of the statute is the strongest evidence of legislative intent. The wording of the statute applicable to our review provides that "*[n]o* part of the area shall be included within the boundary of another incorporated municipality" and is specifically made applicable to "[t]he *total area* to be annexed." N.C.G.S. § 160A-36(b) (emphasis added). The clarity of the legislative mandate that *no* part of another municipality be included leaves little room for interpretation and compels a holding that *any* inclusion of another municipality's territory precludes a finding of substantial compliance and nullifies the resolution of intent.

East Spencer contends that even if its resolution was void, it was easily amended. However, it is important to note that the question before this Court is not whether municipal governing boards have authority to amend resolutions of intent or supporting reports. The legislature has clearly provided opportunity for extensive public review of annexation proposals and for amendment of proposed ordinances through section 160A-37. The relevant question is strictly whether loss of jurisdictional priority results from such an amendment, or the need for such an amendment. As to this question, remedial efforts have been held to be ineffectual with regard to maintaining jurisdictional priority if a valid resolution is passed in the interim giving prior jurisdiction over the disputed territory to the intervening municipality. *See City of Kannapolis*, 326 N.C. 512, 391 S.E.2d 493 (remedial efforts ineffectual as to a valid resolution passed in the interim); *Town of Hudson v. City of Lenoir*, 279 N.C. 156, 181 S.E.2d 443 (1971) (finding an attempt to remedy flaws in its first resolution of intent was ineffectual in establishing priority), *overruled in part on other grounds by City of Burlington*, 310 N.C. 723, 314 S.E.2d 534.

The Court of Appeals noted that section 160A-38 provides that an action challenging an annexation may be commenced within thirty days after passage of an annexation ordinance and that the court may affirm the action or remand the ordinance for compliance with statutory requirements. *Town of Spencer*, 129 N.C. App. at 757, 501 S.E.2d at 371. The Court of Appeals then concluded that "*under no circumstances* does the statute allow a trial court to void an enacted ordinance for failure to comply with [section 160A-36] without first allowing the municipality an opportunity to amend the ordinance." *Id.* at 757-58, 501 S.E.2d at 371-72. This conclusion, however, was based on several false premises. First, as discussed previously, the court was relying on the incorrect determination that there is not a justiciable controversy under the Act when two municipalities are competing for jurisdiction to annex territory through competing resolutions of intent. Next, the court interpreted section 160A-38 as applying to resolutions of intent, when in actuality the appeal process under that section is applicable "*following* the passage of an annexation ordinance." N.C.G.S. § 160A-38(a) (1998) (emphasis added). Finally, the court did not give consideration to precedent established by this Court that a resolution which is not in substantial compliance with statutory requirements is null and void.

In summary, we hold that the question of prior jurisdiction between two competing resolutions of intent is a justiciable issue under the Declaratory Judgment Act, that the elements of N.C.G.S. § 160A-36(b) are applicable to resolutions of intent, and that those elements are "essential elements" with regard to a "prior jurisdiction" determination. The evidence before the trial court presented "no genuine issue as to any material fact," N.C.G.S. § 1A-1, Rule 56(c) (1990), but presented purely a question of law as to the validity of East Spencer's resolution of intent. For the reasons set forth above, that resolution was invalid, thereby establishing Spencer's 8 October 1996 resolution of intent as the first valid resolution to effect jurisdiction. The trial court thus properly entered summary judgment for plaintiff Spencer, and the Court of Appeals erred in reversing the ruling. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

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

Chief Justice FRYE dissenting.

The majority holds that the determination of prior jurisdiction raised by competing resolutions of intent is a justiciable controversy under the Declaratory Judgment Act. I agree. The majority also holds that "the elements of N.C.G.S. § 160A-36(b) are applicable to resolutions of intent, and that those elements are 'essential elements' with regard to 'prior jurisdiction' determination." I disagree with this holding. However, assuming *arguendo* that N.C.G.S. § 160A-36(b) applies to resolutions of intent, I would hold that a resolution of intent that inadvertently includes two acres already within the boundaries of another municipality does not preclude a finding of substantial compliance with section 160A-36(b).

In the instant case, the Town of East Spencer passed a resolution stating its intent to consider annexation of 133 acres contiguous to its boundaries. The majority holds that because approximately two acres of the property were within the boundaries of the Town of Spencer, the resolution of intent was not in substantial compliance with the annexation statute and could not give the Town of East Spencer prior jurisdiction as to any of the property sought to be annexed.

In *City of Kannapolis v. City of Concord*, a majority of this Court held that the failure of the City of Kannapolis to specify in its initial resolution of intent that the effective date of the involuntary annexation would be at least one year from the date of passage of the annexation ordinance was an inconsequential irregularity that did not invalidate the annexation, where the correct annexation date was set forth in the annexation ordinance. 326 N.C. 512, 519, 391 S.E.2d 493, 497 (1990). In concluding that the failure to include the effective date in the resolution of intent was an inconsequential irregularity that did not preclude substantial compliance with the annexation statute and materially injure the City of Concord, this Court relied upon the following quote:

> Absolute and literal compliance with a statute enacted describing the conditions of annexation is unnecessary; substantial compliance only is required. . . . The reason is clear. Absolute and literal compliance with the statute would result in defeating the purpose of the statute in situations where no one has been or could be misled.

In re Annexation Ordinance, 278 N.C. 641, 648, 180 S.E.2d 851, 856 [(1971)] (quoting *State v. Town of Benson, Cochise County*, 95 Ariz. 107, 108, 387 P.2d 807, 808 (1963)).

City of Kannapolis, 326 N.C. at 518, 391 S.E.2d at 497 (alteration in original).

Likewise, the question here is whether the resolution of intent is in substantial compliance with the annexation statute. In *Kannapolis*, the missing effective date was an express requirement of N.C.G.S. § 160A-49(j). Nevertheless, the majority in *Kannapolis* held that the failure to include the effective date in the resolution of intent was not a fatal flaw but could be corrected in the annexation ordinance. Similarly, the inclusion of the extra two acres in the 133-acre tract described in the resolution of intent here was not a fatal flaw. The Town of Spencer could not be materially prejudiced because it was legally impossible for the Town of East Spencer to annex the additional two acres that were already a part of the Town of Spencer. Clearly, the inadvertent error in the description of the property could have been corrected without affecting the validity of the resolution of intent as to the remaining 131-acre tract.

The Town of East Spencer filed a valid resolution of intent in substantial compliance with N.C.G.S. § 160A-36(b) by describing the boundaries of the area under consideration and establishing priority in jurisdiction and a right to annex the disputed territory. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA v. DAVID ALLEN SOKOLOWSKI

No. 468A98

(Filed 3 December 1999)

1. Homicide— first-degree murder—corpus delicti—criminal act—premeditation and deliberation—sufficient evidence

The evidence was sufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant was guilty of premeditated and deliberate murder of the victim (his live-in girlfriend), although her body was never recovered, where circumstantial evidence presented by the State tended to show: (1) defendant had wooden pallets delivered to his house; (2) defendant built a bonfire with some of the pallets in mid-February 1992

around the time the victim mysteriously disappeared; (3) defendant made contradictory statements as to the victim's whereabouts; (4) defendant made incriminating comments to two friends, concluding that he had had the victim "tooken (sic) care of"; (5) defendant concealed the victim's corpse by the hideous indignities of dismemberment and burning; (6) defendant built a second bonfire on 9 March 1992 and a male neighbor's remains were found burning in this fire; (7) police found the neighbor's severed ears as well as the severed ears of the victim at defendant's house; (8) defendant possessed the victim's bloody shirt and bloody bra; (9) the victim's shirt had a hole in the back "consistent with an injury resulting from a gunshot wound"; (10) the victim's clothes were cut up the back as if to remove them from her torso; (11) charred bone and skull fragments were found in a hole 300 feet from defendant's house in a location where he indicated to a friend that the victim was located; and (12) the victim's important belongings were found at defendant's house.

2. Jury— defendant's conviction of another murder—knowledge by prospective jurors—refusal to excuse

The trial court did not abuse its discretion in refusing to excuse five prospective jurors for cause in this first-degree murder prosecution because they had some knowledge, through news media accounts, of defendant's conviction of another murder which was connected to the murder of this victim by a common plan or scheme where each of the five jurors said that he or she could set aside knowledge of defendant's prior murder conviction and decide guilt or innocence based solely on the evidence presented at trial, and the record provides no basis for a conclusion that any juror based his or her decision upon pretrial information.

3. Homicide— premeditation and deliberation—conduct toward corpse, concealment of body

The trial court did not err when it instructed the jury that it could consider defendant's unseemly conduct toward the victim's corpse and concealment of her dead body to infer premeditation and deliberation.

4. Evidence— subsequent crime or act—similar modus operandi—identity

Evidence concerning defendant's subsequent murder of a second person and his attempt to burn that person's body was

admissible in this first-degree murder prosecution where the unusual, unique, and bizarre circumstances of the two deaths, including the dismemberment of the bodies, the severing of the ears from those two bodies, the saving of those ears by defendant, and the building of two bonfires by defendant, one about the time this victim mysteriously disappeared and the other at the time the second person's charred head and body parts were found, reveal a contrived, common plan showing the same person committed both crimes.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Grant (Cy A.), J., on 26 October 1994 in Superior Court, Orange County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 September 1999.

Michael F. Easley, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

FREEMAN, Justice.

On 16 March 1992, defendant David Allen Sokolowski was indicted for the first-degree murder of Pamela Owens Ellwood. Pamela Ellwood's body was never recovered. Defendant was tried noncapitally before a jury, and on 26 October 1994, the jury found him guilty. Thereafter, the trial court sentenced defendant to a term of life imprisonment to be served consecutively with a life sentence imposed in March 1994 for the first-degree murder of Rubel Hill.

The State claimed defendant killed Ellwood, dismembered her body, and burned her body parts in their backyard. The State's evidence tended to show that in early 1992, defendant and Ellwood lived in a farmhouse in a rural part of Orange County near Hillsborough. The couple had lived together under the name of Pamela and David Ellwood for a number of years prior to 1992. Sometime in mid-February 1992, Pamela Ellwood (Ellwood) mysteriously disappeared.

The State presented evidence from several witnesses indicating that the last time anyone ever saw Ellwood alive was 9 February 1992, and is summarized as follows: On 7 February 1992, Stanley Hutchins saw Ellwood for the last time when he met defendant and Ellwood at a grocery store to pay them for some construction work

they had done. Ellwood was also seen by Robert Rice (Rice) when she bought a Citation car from him on 7 February 1992. On 9 February 1992, Ellwood telephoned Rice to tell him the car would not start. Rice went to defendant and Ellwood's house. This was the last time Rice ever saw or heard from Ellwood again. Defendant and Ellwood also went to Winston-Salem to visit her parents on 9 February, which was the last time Ellwood's parents ever saw or heard from her. On 10 February 1992, Rice took a starter to defendant and Ellwood's home to fix Ellwood's car, and defendant helped Rice install the starter. Rice did not see Ellwood that day. When he asked defendant about Ellwood, defendant said she was at work. Rice testified the Citation remained in the front yard for the next two weeks. Thereafter, Rice noticed the front tires of the automobile had been removed.

Ellwood and defendant's landlord, Robert Strayhorn (Strayhorn), initially testified that the last time he saw Ellwood was 1 March 1992, when she paid the monthly rent. However, Strayhorn corrected his testimony when he remembered the last time he saw Ellwood was when she got out of her Citation automobile sometime in February 1992. As previously mentioned, Ellwood bought this car from Rice on 7 February 1992. Two days later on 9 February, the Citation was not running.

Further testimony by Strayhorn showed that in mid-February 1992, he saw defendant unloading from a delivery truck a large number of wooden pallets and stacking them in piles in his yard. Sometime later in February, after the last time Strayhorn had seen Ellwood, Strayhorn was tending to his farm animals and saw defendant in the backyard using some of the pallets to fuel a large bonfire. Upset about the bonfire because the yard had been in such good shape, Strayhorn drove from the pasture to the yard to ask defendant about it. When Strayhorn got out of his truck, defendant left the fire and met Strayhorn at the truck. Strayhorn asked defendant why he got the pallets if he was just going to burn them. Defendant replied that some boys wanted to repair and sell them, but defendant got tired of looking at them. However, defendant was not burning all of the pallets at that time.

The State's evidence revealed that for the remainder of February 1992 and the early part of March 1992, defendant gave contradictory stories to various people concerning Ellwood's whereabouts. On 15 February 1992, Keith Wilkerson visited defendant's home and asked

where Ellwood was. Defendant responded that she was in Winston-Salem. However, Wilkerson noticed the pickup truck and Ellwood's car were both still in the front yard. On 21 February 1992, Charlene Thornton (Thornton) visited defendant's house and asked if Ellwood was home. Defendant told Thornton that Ellwood was in Winston-Salem and that she would be returning in a week.

On 8 March 1992, Ellwood's parents came to check on their daughter because they had not heard from her since they saw her on 9 February 1992. Ellwood's mother testified that Ellwood usually spoke to them about twice a month by telephone. When Ellwood's parents arrived at their daughter's house, Ellwood's father blew on the car horn to announce their arrival. Ellwood's parents walked to the front door and started to go inside, but Ellwood's father felt resistance on the door causing them to stop. Thereafter, Ellwood's mother walked to the right side of the house while Ellwood's father walked to the left side of the house. Ellwood's father heard his wife talking to someone at the back of the house. On joining his wife, he found her talking to defendant, who had a pistol and shotgun with him. Defendant told them Ellwood had gone shopping in Durham with a friend named Leann Hill, and they would not be home until after dark. Ellwood's parents returned to their own home in Winston-Salem without seeing their daughter. Later that same day, Curtis Bauer (Bauer) saw defendant pour gasoline onto a pile of wooden pallets, igniting a large bonfire.

The State presented evidence contradicting defendant's 8 March assertions to Ellwood's parents that Virginia "Leann" Hill (Leann) had gone shopping with Ellwood. Leann testified the last time she saw Ellwood was at the beginning of February 1992 when Ellwood gave Leann a haircut. Leann stated she usually came to Ellwood and defendant's house twice a month to get her hair cut. When Leann returned to their house sometime in late February or early March to get a haircut, defendant told her that Ellwood had left him and had gone to her parents' house in Winston-Salem. Leann testified that she saw boxes of Ellwood's items in the living room.

The State also provided evidence that defendant made incriminating statements to different people indicating he killed Ellwood. On 5 March 1992, defendant's friend Kevin Folmar (Folmar) was at defendant's house, along with Bauer, watching television. While Bauer was asleep in a chair, defendant looked at Folmar and said, "[Ellwood's] out there and [Hill's] in yonder. Or vice versa." Folmar

testified that defendant motioned with his finger outside the house, and then he pointed towards the bedroom area with his other hand. When Darryl Underwood (Underwood) was questioned by the police on 11 March 1992, he testified that he had been at defendant's house and had asked about Ellwood. Defendant responded that he "had [Ellwood] tooken [sic] care of."

On 9 March 1992, police officers went to Ellwood and defendant's home, and saw a large bonfire. In addition, officers noticed an area under the left side of the house that had been dug out as if construction work was in progress. When officers looked into the fire, they saw a badly burned human head, a separate portion of the torso of a human body, and some bone fragments. Defendant told officers the remains in the fire were his neighbor Rubel Hill (Hill). A later forensics examination of the remains in the fire confirmed it was Hill.

Officers continued to search the backyard. They sifted through the contents of a hole near the shed in the backyard, approximately three hundred feet from the residence, and found charred bone and skull fragments. When officers searched around the house, they found two human ears on the deck behind the house under some rugs. These ears were later identified as Hill's. A medical examiner concluded the ears had been severed from Hill's head with a sharp object.

Inside defendant's house, officers found a plastic bag that contained female clothing, including a blood-soaked bra, a blood-soaked sweatshirt, and socks. Defendant told officers the clothing in the plastic bag belonged to "his old lady," meaning Ellwood. When questioned about the clothing, defendant claimed he had been in a fight with Ellwood several weeks before and she had left him. The clothing found in the plastic bag was determined to be covered in human blood. However, the clothing was too putrid to test for blood type. A subsequent review of the contents of the plastic bag revealed the shirt had been cut from the hem in the back straight up to the neck, the bra straps had been cut from the back, and the shirt contained a hole in the back that was "consistent with an injury resulting from a gunshot wound."

On 11 March 1992, officers returned to defendant's house for a further search. Officers found a third ear in an ice tray in the freezer, testicles in the refrigerator, and a fourth ear inside a hollowed-out gourd on the kitchen table. An examination of these two ears revealed they had also been severed with a sharp object. The left ear

had a pierced lobe, and the right ear had a gold pierced earring with a green stone in place. Ellwood's mother testified the earring belonged to her daughter. Subsequent forensic tests showed both ears were Ellwood's.

[1] Defendant's first issue on appeal is whether the trial court erred when it denied defendant's motion to dismiss the charge of first-degree murder. Defendant contends the evidence was insufficient to permit a reasonable juror to find beyond a reasonable doubt that defendant was guilty of the premeditated and deliberate murder of Ellwood.

When the trial court considers a motion to dismiss, it is "concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). The State gets the benefit of all reasonable inferences drawn from the evidence. *State v. Scott*, 296 N.C. 519, 522, 251 S.E.2d 414, 416 (1979). The test for sufficiency of the evidence is the same whether it is circumstantial, direct, or both. *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981). If the evidence is sufficient to raise only a suspicion as to either the commission of the offense or the identity of defendant as the perpetrator, the motion to dismiss should be allowed. *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967). If the evidence at trial gives a reasonable inference of guilt, the jury must decide whether the facts show defendant's guilt beyond a reasonable doubt. *Id.*

Although defendant concedes there is sufficient circumstantial evidence to determine that Ellwood is dead, defendant claims the State offered no direct evidence that Ellwood's death was caused by a criminal act. Defendant claims the only evidence of possible criminal harm was the bag of blood-stained female clothes. However, defendant contends the State could only speculate that Ellwood was wearing these clothes at the time of her death. Further, defendant claims that even if the State provided evidence that Ellwood died as the result of a criminal act, the State has failed to prove defendant killed Ellwood.

Contrary to defendant's assertions, there was sufficient evidence in addition to Ellwood's bloody clothes for the jury to consider and convict defendant of the first-degree murder of Ellwood. "The *corpus delecti* may be established by direct or circumstantial evidence." *State v. Bishop*, 272 N.C. 283, 299, 158 S.E.2d 511, 522 (1968). As to the issue of defendant's responsibility for Ellwood's death, the jury

could properly consider the evidence relating to the manner in which defendant tried to dispose of Hill's body because "[t]he other crime may be offered on the issue of defendant's identity as the perpetrator when the *modus operandi* of that crime and the crime for which defendant is being tried are similar enough to make it likely that the same person committed both crimes." *State v. Carter*, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995). In the instant case, there was a rational connection between defendant's unseemly conduct towards Ellwood's corpse and the concealment of her dead body, leading to a logical inference that defendant killed Ellwood and disposed of her body in the same manner as Hill's corpse. The State presented evidence that after obtaining a large number of wooden pallets, defendant built a bonfire with some of the pallets sometime in mid-February 1992, around the time witnesses testified Ellwood disappeared. On 9 March 1992, police discovered defendant had, with more of the pallets, built a second bonfire and Hill's remains were found burning in the fire. One of the items in the fire was Hill's severed head with his two ears missing. The police found Hill's two severed ears, as well as the severed ears of Ellwood, at defendant's house.

An officer testified that defendant said he attempted to bury Hill, but it was too much trouble so he decided to burn the body. Thereafter, the police looked in holes in the yard for additional evidence. The officers found charred human bone and skull fragments in an area where defendant previously pointed out to Folmar that Ellwood was located. Further, defendant told Underwood that he "had [Ellwood] tooken [sic] care of." This circumstantial evidence provided proof of defendant's criminal agency and an explanation for the reason the police were unable to find the rest of Ellwood's body.

"Premeditation and deliberation generally must be established by circumstantial evidence, because both are processes of the mind not ordinarily susceptible to proof by direct evidence." *State v. Rose*, 335 N.C. 301, 318, 439 S.E.2d 518, 527, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994). One of "the circumstances to be considered in determining whether a killing was done with premeditation and deliberation is 'the conduct and statements of the defendant before and after the killing.' " *Id.* (quoting *State v. Small*, 328 N.C. 175, 181-182, 400 S.E.2d 413, 416 (1991)). The State presented evidence that sometime in February 1992, Ellwood disappeared, and afterwards, defendant gave conflicting responses for her absence. As previously stated, defendant indicated to some people that Ellwood was in Winston-

Salem, to others that Ellwood was out shopping, and to still others that she had left him and moved back in with her parents. However, the State's evidence reveals Ellwood did not go to Winston-Salem, she was not out shopping, and she did not go back to her parents' house to live. In fact, Ellwood's parents had not seen her since she visited them in Winston-Salem on 9 February 1992.

In addition to his contradictory statements, defendant more importantly made incriminating statements to friends concerning the whereabouts of Ellwood, including a statement to Underwood that he "had [Ellwood] tooken [sic] care of." Folmar testified that defendant said he had "[Ellwood] out here and [Hill] in yonder. Or vice versa." The State contends when Folmar asked defendant about Ellwood, defendant said Ellwood is "out there," pointing to the backyard. The State claims it can be reasonably inferred that defendant was talking about the area approximately three hundred feet behind the house, where the additional skull and bone fragments were found. Defendant's contradictory statements, concerning the whereabouts of Ellwood, and incriminating statements, indicating to acquaintances that he killed Ellwood, point to defendant as having killed Ellwood with premeditation and deliberation.

Another factor for this Court to consider on the question of premeditation and deliberation is that "any unseemly conduct towards the corpse of the person slain, or any indignity offered it by the slayer, as well as concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying." *Rose*, 335 N.C. at 318, 439 S.E.2d at 527. Officers searched the location behind the residence and found evidence of bone fragments, including pieces of a charred human skull, in a hole that was approximately three hundred feet behind defendant's residence, and searched the bonfire site at the residence where Hill's skull and partial torso were found. The State contends these charred bone and skull fragments were Ellwood's, as they were found in the area where defendant was pointing out the window when he told Folmar that Ellwood was "out there."

In subsequent investigations, officers found Ellwood's ears, one in a gourd on the kitchen table with her earring still in it and the other in the freezer. The ears were tested and compared with the blood from her parents to verify they were Ellwood's. A medical examiner testified that these ears had been severed with a sharp object, in a similar manner as the ears severed from Hill's head.

In addition, officers found a plastic bag of Ellwood's clothing, including a bloody bra, a bloody shirt, and a pair of socks. The back of the shirt had been cut straight up from hem to neck, and it had a hole in the back "consistent with an injury resulting from a gunshot wound." SBI agents testified the bra and shirt had a lot of blood on them. Defendant's explanation to the officers that he had been in a fight with his "old lady" did not explain why there was so much blood. Even if defendant had been in a fight with Ellwood, the State contends, this still did not explain why Ellwood's shirt had a straight, neat cut all the way up the back from the bottom to the top, or why her bra straps had been cut (nor does it explain the hole in the back of the shirt "consistent with an injury resulting from a gunshot wound"). The State concluded the shirt was cut up the back to remove it from Ellwood's body before she was dismembered and her body burned.

Moreover, the State's evidence revealed that in early February 1992, Strayhorn observed a large stack of wooden pallets in Ellwood and defendant's yard being delivered. Defendant had a large stack of pallets in one location and was burning a smaller group of pallets that had been moved to another location only ten to twelve feet from the rest of the pallets. Strayhorn chastised defendant because defendant had a fire burning in the yard. Defendant indicated the reason he was burning the pallets was because he was tired of looking at them. However, he was only burning some of the pallets, not all of them.

Testimony was presented that defendant used the pallets in a similar manner on the Sunday prior to the officers going there in March. Both times, defendant ignited the pallets with gasoline. In the second fire, officers discovered the remains of Hill. They also discovered through forensic tests on Hill's ears that they had been removed by a sharp object.

The State also presented evidence that defendant pawned Ellwood's belongings, including her guitar and two tires from her recently purchased car. Rice, who sold the car to Ellwood, testified that he asked defendant why he sold the two tires from the car before the car was paid off. Even though the car belonged to Ellwood, defendant told Rice he could take the car back if he wanted. This statement indicates that, contrary to defendant's assertions to various people, he did not expect Ellwood to return.

Further, evidence showed that Ellwood's important belongings, including her jewelry chest, a Bible she had received as a wedding

present, a wallet with pictures in it, a family photo album she had for twenty-seven years, combs and brushes, her clothes, and her recently purchased car remained at the farmhouse. The fact that these important items were left behind contradict defendant's statements that Ellwood had left him and moved to Winston-Salem to live with her parents. Had she left defendant, as he claimed, she would have taken these items with her.

Viewed in the light most favorable to the State, there was sufficient circumstantial evidence of all the essential elements of the crime of first-degree murder. As this Court has previously held,

> [c]ircumstantial evidence may be of two kinds, consisting either of a number of consecutive links, each depending upon the other, or a number of independent circumstances all pointing in the same direction. In the former case it is said that each link must be complete in itself, and that the resulting chain cannot be stronger than its weakest link. In the latter case the individual circumstances are compared to the strands in a rope, where no one of them may be sufficient in itself, but all together may be strong enough to prove the guilt of the defendant beyond reasonable doubt. But it necessarily follows that in either case every individual circumstance must in itself at least *tend* to prove the defendant's guilt before it can be admitted as evidence. No possible accumulation of irrelevant facts could ever satisfy the minds of the jury beyond a reasonable doubt.

State v. Austin, 129 N.C. 534, 535, 40 S.E. 4, 5 (1901). In the instant case, the total of all the evidence is similar to strands in a rope. The strands of circumstantial evidence presented by the State included: (1) Ellwood's mysterious disappearance after 9 February 1992; (2) defendant's contradictory statements as to Ellwood's whereabouts; (3) his incriminating comments, including he "had [Ellwood] tooken [sic] care of"; (4) defendant's unseemly conduct toward Ellwood's corpse, including concealing it by the hideous indignities of dismemberment and burning; (5) the fact Ellwood's shirt had a hole in the back "consistent with an injury resulting from a gunshot wound"; (6) the fact defendant possessed Ellwood's bloody shirt and bloody bra; (7) the fact Ellwood's clothes were cut up the back as if to remove them from her torso; (8) the fact he saved Ellwood's ears; (9) the fact he had pallets delivered to the house that were used to fuel bonfires; (10) the fact charred bone and skull fragments were found in a hole three hundred feet from the house in a location where he indicated to

Folmar that Ellwood was located; and (11) the fact Ellwood's important belongings were found at the farmhouse. Each of these strands is relevant and tends to prove defendant's guilt. All of the strands together are strong enough to provide ample evidence of premeditation and deliberation. Thus, the trial court properly denied the motion to dismiss.

[2] In his second assignment of error, defendant claims the trial court erred when it refused to excuse five of the prospective jurors for cause because, based on news media accounts, they had some knowledge about defendant's earlier conviction for the murder of Hill. "Due process requires that the accused receive a trial by an impartial jury free from outside influences." *State v. Boykin*, 291 N.C. 264, 269, 229 S.E.2d 914, 917 (1976). Counsel may challenge for cause an individual juror if the juror is unable to render a fair and impartial verdict. N.C.G.S. § 15A-1212(9) (Supp. 1998). However, the trial court's decision to dismiss a juror for cause is discretionary and will not be disturbed absent an abuse of discretion. *State v. Jaynes*, 342 N.C. 249, 270, 464 S.E.2d 448, 461 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). The test for determining if a prospective juror is able to render an impartial verdict is "whether the trial court can reasonably conclude from the *voir dire* examination that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence." *Id.*

In the instant case, defendant concedes that each of the five jurors challenged for cause said they could set aside their knowledge of defendant's prior first-degree murder conviction for the death of Hill and could decide guilt or innocence based solely on evidence presented at trial. However, defendant contends none of these prospective jurors knew during *voir dire* that the State would offer evidence at trial that the Hill murder was connected to the alleged murder of Ellwood because of a common plan or scheme. Defendant claims the fact that these five prospective jurors knew prior to defendant's trial that he was convicted of the first-degree murder of Hill requires a presumption of partiality and disqualification, despite the statements that they could judge defendant based solely on the evidence presented at trial.

As this Court has previously stated, "[w]e presume that jurors will tell the truth; our court system simply could not function without the ability to rely on such presumptions." *State v. Barnes*, 345 N.C.

184, 207, 481 S.E.2d 44, 56, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), and *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). Since a prospective juror's bias may not always be provable with unmistakable clarity, this Court must defer to the trial court's judgment concerning the prospective juror's ability to follow the law. *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). In the instant case, the record does not provide a basis to conclude that any juror based his or her decision upon pretrial information, rather than the evidence presented at trial. Since defendant did not prove the trial court abused its discretion in concluding these five prospective jurors could render an impartial decision, this assignment of error is overruled.

[3] Third, defendant claims the trial court erred when it instructed the jury that it could consider defendant's unseemly conduct toward the victim's corpse and concealment of her dead body to infer premeditation and deliberation. As already noted, this Court has held that unseemly conduct towards a victim's corpse and efforts to conceal the body are relevant as circumstantial evidence of premeditation and deliberation. *Rose*, 335 N.C. at 318, 439 S.E.2d at 527. There was a rational connection between defendant's unseemly conduct towards Ellwood's corpse and concealment of her body, leading to a logical inference that defendant killed her with premeditation and deliberation. Thus, this assignment of error is overruled.

[4] Finally, defendant contends the trial court erred when it allowed evidence to be introduced pursuant to Rule 404(b) concerning Hill and defendant's attempt to burn Hill's body. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1998). 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).

As previously mentioned, the other crime may be offered to show defendant's identity as the perpetrator when the *modus operandi* is similar enough to make it likely that the same person committed both crimes. *Carter*, 338 N.C. at 588, 451 S.E.2d at 167. A prior act or crime is sufficiently similar to warrant admissibility under Rule 404(b) if there are " 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes.' " *State v. Riddick*, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986) (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)). It is not necessary that the similarities between the two situations "rise to the level of the unique and bizarre." *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). However, the similarities must tend to support a reasonable inference that the same person committed both the earlier and later acts. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991).

In the instant case, the unusual, unique, and bizarre circumstances of the two deaths, including the dismemberment of the bodies; the severing of the ears; the saving of those ears; and the building of two bonfires, one about the time Ellwood mysteriously disappeared and the other at the time Hill's charred head and body parts were found, reveal a contrived, common plan showing the same person committed both crimes. These similarities support a reasonable inference that the same person committed both the earlier and later acts. Accordingly, defendant's fourth assignment of error is overruled.

For the foregoing reasons, we conclude defendant received a fair trial.

NO ERROR.

FORDHAM v. EASON

[351 N.C. 151 (1999)]

WENDELL A. FORDHAM v. A.V. EASON AND WIFE, GRACE W. EASON; AND AMERICAN WOODLAND INDUSTRIES, INC.

No. 509PA98

(Filed 3 December 1999)

1. Trespass; Uniform Commercial Code— contract for sale of timber—competing claims—trespass to chattel

Timber is classified as goods under the U.C.C., N.C.G.S. § 25-2-107(2), when it is the subject of a contract for sale. Therefore, a dispute over a trespass to timber where the claim to a possessory interest arises under a contract for the sale of timber should be settled using a trespass to chattel analysis.

2. Trespass— contract for timber sale—validity—possessory interest—trespass to chattel

Defendant AWI owned a sufficient possessory interest in timber under a "Timber Purchase and Sales Agreement" with the landowners to bring an action against plaintiff for trespass to chattel based upon plaintiff's removal of some of the timber, and plaintiff had no possessory interest in the timber pursuant to a "Timber Cutting Contract" with the landowners, where defendant AWI had a valid contract under the U.C.C. for the sale of timber in that its agreement with the landowners constituted a writing sufficient to meet the statute of frauds under N.C.G.S. § 25-2-201, a $30,000 deposit AWI paid the landowners was consideration to guarantee AWI's rights in the timber, and AWI's actions in accordance with the terms of the agreement created a contract for the sale of timber; plaintiff's "Timber Cutting Contract" constituted only an attempt to create an option to purchase timber which failed because plaintiff did not give the landowners any consideration for the option to purchase; and plaintiff thus had no rights in the timber so that his entry onto the landowners' property and his removal of timber was unauthorized and unlawful.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 131 N.C. App. 226, 505 S.E.2d 895 (1998), affirming in part and reversing in part an order for summary judgment entered by Jenkins, J., on 9 October 1997 in Superior Court, Johnston County. Heard in the Supreme Court 13 September 1999.

Narron, O'Hale and Whittington, P.A., by Jacquelyn L. Lee, O. Hampton Whittington Jr., James W. Narron, and John P. O'Hale, for plaintiff-appellee.

Thomas Edward Hodges for defendant-appellant American Woodland Industries, Inc.

ORR, Justice.

This case arises out of a dispute between defendant-appellant American Woodland Industries, Inc. (AWI) and plaintiff-appellee Wendell A. Fordham over a parcel of timber owned by defendants A.V. Eason and his wife, Grace W. Eason (Easons). On 11 November 1996, the Easons signed an agreement with Fordham titled "Timber Cutting Contract." This contract gave Fordham rights to "all timber and pulpwood located on all lands owned by Mr. A.V. Eason and being located in Johnston County, N.C.," until 1 June 1997. On 7 February 1997, the Easons entered into a separate agreement with AWI titled "Timber Purchase and Sales Agreement." This agreement covered the same parcel of land as Fordham's "Timber Cutting Contract" with the Easons and allowed AWI to cut and remove timber from the Easons' property for two years. AWI recorded the "Timber Purchase and Sales Agreement" with the Johnston County Register of Deeds on 10 February 1997.

AWI began to cut timber on the Easons' property within forty-eight hours of recording the "Timber Purchase and Sales Agreement." On 12 February 1997, Fordham obtained a temporary restraining order enjoining AWI from continuing its logging operation on the Easons' property. In a complaint, filed on 14 February 1997, Fordham alleged breach of contract against the Easons and interference with contractual relations and "unfair and deceptive trade practices" against AWI, and requested a preliminary injunction "prohibiting the cutting of timber on the property of the Defendant Eason by the Defendant AWI." On 17 February 1997, the trial court granted a preliminary injunction barring AWI from "harvesting or logging any of the timber located on those lands owned by Defendants Eason." Several days after the trial court entered the preliminary injunction, Fordham entered the Easons' property and cut and removed timber.

AWI filed an answer to Fordham's complaint on 21 March 1997 denying all pertinent allegations and alleging several counterclaims, including trespass, wrongful cutting of timber, interference with contractual relations, "unfair and deceptive trade practices," and abuse

of process. Fordham responded to AWI's counterclaims on 29 April 1997, also denying all pertinent allegations. Fordham filed for summary judgment of AWI's counterclaims on 15 September 1997, and AWI filed for summary judgment of Fordham's claims on 26 September 1997. The motions were heard at the 6 October 1997 Civil Session of Superior Court, Johnston County. The trial court entered an order on 9 October 1997 granting Fordham's motion for summary judgment of all of AWI's counterclaims and further granting AWI's motion for summary judgment of all of Fordham's claims. AWI appealed to the Court of Appeals from the order allowing Fordham's motion for summary judgment as to AWI's counterclaims.

In a unanimous decision, the Court of Appeals affirmed summary judgment on AWI's counterclaims against Fordham for interference with contractual rights, for "unfair and deceptive trade practices," for wrongful cutting of timber, and for trespass, but reversed summary judgment on AWI's abuse of process claim. As to the trespass claim, the Court of Appeals stated:

> Furthermore, a claim of trespass requires: (1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff. Since Woodland cannot show that it was the owner of the land, it cannot maintain a cause of action for trespass.

Fordham v. Eason, 131 N.C. App. 226, 229, 505 S.E.2d 895, 898 (1998) (citation omitted).

On 3 March 1999, we allowed AWI's petition for discretionary review of the trespass action but denied Fordham's conditional petition for discretionary review.

The basic issue before this Court for review is whether AWI, under its agreement with the Easons, has sufficient ownership rights to bring an action for trespass. The Court of Appeals ruled that AWI did not. For the reasons set forth below, we disagree.

The Court must first evaluate the elements of a trespass cause of action and determine if there are any genuine issues of fact as to any element and if Fordham, as the moving party, was entitled to judgment as a matter of law. Before the Court can analyze AWI's counterclaim for trespass, we must determine whether it is appropriate to evaluate this particular cause of action and claim for timber rights as a trespass to realty or a trespass to chattel. Essential to this decision is the determination of whether timber should be classified as realty

or as goods. Fordham contends that timber should be classified as realty, and AWI contends that timber is classified as goods under the Uniform Commercial Code as adopted in chapter 25 of the North Carolina General Statutes (Uniform Commercial Code). As will be discussed in detail below, in this case, the timber involved in AWI's "Timber Purchase and Sales Agreement" was goods. Because timber is classified as goods, the Court must evaluate Fordham's motion for summary judgment on AWI's counterclaim for trespass using the elements of a trespass to chattel cause of action.

Historically, timber interests have been treated as an interest in land. *See Drake v. Howell*, 133 N.C. 162, 165, 45 S.E. 539, 540 (1903); *Mizell v. Burnett*, 49 N.C. 249, 252 (1857). Traditional case law classified timber as realty. *See Williams v. Parsons*, 167 N.C. 529, 531, 83 S.E. 914, 915 (1914); *Hawkins v. Goldsboro Lumber Co.*, 139 N.C. 160, 162, 51 S.E. 852, 853 (1905). As realty, timber transactions had to comply with the formalities required by a transfer of an interest in land. *See Dulin v. Williams*, 239 N.C. 33, 38, 79 S.E.2d 213, 217 (1953); *Winston v. Williams & McKeithan Lumber Co.*, 227 N.C. 339, 341, 42 S.E.2d 218, 220 (1947); *Morton v. Pine Lumber Co.*, 178 N.C. 163, 167, 100 S.E. 322, 323 (1919). Several cases also distinguished the classification and treatment of standing timber from severed timber. Those decisions held that while standing timber was realty, severed timber was personal property. *See Austin v. Brown*, 191 N.C. 624, 627, 132 S.E. 661, 662 (1926); *Frank Hitch Lumber Co. v. Brown*, 160 N.C. 281, 283, 75 S.E. 714, 714-15 (1912).

When North Carolina adopted the Uniform Commercial Code in 1965, it changed the classification of timber when timber is the subject of a contract for sale. N.C.G.S. §§ 25-2-101, 25-2-107 (1995). The Uniform Commercial Code defines timber as follows:

> A contract for the sale . . . of timber to be cut is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties by identification effect a present sale before severance.

N.C.G.S. § 25-2-107(2).

The body of law discussing timber rights under N.C.G.S. § 25-2-107 is limited. In *Mills v. New River Wood Corp.*, 77 N.C. App. 576, 335 S.E.2d 759 (1985), the Court of Appeals held that contracts for the sale of "timber to be cut" had a four-year statute of limitations

because they were governed by N.C.G.S. § 25-2-107(2). *Mills*, 77 N.C. App. at 577, 335 S.E.2d at 760.

[1] We conclude that timber is classified as goods under North Carolina law when it is the subject of a contract for sale. A dispute over a trespass to timber where the claim of a possessory interest arises under a contract for the sale of timber should be settled using a trespass to chattel analysis. *See generally* PROSSER AND KEETON ON THE LAW OF TORTS § 14, at 85 (5th ed. 1984) (discussing that trespass to chattel involves personal property or chattel).

The basis of a trespass to chattel cause of action lies in "injury to possession." *Motley v. Thompson*, 259 N.C. 612, 618, 131 S.E.2d 447, 452 (1963). A successful action for trespass to chattel requires the party bringing the action to demonstrate that she had either actual or constructive possession of the personalty or goods in question at the time of the trespass, *see White v. Morris*, 8 N.C. 301, 303 (1821); *Carson v. Noblet*, 4 N.C. 136 (1814), and that there was an unauthorized, unlawful interference or dispossession of the property, *see Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 515, 23 S.E.2d 894, 896 (1943); *Kirkpatrick v. Crutchfield*, 178 N.C. 348, 350, 100 S.E. 602, 604 (1919); *Reader v. Moody*, 48 N.C. 372, 373-74 (1856).

In order to satisfy the first element of a trespass to chattel cause of action, in this case, AWI must have been in either actual or constructive possession of the property at the time Fordham's alleged trespass was committed. *See White*, 8 N.C. at 303; *Carson*, 4 N.C. at 136. Actual possession consists of exercising dominion over, making ordinary use of, or taking the profits from the land in dispute. *See Matthews v. Forrest*, 235 N.C. 281, 284, 69 S.E.2d 553, 556 (1952). Constructive possession is a legal fiction existing when there is no actual possession, but there is title granting an immediate right to actual possession. *See id.* The key to assessing possession under a trespass to chattel claim is determining if there is a right to present possession whenever so desired, *see Carson*, 4 N.C. at 136, or a right to immediate actual possession, *see White*, 8 N.C. at 303.

[2] In this case, AWI is claiming title to the Easons' tract of timber through its "Timber Purchase and Sales Agreement." To determine if AWI actually had title to the Easons' timber through the "Timber Purchase and Sales Agreement," we must determine if the "Timber Purchase and Sales Agreement" gave AWI possession of the timber at the time Fordham entered the Easons' property and removed the timber.

First, we look at the agreement between AWI and the Easons. On 7 February 1997, Rubin Williams, acting on behalf of AWI, entered into the agreement with the Easons titled "Timber Purchase and Sales Agreement." This agreement allowed AWI to enter and remove trees, tops, or laps from a 115-acre tract of land bounded on the east by the Little River and the West by Cat Tail Swamp, as recorded at book 1434, page 584 in the Johnston County Register of Deeds' office, until 7 February 1999. This agreement priced the timber on a per-unit basis using the species of timber, class of material, and unit type sold. In return for the right to remove timber from the Easons' property, AWI paid Eason a $30,000 deposit. The "Timber Purchase and Sales Agreement" allowed AWI initially to deduct the cost of any timber removed from the land from the $30,000 deposit consistent with the per-unit prices listed in the agreement. AWI agreed to pay the Easons on a per-unit basis when the $30,000 deposit was completely depleted. Additionally, the agreement required the Easons to refund AWI's deposit "if there is any stoppage of logging operations for any reason, less the amount of the stumpage cut." The Easons received a check for $30,000 from AWI on 7 February 1997. A.V. Eason and Grace W. Eason signed the agreement on 10 February 1997 in the presence of Rubin Williams, a Notary Public, but the agreement was not signed by an AWI representative. However, the bottom of the agreement listed American Woodland Industries, Inc. and listed the corporation's address. Within forty-eight hours of recording the "Timber Purchase and Sales Agreement," AWI entered the Easons' property and began cutting timber.

To determine if AWI had possession of the Easons' timber at the time Fordham entered and removed timber, we must evaluate the "Timber Purchase and Sales Agreement" under the Uniform Commercial Code and decide if AWI's contract for the sale of timber was enforceable and what its rights, if any, were under that contract. *See* N.C.G.S. §§ 25-2-107, 25-2-102 (1995).

The Uniform Commercial Code applies more liberal rules governing the formation of contracts than the rules applied under traditional common law. *See* N.C.G.S. § 25-1-102. Section 25-2-204 of the Uniform Commercial Code provides for the general formation of contracts. *See* N.C.G.S. § 25-2-204 (1995). Section 25-2-204(1) reads as follows: "A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Generally, contracts formed under article 2 will also have to be supported by con-

sideration. *See* N.C.G.S. § 25-1-103 (1995); *Brenner v. Little Red Sch. House, Ltd.*, 302 N.C. 207, 215, 274 S.E.2d 206, 212 (1981).

AWI and the Easons' conduct clearly demonstrates that they intended to enter a contract for the sale of timber. *See* N.C.G.S. § 25-2-204. The "Timber Purchase and Sales Agreement" also constitutes a writing sufficient to meet the statute of frauds requirements in N.C.G.S. § 25-2-201. *See* N.C.G.S. § 25-2-201 (1995). The $30,000 deposit AWI paid the Easons was consideration to guarantee AWI's rights in the Easons' timber from 10 February 1997 until 7 February 1999. *See Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 722, 127 S.E.2d 539, 543 (1962) (noting that adequacy of consideration is generally irrelevant after consideration is found to exist). Finally, by acting in accordance with the terms in the "Timber Purchase and Sales Agreement," AWI created a contract for the sale of timber. *See Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976).

We conclude that under the Uniform Commercial Code, AWI had a valid contract for the sale of timber. At the time Fordham removed the timber from the Easons' property, under the "Timber Purchase and Sales Agreement," AWI also had the right to immediate possession of that timber. Thus, AWI meets the first requirement of a trespass to chattel cause of action.

Fordham challenges AWI's claim of possession of the Easons' timber on the grounds that AWI did not have a valid deed. However, under the Uniform Commercial Code, a deed is not required to create a contract for the sale or transfer of goods. *See* N.C.G.S. § 25-2-204. Thus, this argument is without merit.

The second element to a successful cause of action for trespass to chattel is that the defendant made an unauthorized interference or dispossession of the property. *See Binder*, 222 N.C. at 515, 23 S.E.2d at 896; *Kirkpatrick*, 178 N.C. at 350, 100 S.E. at 604; *Reader*, 48 N.C. at 373-74. It is undisputed that Fordham entered the Easons' property and removed timber; thus, we must only look at the agreement between Fordham and the Easons to determine if Fordham's entry onto the Easons' property and removal of the timber was unauthorized.

The agreement Fordham and the Easons entered into on 11 November 1996 allowed Fordham to cut and remove "all timber and pulpwood located on all lands owned by Mr. A.V. Eason and being

located in Johnson County, N.C.," until 1 June 1997. This "Timber Cutting Contract" placed no obligation on Fordham to cut any timber, and Fordham did not pay the Easons any consideration for the right to remove the timber. Fordham agreed to pay the Easons a per-unit price for any timber removed during the life of the "Timber Cutting Contract." The agreement was signed by A.V. Eason, Grace W. Eason, and Wendell Fordham in the presence of a notary public, but it was never registered in the Office of the Register of Deeds.

Through the "Timber Cutting Contract," Fordham and the Easons attempted to create an option to purchase timber. While contracts for the sale of timber are governed by the Uniform Commercial Code and are treated as goods, an option to purchase timber is not a contract for the sale of timber. *See Fisher v. Elmore*, 802 F.2d 771, 773 (4th Cir. 1986) (holding that an option to purchase timber did not become a contract for the sale of timber governed by the Uniform Commercial Code until the option was exercised by harvesting the timber). North Carolina case law also distinguishes between options to purchase and contracts for the sale of goods. *See Rose v. Vulcan Materials Co.*, 282 N.C. 643, 668, 194 S.E.2d 521, 538 (1973). Since the Uniform Commercial Code governs only contracts for the sale of timber, *see* N.C.G.S. § 25-2-107, an option to purchase timber is not governed by the Uniform Commercial Code. Instead, an option to purchase timber is governed by the common law. *See Fisher*, 802 F.2d at 773.

An option to purchase is an offer for which consideration has been given. *See Kidd*, 289 N.C. at 360, 222 S.E.2d at 404. Thus, an option is a contract itself. *Id.* Fordham did not give the Easons any consideration for the option to purchase timber under the "Timber Cutting Contract." While, under the Uniform Commercial Code, certain option contracts can remain open without consideration, *see* N.C.G.S. § 25-2-205 (1995), under the common law, an option to purchase requires consideration to be enforceable, *see Kidd*, 289 N.C. at 360, 222 S.E.2d at 404; *Brenner*, 302 N.C. at 215, 274 S.E.2d at 212. The option to purchase fails because Fordham did not give the Easons any consideration for the option to purchase in the "Timber Cutting Contract." *See Brenner*, 302 N.C. at 215, 274 S.E.2d at 212. At the time Fordham entered the Easons' property and removed the timber, he had no rights in the timber, and his entry on the property was both unauthorized and unlawful.

Only one party in this case, AWI, had any possessory rights in the Easons' timber. Thus, it is unnecessary to discuss the filing procedures and requirements necessary to establish superior title and to

protect a contract holder's rights against subsequent purchasers and lien creditors.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990).

No genuine issue of material fact exists in this cause of action for trespass to chattel. AWI owned a valid possessory interest in the subject timber on 10 February 1997 under its "Timber Purchase and Sales Agreement" with the Easons. Fordham has admitted intentional interference with that possessory interest by entering the property and removing the timber. As we have determined that Fordham had no valid possessory interest in the timber at the time he removed it, this intentional interference was unauthorized. Consequently, Fordham was not entitled to summary judgment on AWI's counterclaim for trespass.

Therefore, we reverse the Court of Appeals as to AWI's counterclaim for trespass and remand this case to that court for further remand to the Superior Court, Johnston County, for such other actions as are consistent with this opinion.

REVERSED AND REMANDED.

LASSIE M. SHARPE v. DAVID ERIC WORLAND, GREENSBORO ANESTHESIA ASSOCIATES, P.A., WESLEY LONG COMMUNITY HOSPITAL, INC., JOHN DOES I THROUGH XXV, AND JANE DOES I THROUGH XXV

No. 55PA99

(Filed 3 December 1999)

Appeal and Error— appealability—discovery order—hospital—impaired physician program documents

An interlocutory discovery order in a medical malpractice action requiring defendant hospital to produce documents concerning defendant physician's participation in an impaired physician program affected a substantial right and was immediately appealable where defendants asserted that the documents were

protected by a statutory privilege, N.C.G.S. § 90-21.32(e), a substantial right of defendants is thus affected, and this right will be lost if the trial court's order is not reviewed before entry of a final judgment.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 132 N.C. App. 223, 511 S.E.2d 35 (1999), dismissing as interlocutory the appeal of a 24 February 1998 order entered by Freeman, J., in Superior Court, Guilford County. Heard in the Supreme Court 20 September 1999.

Faison & Gillespie, by O. William Faison and John W. Jensen, for plaintiff-appellee.

Carruthers & Roth, P.A., by Richard L. Vanore and Norman F. Klick, Jr., for defendant-appellants David Eric Worland and Greensboro Anesthesia Associates.

Lawing, Sharpless & Stavola, P.A., by Joseph M. Stavola and Joseph P. Booth, III, for defendant-appellant Wesley Long Community Hospital.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael E. Weddington, on behalf of North Carolina Physicians Health Program, Inc., amicus curiae.

MARTIN, Justice.

On 5 March 1997 plaintiff, Lassie M. Sharpe, initiated this medical malpractice action against named defendants David Eric Worland, M.D. (Dr. Worland), Greensboro Anesthesia Associates, P.A. (Greensboro Anesthesia), and Wesley Long Community Hospital, Inc. (the Hospital) for personal injuries she received while being treated at the Hospital. Plaintiff alleges that Dr. Worland, an employee of Greensboro Anesthesia and a practicing anesthesiologist at the Hospital, negligently supervised the administration of an epidural for post-surgery pain management resulting in injury to plaintiff's spine.

On 22 December 1997, pursuant to North Carolina Rule of Civil Procedure 30(b)(5), plaintiff served a notice of deposition upon the Hospital, requesting, among other things, that the Hospital produce "[a]ll documents related to all complaints and incident reports" and "[a]ll minutes of any meeting or hearing of the Board of Trustees" relating to Dr. Worland. On 29 December 1997 the Hospital moved for

a protective order. In the trial court, the Hospital asserted that certain documents pertaining to Dr. Worland's participation in the Physician's Health Program (PHP) were privileged and, therefore, protected from disclosure.

On 24 February 1998 the trial court denied the motion for a protective order and ordered the Hospital to produce all documents "concerning Defendant Worland's participation in the Physician's Health Program." Defendants appealed.

The Court of Appeals dismissed defendants' appeal as interlocutory and not affecting a substantial right. *See Sharpe v. Worland*, 132 N.C. App. 223, 225, 511 S.E.2d 35, 37 (1999). On 6 May 1999 we allowed defendants' petitions for discretionary review.

Interlocutory orders and judgments are those "made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999); *accord Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Generally, there is no right of immediate appeal from interlocutory orders and judgments. *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992); *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381; *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 718, 504 S.E.2d 802, 807 (1998); *accord Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712, 135 L. Ed. 2d 1, 10 (1996) (discussing appeal of interlocutory orders under federal rules). The purpose of this rule is "to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980); *accord Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). As we have noted, "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382.

Notwithstanding this cardinal tenet of appellate practice, immediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than

all, claims or parties and certifies there is no just reason for delay. N.C.G.S. § 1A-1, Rule 54(b) (1990); *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998); *Oestreicher v. American Nat'l Stores*, 290 N.C. 118, 121-22, 225 S.E.2d 797, 800 (1976). When the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory. *DKH Corp.*, 348 N.C. at 585, 500 S.E.2d at 668. Nonetheless, the trial court may not, by certification, render its decree immediately appealable if "[it] is not a final judgment." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983); *see Tridyn Indus. v. American Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) ("That the trial court declared it to be a final, declaratory judgment does not make it so."). Second, immediate appeal is available from an interlocutory order or judgment which affects a "substantial right." N.C.G.S. § 1-277(a) (1996); N.C.G.S. § 7A-27(d)(1) (1995); *Bowden v. Latta*, 337 N.C. 794, 796, 448 S.E.2d 503, 505 (1994); *Oestreicher*, 290 N.C. at 124, 225 S.E.2d at 802.

In the instant case, the trial court's discovery order is interlocutory because it does not "dispose of the case, but instead leave[s] it for further action by the trial court in order to settle and determine the entire controversy." *Carriker*, 350 N.C. at 73, 511 S.E.2d at 4. Since the trial court did not certify its order under Rule 54(b), immediate review is foreclosed unless the order affects a substantial right under sections 1-277(a) and 7A-27(d)(1).

It is well settled that an interlocutory order affects a substantial right if the order "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991); *see Waters*, 294 N.C. at 207, 240 S.E.2d at 343. "Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. This Court in *Oestreicher* adopted the dictionary definition of "substantial right": " 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right.' " *Oestreicher*, 290 N.C. at 130, 225 S.E.2d at 805 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1971)). Nevertheless, "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the proce-

dural context in which the order from which appeal is sought was entered." *Waters*, 294 N.C. at 208, 240 S.E.2d at 343.

An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment. *Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988), *disc. rev. denied*, 323 N.C. 704, 377 S.E.2d 225 (1989); *Benfield v. Benfield*, 89 N.C. App. 415, 418, 366 S.E.2d 500, 502 (1988); *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554, 353 S.E.2d 425, 426 (1987); *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. rev. denied*, 318 N.C. 505, 349 S.E.2d 859 (1986).

This Court recognized one exception to the general rule prohibiting immediate review of interlocutory discovery orders in *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976). In *Willis* the trial court ordered the defendant to produce and permit the plaintiff to inspect, among other things, the defendant's investigation files on the accident that was the subject of the wrongful death action. *Id.* at 26, 229 S.E.2d at 194. When the defendant failed to fully comply, the trial court adjudged the defendant to be in contempt under North Carolina Rule of Civil Procedure 37(b). *Id.* at 26-27, 229 S.E.2d at 195-96. On appeal, the Court of Appeals concluded that the trial court's discovery order was not immediately appealable and dismissed the defendant's appeal. *Id.* at 27, 229 S.E.2d at 196.

Reversing the Court of Appeals, we recognized that the trial court's contempt order affected a substantial right of the defendant under sections 1-277(a) and 7A-27(d)(1) and held that

> when a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature and the order is immediately appealable for the purpose of testing the validity both of the original discovery order and the contempt order itself where, as here, the contemptor can purge himself of the adjudication of contempt only by, in effect, complying with the discovery order of which he essentially complains.

Id. at 30, 229 S.E.2d at 198. The principle we recognized in *Willis* has been followed in numerous cases. *See, e.g.*, *Wilson v. Wilson*, 124 N.C. App. 371, 374-75, 477 S.E.2d 254, 256 (1996) (litigant held in contempt); *Mack*, 91 N.C. App. at 480, 372 S.E.2d at 316 (discovery order not immediately appealable due to lack of enforcement sanctions);

Benfield, 89 N.C. App. at 418-19, 366 S.E.2d at 502 (same); *Walker*, 84 N.C. App. at 554-55, 353 S.E.2d at 426 (discovery order immediately appealable when enforced by sanctions under Rule 37(b)).

Willis and its progeny, however, do not necessarily represent the singular exception to the general rule that interlocutory discovery orders are not ordinarily appealable prior to entry of a final judgment. *See, e.g., Lockwood v. McCaskill*, 261 N.C. 754, 757, 136 S.E.2d 67, 69 (1964) (discovery order affected substantial right where patient-physician privilege asserted); *Shaw v. Williamson*, 75 N.C. App. 604, 606, 331 S.E.2d 203, 204 (discovery order affected substantial right where constitutional right against self-incrimination asserted), *disc. rev. denied*, 314 N.C. 669, 335 S.E.2d 496 (1985); *cf. In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997); *In re Grand Jury Proceedings*, 43 F.3d 966 (5th Cir. 1994). Rather, the *Willis* line of cases merely represents one example of how a discovery order may affect a substantial right pursuant to sections 1-277(a) and 7A-27(d)(1).

In the present case, defendants assert that the PHP documents are protected by a statutory privilege. The statute on which defendants rely pertains to doctors participating in an impaired physician program and provides:

> Any confidential patient information and other nonpublic information acquired, created, or used in good faith by the Academy or a society pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in the peer review or impaired physician or impaired physician assistant programs of this section shall be required in a civil case to disclose any information acquired or opinions, recommendations, or evaluations acquired or developed solely in the course of participating in any agreements pursuant to this section.

N.C.G.S. § 90-21.22(e) (1997).

We need not decide here whether the PHP documents fall within the statutory privilege set forth within section 90-21.22(e). Rather, in determining whether a substantial right is affected by the challenged order, it suffices to observe that, if the Hospital is required to disclose the very documents that it alleges are protected from disclosure by the statutory privilege, then " 'a right materially affecting those interests which a [person] is entitled to have preserved and protected by law' "—a "substantial right"—is affected. *Oestreicher*, 290 N.C. at

130, 225 S.E.2d at 805 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280). Moreover, the substantial right asserted by defendants will be lost if the trial court's order is not reviewed before entry of a final judgment. *See Cook*, 329 N.C. at 491, 406 S.E.2d at 850; *Waters*, 294 N.C. at 207, 240 S.E.2d at 343.

In *Lockwood*, defendant Macon sought, in the trial court, an order authorizing the deposition of the plaintiff's psychiatrist concerning the plaintiff's mental and emotional health. 261 N.C. at 755-56, 136 S.E.2d at 67-68. The trial court ruled that the defendant was authorized to proceed with his deposition, and the plaintiff appealed, asserting the physician-patient privilege created by N.C.G.S. § 8-53. *Id.* at 756-57, 136 S.E.2d at 68-69. Reversing the trial court, this Court stated:

> Undoubtedly, Judge McConnell's order purports to compel Dr. Wright to testify concerning matters which otherwise would be privileged. Whether Dr. Wright's deposition is offered in evidence is immaterial. If and when Dr. Wright is required to testify concerning privileged matters at a deposition hearing, *eo instante* the statutory privilege is destroyed. This fact precludes dismissal of the appeal as fragmentary and premature.

Id. at 757, 136 S.E.2d at 69.

In the present case, the Court of Appeals concluded that application of *Lockwood* was "inappropriate" because "[t]he trial court reviewed the material *in camera*, found no applicable privilege, and ordered protective measures to insure the material would be restricted to the parties and their experts." *Sharpe*, 132 N.C. App. at 226, 511 S.E.2d at 37.

At the outset, we note that the record does not disclose whether the trial court conducted an *in camera* review of the PHP documents.[1] Moreover, we do not believe that the existence of protective measures renders the application of *Lockwood* inappropriate within this context. Specifically, section 90-21.22(e) provides that "[a]ny confidential patient information and other nonpublic information acquired, created, or used in good faith by the Academy or a society pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case" and that "[n]o per-

1. Before this Court, Dr. Worland and Greensboro Anesthesia have alleged, and plaintiff has not contested, that the trial court declined the Hospital's request to conduct an *in camera* review of the PHP documents.

son participating in good faith in the peer review or impaired physician or impaired physician assistant programs . . . shall be required in a civil case to disclose any information acquired or opinions, recommendations, or evaluations acquired or developed solely in the course of participating in any agreements pursuant to this section." N.C.G.S. § 90-21.22(e). Therefore, our decision in *Lockwood* controls for purposes of determining whether a substantial right is affected by the trial court's order.

Accordingly, when, as here, a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under sections 1-277(a) and 7A-27(d)(1). To the extent such cases as *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 677, 474 S.E.2d 408 (1996), differ, they are overruled.

Because the discovery order entered by the trial court on 24 February 1998 affected a substantial right, the Court of Appeals erred in dismissing defendants' appeal.

REVERSED.

JENNY BARBEE SHORE v. RAY FARMER, T/D/B/A, RAY FARMER BONDING

No. 303A99

(Filed 3 December 1999)

1. Appeal and Error— preservation of issues—in-chambers conference—oral objection—failure to record

Rule 10(b) does not bar defendant from challenging the trial court's instruction and submission to the jury of the issue of plaintiff's claim for punitive damages where the record shows that defendant's counsel orally objected to plaintiff's motion to amend her complaint to include an issue of punitive damages during an in-chambers conference which occurred after all of the evidence was presented to the jury and prior to the jury charge. Although the better practice is to make sure the objection is recorded in order to preserve it for appeal, defend-

ant's position on the motion to amend was clear to the trial court before the jury began its deliberations, and it was not necessary for defendant to further object to plaintiff's motion. N.C. R. App. P. 10(b)(1), (2).

2. Bail and Pretrial Release— rescission of bail contract— surrender of defendant—return of premium

Under N.C.G.S. § 58-71-20, a licensed bail bondsman has the right to rescind the bail contract and surrender a defendant into custody at any time without cause or reason, provided he returns the full premium paid; however, the bondsman would be liable in contract if he fails to make such a refund.

3. Damages— punitive—breach of contract—no separate tort

The trial court erred in submitting a punitive damages issue to the jury in an action against a bail bondsman for breach of the bail bond contract where there was not a separate, identifiable tort to support a punitive damages claim.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. 350, 515 S.E.2d 495 (1999), finding no error in a judgment entered 31 July 1997 by Seay, J., in Superior Court, Rowan County. Heard in the Supreme Court 11 October 1999.

Thomas M. King and David Y. Bingham for plaintiff-appellee.

The Holshouser Law Firm, by John L. Holshouser, Jr., for defendant-appellant.

LAKE, Justice.

The question presented for review is whether the Court of Appeals erred in concluding that the trial court did not abuse its discretion by allowing plaintiff to amend her complaint to seek punitive damages in an action sounding in contract. In the decision below, the Court of Appeals concluded that the trial court did not err in allowing plaintiff's motion to amend her pleadings to conform to the evidence because there was no showing that the amendment in some way prejudiced defendant in maintaining his defense. Since we conclude that the evidence in this case does not support a claim for punitive damages and that such claim is improper in a breach of contract action, we reverse the decision of the Court of Appeals.

Plaintiff made the following basic allegations in the complaint filed in this action. In June 1991, plaintiff and her husband were arrested on North Carolina warrants while they were on vacation in Myrtle Beach, South Carolina. Plaintiff and her husband waived extradition and were transported to North Carolina, and plaintiff was ultimately transported to the Watauga County jail.

Defendant is a professional bail bondsman. Upon contact, he informed plaintiff that a total of $75,000 in bond premiums would procure the necessary bail bonds to secure her release. Plaintiff and defendant subsequently entered into an agreement whereby plaintiff would advance a portion of the $75,000 to defendant and then tender the remaining balance to defendant within ten days of her release. On 25 June 1991, plaintiff paid the initial, agreed-upon portion of the fee and was thereafter released from jail. Plaintiff then tendered the rest of her outstanding balance to defendant on 29 June 1991.

That same day, plaintiff and defendant discussed and negotiated an agreement to procure the release of plaintiff's husband from jail by having him bonded on credit. During the next two days, plaintiff procured a bail bond for her husband by the following means: plaintiff's friend, Bob LaBianca, charged $10,000 on his Gold Master Card. Once defendant received notice of this $10,000 premium, defendant posted the bond for plaintiff's husband, and he was subsequently released from jail. However, on 26 July 1991, defendant received a notice from Mr. LaBianca's bank that LaBianca had signed a statement indicating that he did not authorize the $10,000 credit.

On 12 August 1991, plaintiff and her husband traveled to the Alleghany courthouse for a scheduled bond hearing. When they arrived at the courthouse, defendant arrested and surrendered both plaintiff and her husband into custody. Defendant informed plaintiff that he was surrendering her because her husband had not paid his bond due to Mr. LaBianca's rescission of the $10,000 credit card charge.

On 16 October 1995, plaintiff instituted this action against defendant by filing a complaint alleging breach of contract, unfair and deceptive practices, and intentional infliction of emotional distress. Defendant filed an answer on 9 January 1996 denying plaintiff's allegations. A jury trial commenced on 21 July 1997. The record reflects that after all of the evidence was presented to the jury, but prior to the jury charge, the trial court conducted an in-chambers

conference with counsel for both parties. During this conference, the trial court ruled that it would not submit plaintiff's claims of unfair and deceptive practices and intentional infliction of emotional distress to the jury, leaving only the breach of contract action. Plaintiff then orally moved to amend her complaint to include an issue of punitive damages. As reflected in the record, defendant objected to plaintiff's motion, and the trial court ruled in favor of plaintiff. Plaintiff subsequently filed a written amendment to her complaint asserting a claim for "punitive damages in an amount in excess of Ten Thousand Dollars ($10,000.00)."

On 25 July 1997, the jury found for plaintiff and recommended an award of damages in the amount of $7,425 for breach of contract and $150,000 in punitive damages. The trial court entered judgment accordingly on 31 July 1997. Defendant appealed; the Court of Appeals, with Judge Walker dissenting, affirmed the order of the trial court.

[1] Defendant contends that the Court of Appeals erred in affirming the trial court's order on the ground that the trial court abused its discretion in allowing plaintiff to amend her complaint since plaintiff's evidence did not support a claim for punitive damages in her breach of contract action. In its decision, the Court of Appeals majority held that defendant failed to preserve this issue for appellate review, and thus it was not addressed because "defendant lodged no objection on the record to the submission of a punitive damages issue to the jury either at the recorded charge conference or subsequent to the trial court's jury charge." *Shore v. Farmer*, 133 N.C. App. 350, 353, 515 S.E.2d 495, 497 (1999). Therefore, the Court of Appeals majority concluded that Rule 10(b)(2) of the Rules of Appellate Procedure precluded defendant from asserting this "unpreserved argument regarding submission of punitive damages to the jury." *Id.* We disagree.

N.C. R. App. P. 10(b)(1) provides in pertinent part:

> *General.* In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

Furthermore, under subsection (b)(2) of Rule 10, "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict." As above stated, the record in the case at bar clearly shows that defendant's counsel orally objected to plaintiff's motion to amend the complaint to include an issue of punitive damages. As stipulated by counsel, the record on appeal reflects that there is no dispute that defendant's counsel made this objection during the in-chambers conference which occurred after all of the evidence was presented to the jury and prior to the jury charge. Therefore, although the better practice is to make sure the objection is recorded in order to preserve it for appeal, under these circumstances, defendant's position on the motion to amend was clear to the trial court before the jury began its deliberations, and it was not necessary for defendant to further object to plaintiff's motion. Having concluded upon the record before this Court that Rule 10(b) does not bar defendant from challenging the trial court's instruction to the jury and submission of the issue of plaintiff's claim for punitive damages, we turn to the issue raised by defendant in this appeal.

The appellate courts of this state have long and consistently held that punitive damages should not be awarded in a claim for breach of contract. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 301 (1976); *Taha v. Thompson*, 120 N.C. App. 697, 704-05, 463 S.E.2d 553, 558 (1995), *disc. rev. denied*, 344 N.C. 443, 476 S.E.2d 130, *and disc. rev. denied*, 344 N.C. 443, 476 S.E.2d 131 (1996). The one exception to this rule is in breach of contract to marry. *Newton*, 291 N.C. at 111, 229 S.E.2d at 301. However, this Court has stated:

> [W]hen the breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for recovery of punitive damages. Our recent holdings in this area of the law clearly reveal, moreover, that allegations of an identifiable tort accompanying the breach are insufficient alone to support a claim for punitive damages. In *Newton*[,] the further qualification was stated thusly: "Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." *Newton*, [291 N.C.] at 112, 229 S.E.2d at 301.

Stanback v. Stanback, 297 N.C. 181, 196, 254 S.E.2d 611, 621 (1979) (citation omitted).

[2] In the instant case, defendant was acting as a licensed bail bondsman when he contracted with plaintiff to procure the release of plaintiff and plaintiff's husband from jail. Accordingly, the agreement between plaintiff and defendant is governed by N.C.G.S. § 58-71-20 which provides:

> At any time before there has been a breach of the undertaking in any type of bail or fine and cash bond the surety may surrender the defendant to the official to whose custody the defendant was committed at the time bail was taken, or to the official into whose custody the defendant would have been given had he been committed; in such case the full premium shall be returned within 72 hours after the surrender. The defendant may be surrendered without the return of premium for the bond if the defendant does any of the following:
>
> (1) Willfully fails to pay the premium to the surety or willfully fails to make a premium payment under the agreement specified in G.S. 58-71-167.
>
> (2) Changes his or her address without notifying the surety before the address change.
>
> (3) Physically hides from the surety.
>
> (4) Leaves the State without the permission of the surety.
>
> (5) Violates any order of the court.

N.C.G.S. § 58-71-20 (Supp. 1998). Pursuant to this statute, it is clear a bail bondsman has the right to rescind the bail contract and surrender a defendant into custody at any time without cause or reason, provided he returns the full premium paid. The bail bondsman would be liable in contract if he fails to make such refund.

[3] As the dissent to the decision below correctly noted, plaintiff's cause of action ultimately consisted of a simple claim for beach of contract because the trial court did not submit to the jury the issues of unfair and deceptive practices and intentional infliction of emotional distress. Significantly, plaintiff does not now contend that the trial court erred in refusing to submit these claims to the jury.

Because there was not a separate, identifiable tort to support a punitive damages claim in this breach of contract action, we must conclude the trial court erred in submitting the punitive damages issue to the jury. Therefore, the decision of the Court of Appeals is

reversed, and this case is remanded to the Court of Appeals for further remand to the Superior Court, Rowan County, for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

DEPARTMENT OF TRANSPORTATION v. JOE C. ROWE AND WIFE, SHARON B. ROWE; HOWARD L. PRUITT, JR., AND WIFE, GEORGIA PRUITT; ROBERT W. ADAMS, TRUSTEE; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY AND HUSBAND, KENNETH H. ABERNETHY; MARTHA BOWMAN CAUDILL AND HUSBAND, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC. (FORMERLY APPALACHIAN POSTER ADVERTISING COMPANY, INC.), LESSEE; AND FLORENCE BOWMAN BOLICK

No. 506PA98

(Filed 3 December 1999)

Appeal and Error; Eminent Domain— appealability—pretrial condemnation hearing—unification order—substantial right not affected—immediate appeal not required

The trial court's interlocutory order entered in a pretrial N.C.G.S. § 136-108 condemnation hearing which unified defendants' four remaining tracts of land for the purpose of determining damages did not affect a substantial right of defendants, and defendants were thus not required to immediately appeal the order before proceeding to the damages trial and did not waive their right to appeal after the final judgment by foregoing an interlocutory appeal. The holding of *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967) is limited to questions of title and area taken. Even assuming the interlocutory unification order affected a substantial right, defendants were permitted but not required to immediately appeal this order.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 131 N.C. App. 206, 505 S.E.2d 911 (1998), holding that defendants Rowe and Pruitt's appeal of preliminary orders entered by Baker, J., on 8 May 1997 and 16 May 1997 in Superior Court, Catawba County, following a hearing pursuant to N.C.G.S. § 136-108, was not timely filed; finding error in a judgment entered 17 June 1997 by Hyatt, J., in Superior Court, Catawba County;

and ordering a new trial. Heard in the Supreme Court 13 September 1999.

Michael F. Easley, Attorney General, by J. Bruce McKinney, Assistant Attorney General, for plaintiff-appellee.

Lewis & Daggett, by Michael Lewis; and Bell, Davis & Pitt, P.A., by Stephen M. Russell, for defendant-appellants Joe and Sharon Rowe and Howard and Georgia Pruitt.

PARKER, Justice.

The issue in this case is whether defendants Joe C. Rowe, Sharon B. Rowe, Howard L. Pruitt, and Georgia M. Pruitt ("defendants")[1] were required to immediately appeal the trial court's orders from a condemnation hearing unifying their four remaining tracts of land. We hold that the interlocutory orders did not affect a substantial right of defendants and that defendants were not required to immediately appeal the trial court's orders.

Defendants owned 18.123 acres of land located in Catawba County, North Carolina. On 26 June 1995 plaintiff North Carolina Department of Transportation ("DOT") filed a complaint and declaration of taking in Superior Court, Catawba County, condemning 11.411 acres of defendants' land for a highway project and leaving them with 6.712 acres. DOT concluded that the resulting benefits to defendants' property outweighed any loss suffered by the taking. Therefore, DOT did not make a deposit of estimated compensation for the taking.

On 17 May 1996 defendants filed an answer contending that the "special and general benefits" provision of the condemnation statute, N.C.G.S. § 136-112(1) (1993), denied them equal protection in violation of the North Carolina and United States Constitutions. Defendants also challenged DOT's claim that all of defendants' remaining tracts of land should be considered in comparing the benefits of the taking to defendants' resulting loss.

A pretrial hearing was conducted pursuant to N.C.G.S. § 136-108 to settle issues arising from the pleadings other than the amount of damages. The evidence showed that, after the taking, defendants were left with four separate tracts of land identified as tracts A, B, C, and D. The right-of-way taken by DOT ran between tracts A and B,

1. The remaining defendants failed to answer the complaint and thus waived their rights in any further proceeding pertaining to this case, including this appeal.

with tract A lying to the southeast and tract B lying to the northwest. Street rights-of-way deeded to the City of Hickory divided tract B from tract C and tract C from tract D. Neither of these rights-of-way was an existing street at the time of the taking.

On 8 May 1997 the trial court filed an order concluding that the four remaining tracts of land formed a physically unified parcel affected by the taking. On 16 May 1997 the trial court entered a second order denying defendants' constitutional challenge to N.C.G.S. § 136-112(1). Following a jury trial on the issue of just compensation, the trial court entered a final judgment on 17 June 1997 decreeing that defendants were not entitled to any compensation for the 11.411 acres of land taken by the DOT.

On appeal the Court of Appeals reversed the trial court and awarded a new trial based on the trial court's erroneous exclusion of impeachment evidence. However, the Court of Appeals also concluded that the trial court's rulings on the constitutionality of the special and general benefits provision of the condemnation statute and the unity of the tracts were interlocutory orders that prejudiced a substantial right of defendants. The Court of Appeals held that *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967), required defendants to immediately appeal those preliminary orders before proceeding to the damages trial. Thus, the rulings were not timely appealed; and the Court of Appeals refused to consider the rulings on their merits. For the reasons which follow, we reverse the decision of the Court of Appeals.

A ruling is interlocutory "if it does not determine the issues but directs some further proceeding preliminary to final decree." *Greene v. Charlotte Chem. Lab., Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961). In this case, the trial court's orders were clearly interlocutory. The trial court did not completely resolve the entire case. Instead, the court, pursuant to N.C.G.S. § 136-108, determined all relevant issues other than damages in anticipation of a jury trial on the issue of just compensation. Under Article 9, Chapter 136 of the General Statutes, either party to a condemnation action shall have a right of appeal "in the same manner as in any other civil actions." N.C.G.S. § 136-119 (1993).

In general, a party may not seek immediate appeal of an interlocutory order. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). A party may appeal an interlocutory order under two circumstances. First, the trial court may certify that

there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. N.C.G.S. § 1A-1, Rule 54(b) (1990). Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381; *see also* N.C.G.S. § 1-277 (1996); N.C.G.S. § 7A-27 (1995); *Tridyn Indus. Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979).

Defendants argue that the trial court's unification of the four remaining tracts did not affect a substantial right of defendants and that defendants were not required to immediately appeal that interlocutory order. We agree.

Whether an interlocutory ruling affects a substantial right requires consideration of "the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). This Court has previously determined those issues that affect a substantial right in the context of a condemnation proceeding. *See Nuckles*, 271 N.C. at 14, 155 S.E.2d at 784.

Parties to a condemnation proceeding must resolve all issues other than damages at a hearing pursuant to N.C.G.S. § 136-108. As now written N.C.G.S. § 136-108 provides:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C.G.S. § 136-108 (1993). At the condemnation hearing in *Nuckles*, the parties contested the area of land being taken by the State Highway Commission ("Commission") based on the Commission's assertion that it had previously acquired a right-of-way over a portion of defendants' land. *See Nuckles*, 271 N.C. at 6, 155 S.E.2d at 778. This Court explained that the purpose of the N.C.G.S. § 136-108 condemnation hearing is "to eliminate from the jury trial any question as to

what land the State Highway Commission is condemning and any question as to its title." *Id.* at 14, 155 S.E.2d at 784. The Court recognized that orders from a condemnation hearing concerning title and area taken are "vital preliminary issues" that must be immediately appealed pursuant to N.C.G.S. § 1-277, which permits interlocutory appeals of determinations affecting substantial rights. *See id.*

In contrast, defendants here are the undisputed owners of the land DOT is seeking to condemn. Defendants contest only the unification of the four remaining tracts, not what parcel of land is being taken or to whom that land belongs. Thus, we hold that the trial court's interlocutory order does not affect any substantial right of these defendants. To the extent that *Nuckles* has been expanded to other issues arising from condemnation hearings, we now limit that holding to questions of title and area taken.

Even assuming that the unification order affected some substantial right, defendants were not required to immediately appeal the trial court's determination. The appeals process "is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." *City of Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951). As a result, interlocutory appeals are discouraged except in limited circumstances. *See* N.C.G.S. §§ 1-277, 7A-27. The language of N.C.G.S. § 1-277 is permissive not mandatory. Thus, where a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so. To the extent language in *Charles Vernon Floyd, Jr. & Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51, 510 S.E.2d 156, 159 (1999), suggests otherwise, it is hereby disavowed.

Although the parties to a condemnation hearing must resolve all issues other than damages at the N.C.G.S. § 136-108 hearing, that statute does not require the parties to appeal those issues before proceeding to the damages trial. In *N.C. State Highway Comm'n v. Nuckles*, this Court required an interlocutory appeal of ownership issues pursuant to N.C.G.S. § 1-277, not N.C.G.S. § 136-108. 271 N.C. at 14, 155 S.E.2d at 784. The Court held that an immediate appeal following a condemnation hearing was mandatory based on the futility of proceeding with a damages trial when questions linger about what land is being taken and to whom that land belongs. *See id.*

In this case defendants' appeal was unrelated to title or area taken. Defendants did not waive their right to appeal after the final

judgment by foregoing an interlocutory appeal. In a condemnation proceeding, an interlocutory appeal is permissive, not mandatory, except in the limited circumstances that existed in *Nuckles*. Therefore, we hold that defendants were not required to immediately appeal the trial court's order unifying the four remaining tracts. Further, to the extent that *Ingle v. Allen*, 71 N.C. App. 20, 23, 321 S.E.2d 588, 592 (1984), suggests that *Nuckles* was overruled by the enactment of Rule 54 of the North Carolina Rules of Civil Procedure, *Ingle* and its progeny are hereby overruled.

For the reasons stated herein, the decision of the Court of Appeals is reversed and remanded to that court for determination of the issues on the merits.

REVERSED AND REMANDED.

ROBERT E. TIMMONS, JR., EMPLOYEE v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, EMPLOYER, SELF-INSURER

No. 470PA98-2

(Filed 3 December 1999)

Workers' Compensation— life care plan—preparation costs—payment by employer

There was some competent evidence in the record to support a finding by the Industrial Commission that preparation of a life care plan was a rehabilitative service necessary to give relief to the paraplegic claimant within the meaning of N.C.G.S. § 97-25, and the Commission did not err by ordering that defendant employer pay for the preparation of the life care plan.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 132 N.C. App. 377, 511 S.E.2d 659 (1999), affirming its holding in a prior decision of this case reported at 130 N.C. App. 745, 504 S.E.2d 567 (1998), in which it affirmed in part and reversed in part a decision of the Industrial Commission entered 29 July 1997. Heard in the Supreme Court 20 September 1999.

Folger and Folger, by Fred Folger, Jr.; and Francisco and Merritt, by George E. Francisco, for plaintiff-appellant.

Michael F. Easley, Attorney General, by William H. Borden and D. Sigsbee Miller, Assistant Attorneys General, for defendant-appellee.

FRYE, Chief Justice.

This case arises from proceedings before the Industrial Commission. Plaintiff requested that the Commission order preparation of a "life care plan" to evaluate plaintiff's condition and rehabilitative needs at defendant's expense pursuant to N.C.G.S. § 97-25. Ultimately, the full Commission found that the life care plan was necessary as a result of the injuries suffered by plaintiff. For the reasons stated herein, we conclude that there is some competent evidence in the record to support the Commission's findings, and accordingly, we reverse the Court of Appeals' decision to the contrary.

Plaintiff was rendered paraplegic from a compensable spinal cord injury in the course and scope of his employment on 3 July 1980. Pursuant to a Form 21 agreement approved by the Industrial Commission, defendant paid plaintiff's disability benefits and a majority of plaintiff's medical expenses. Defendant also paid for modification of plaintiff's parents' home to make it handicapped-accessible.

In 1992, plaintiff sought additional care and rehabilitation services including independent handicapped housing accommodations. He filed a "Motion for Life Care Plan" with the Industrial Commission requesting an order for the preparation of a life care plan at defendant's expense pursuant to N.C.G.S. § 97-25. Defendant thereafter sought to terminate plaintiff's total disability benefits because plaintiff had returned to full-time employment.

The deputy commissioner ordered plaintiff to "present to the defendant a definite outline of the Handicap Housing and Life Care Plan being sought by the plaintiff." Plaintiff submitted a life care plan prepared by Dr. Cynthia Wilhelm and further moved that the Industrial Commission order defendant to compensate Dr. Wilhelm $3,274.30 for preparing the plan.

The deputy commissioner entered an opinion and award that denied defendant's motion to terminate plaintiff's disability benefits; denied plaintiff's motion for a life care plan; but ordered that defend-

ant bear the costs of handicapped housing, attorney's fees, and Dr. Wilhelm's charges. Both parties appealed to the full Commission.

The full Commission found that the life care plan was necessary as a result of the injuries suffered by plaintiff. The Commission decided that plaintiff was entitled to the life care plan and, in all other respects, adopted the opinion and award of the deputy commissioner. Defendant appealed to the Court of Appeals.

The Court of Appeals affirmed in part the Commission's order and remanded in part to the full Commission for clarification of the question of payment of Dr. Wilhelm's fee. *Timmons v. N.C. Dep't of Transp.*, 123 N.C. App. 456, 461, 473 S.E.2d 356, 360 (1996), *aff'd per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997).

On remand, the full Commission made new findings of fact and conclusions of law. The Commission entered an amended opinion and award accepting the life care plan as a necessary plan and ordering defendant to pay for the plan.

Defendant appealed, and the Court of Appeals found no evidence to support the Commission's findings. *Timmons v. N.C. Dep't of Transp.*, 130 N.C. App. 745, 504 S.E.2d 567 (1998). The Court of Appeals determined that there was "no evidence that the life care plan was a medical service or other treatment reasonably necessary to effect a cure or give relief" and thus reversed the opinion and award insofar as it required defendant to pay for the preparation of the life care plan and services mentioned therein.

On 30 December 1998, this Court allowed plaintiff's petition for discretionary review for the limited purpose of remanding the case to the Court of Appeals for reconsideration in light of *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). Upon reconsideration, the Court of Appeals affirmed its prior holding that there was no competent evidence to support the award of the costs of preparation of the life care plan and services therein. *Timmons v. N.C. Dep't of Transp.*, 132 N.C. App. 377, 511 S.E.2d 659 (1999).

This Court allowed plaintiff's petition for discretionary review solely to decide the issue of whether defendant is required to pay Dr. Wilhelm for preparation of the life care plan.

At the time of plaintiff's injury in 1980, N.C.G.S. § 97-31 provided in relevant part:

> (17) The loss of . . . both legs . . . shall constitute total and permanent disability, to be compensated according to the provisions of G.S. § 97-29 . . . .
>
> . . . .
>
> (19) Total loss of use of a member . . . shall be considered as equivalent to the loss of such member . . . .

N.C.G.S. § 97-31 (1979) (amended 1987). At that time, N.C.G.S. § 97-29 provided:

> In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care or rehabilitative services shall be paid for by the employer during the lifetime of the injured employee.

N.C.G.S. § 97-29 (1979) (amended 1981). In addition, at that time, N.C.G.S. § 97-25 required in pertinent part that the employer provide

> [m]edical, surgical, hospital, nursing services, . . . rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief . . . .

N.C.G.S. § 97-25 (1979) (amended 1991). Citing N.C.G.S. § 97-25, the full Commission accepted the life care plan as necessary as a result of the injuries suffered by plaintiff and ordered defendant to pay for the plan.

In its amended opinion and award, the Commission made numerous findings of fact including:

> 6. From 1982, when he began to work part-time for the defendant, until 1989, when he began to work full-time, the plaintiff was living alone in handicapped accessible housing under circumstances of independence in which he developed and became a responsible working member of society. Subsequent thereto upon returning to his parents['] home, because of the rent increase occurring at that time, his privacy as well as that of his parents, has been jeopardized. Although handicapped accommodations had earlier, prior to 1982, been made there by the defendant, the accommodations were no longer appropriate to the plaintiff's more independent and responsible lifestyle which

he had developed after returning to work full-time. For that reason in January of 1991, plaintiff moved to an apartment which provided privacy but which was not adapted to his particular disability needs.

7. Plaintiff has now advanced to a stage in life in which he needs a home and the quality of life to be derived therefrom and is requesting the help of the defendant under the provisions of the North Carolina Workers' Compensation Act to continue the assistance therein provided.

. . . .

9. Dr. Cynthia L. Wilhelm, Ph.D., strongly recommended the development of a Life Care Plan for plaintiff. . . .

. . . .

10. The Full Commission accepts this plan as a necessary life care plan as a result of the injuries suffered by plaintiff.

In *Adams v. AVX Corp.*, this Court stated:

"The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Thus, on appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson*[*v. Lincoln Constr. Co.*], 265 N.C. [431,] 434, 144 S.E.2d [272,] 274[(1965)].

N.C.G.S. § 97-86 provides that "an award of the Commission upon such review, as provided in G.S. § 97-85, shall be conclusive and binding as to all questions of fact." N.C.G.S. § 97-86 (1991). As we stated in *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 141 S.E.2d 632 (1965), "[t]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Id.* at 402, 141 S.E.2d at 633.

Adams, 349 N.C. at 681, 509 S.E.2d at 414. This Court must accept the Commission's findings of fact if there is any competent evidence to support those findings.

While preparation of a life care plan is not necessary in all workers' compensation cases, the record before us contains competent evidence to support the Commission's finding that a life care plan was necessary as a result of the injuries suffered by plaintiff in this case.

Dr. Wilhelm, a rehabilitation expert who teaches at the University of North Carolina School of Medicine, explained that a life care plan is a plan "to evaluate what [plaintiff's] needs would be presently and what his needs would be in the future." In her deposition, Dr. Wilhelm strongly recommended the development of a life care plan to evaluate plaintiff's present and future needs. She further testified that spinal cord injuries require constant monitoring of bowel/bladder, skin, orthopedic issues, neurological issues, and respiratory issues, as well as physical therapy and occupational therapy, and that plaintiff had not been examined by a neurologist or orthopedist since his discharge from the rehabilitation center in 1980. She further stated that plaintiff had not been followed on a regular basis other than urologically, and even that was sporadic. We believe this evidence was sufficient to support a finding by the Commission that preparation of a life care plan was a rehabilitative service necessary to give relief to the paraplegic claimant within the meaning of N.C.G.S. § 97-25.

An appellate court does not weigh the evidence in order to make new findings; rather, it is bound by the Commission's findings of fact when there is any evidence to support those findings, even though the evidence may well support contrary findings. Here, the record contains some competent evidence to support the Commission's finding that the life care plan was necessary as a result of the injury to plaintiff in this case. Therefore, the Court of Appeals erred by rejecting this finding and overruling the Commission.

REVERSED.

ESTRIDGE v. HOUSECALLS HEALTHCARE GRP., INC.

[351 N.C. 183 (1999)]

SAMMY E. ESTRIDGE, III v. HOUSECALLS HEALTHCARE GROUP, INC.; TERRY JUDSON WARD; CAROL WARD; AND CHRISTINE STEWART

No. 47A99

(Filed 3 December 1999)

Evidence— malicious prosecution—employer's Medicaid over-billing—malice

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion that evidence of defendant employer's over-billing practices for Medicaid was relevant in a malicious prosecution action to show malice.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 744, 509 S.E.2d 219 (1998), affirming in part and reversing in part a judgment signed 23 May 1997 by McHugh, J., in Superior Court, Guilford County, and remanding for a new trial. Heard in the Supreme Court 17 November 1999.

Tuggle Duggins & Meschan, P.A., by Robert C. Cone and J. Reed Johnston, Jr., for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by J. Donald Cowan, Jr.; James G. Exum, Jr.; and Paul K. Sun, Jr., for defendant-appellees.

PER CURIAM.

As to the issue regarding the admission of Robert Nowell's testimony, the decision of the Court of Appeals is reversed for the reasons stated in Chief Judge Eagles' dissent.

REVERSED.

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

JAMES L. FREEMAN, JR. v. SUGAR MOUNTAIN RESORT, INC.

No. 397A99

(Filed 3 December 1999)

Premises Liability— negligence by ski resort operator—failure to show breach of duty or proximate cause

The decision of the Court of Appeals in an action by a skier against a ski resort operator to recover for injuries received when struck by another skier who jumped into him from a makshift ramp is reversed and the case is remanded for reinstatement of summary judgment for defendant ski resort operator for the reasons stated in the dissenting opinion that plaintiff failed to establish a breach of duty of defendant or that any breach of duty proximately caused plaintiff's injuries.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 134 N.C. App. 73, 516 S.E.2d 616 (1999), reversing an order for summary judgment entered by Winner, J., on 2 September 1997 in Superior Court, Avery County, and remanding for trial. Heard in the Supreme Court 15 November 1999.

Campbell & Taylor, by Jason E. Taylor, for plaintiff-appellee.

Robert E. Riddle, P.A., by Robert E. Riddle, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Lewis, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to the Superior Court, Avery County, for reinstatement of its summary judgment in favor of defendant.

REVERSED AND REMANDED.

NICHOLAS A. HARDY v. MOORE COUNTY, MOORE COUNTY TAX DEPARTMENT, WILEY BARRETT, AND PHILLIP I. ELLEN

No. 299A99

(Filed 3 December 1999)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. 321, 515 S.E.2d 84 (1999), affirming an order entered by Albright, J., in Superior Court, Moore County. Heard in the Supreme Court 16 November 1999.

Van Camp, Hayes & Meacham, P.A., by Michael J. Newman, for plaintiff-appellant.

Robert V. Suggs for defendant-appellees Moore County and Moore County Tax Department.

Bruce T. Cunningham, Jr., for defendant-appellees Wiley Barrett and Phillip I. Ellen.

PER CURIAM.

AFFIRMED.

BUELTEL v. LUMBER MUT. INS. CO.

No. 455P99

Case below: 134 N.C.App. 626

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

CANNON v. CANNON

No. 515P99

Case below: 135 N.C.App. 384

Petition by plaintiff pro se for writ of supersedeas denied 2 December 1999. Justice Martin recused.

COLEMAN v. FARM FRESH, INC.

No. 487P99

Case below: 135 N.C.App. 231

Petition by plaintiff pro se for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

COOK v. DOXEY

No. 408P99

Case below: 134 N.C.App. 376

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

DE PORTILLO v. D. H. GRIFFIN WRECKING CO.

No. 457P99

Case below: 134 N.C.App. 714

Petition by plaintiff (Zaida Viver) for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

DOBSON v. HARRIS

No. 435PA99

Case below: 134 N.C.App. 573

Petition by defendant (Holly Harris) for discretionary review pursuant to G.S. 7A-31 allowed 3 December 1999. Motion by defendant to dismiss petition for discretionary review denied 3 December 1999. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 December 1999. Motion by plaintiff to dismiss denied 3 December 1999. Motion by plaintiff for sanctions denied 3 December 1999.

FRANCIS v. BEACH MEDICAL CARE

No. 502P99

Case below: 134 N.C.App. 184

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 December 1999.

HATCHER v. LEE

No. 476P99

Case below: Robeson County Superior Court

Petition by petitioner for a writ of certiorari allowed 2 December 1999 for the limited purpose of remanding to the Superior Court, Robeson County, to determine the following issues raised by petitioner 'as a pretrial pro se detainee': 1. Whether petitioner should have 'access to a law library and legal texts'; 2. Whether petitioner should have regular uncensored 'telephone access to expert and defense witnesses'; 3. Whether petitioner should be allowed regular 'private and [or] contact consultation with defense witnesses'; 4. Whether petitioner should have 'uncensored mail from defense witnesses.' The Court ex mero motu further remands to the Superior Court, Robinson County, for the purpose of redetermining the issue of whether Robeson County, rather than Central Prison, would not be a more appropriate place for petitioner to adequately prepare for his pro se defense. Petition by plaintiff for writ of mandamus denied 2 December 1999.

IN RE K.R.B.

No. 406P99

Case below: 134 N.C.App. 328

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 December 1999.

IN RE OAKLEY

No. 361P99

Case below: 134 N.C.App. 376

Petition by respondent (Penelope Brown) for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

LUTZ v. BRIAN CTR. NURSING CARE/HICKORY, INC.

No. 405P99

Case below: 134 N.C.App. 377

Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 2 December 1999.

PCI ENERGY SERVS., INC. v.
WACHS TECH. SERVS., INC.

No. 403P99

Case below: 134 N.C.App. 377

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

REESE v. BARBEE

No. 269P98-2

Case below: 134 N.C.App. 728

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999. Justice Martin recused.

SAUNDERS v. EDENTON OB/GYN CTR.

No. 469A99

Case below: 134 N.C.App. 733

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 2 December 1999.

SHUGART v. VESTAL

No. 471P99

Case below: 134 N.C.App. 733

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

STATE v. EVERHART

No. 482P99

Case below: 123 N.C.App. 358

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 December 1999.

STATE v. JONES

No. 347A99

Case below: 133 N.C.App. 448

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 2 December 1999. Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question denied 2 December 1999.

STATE v. LEGRANDE

No. 215A96-4

Case below: 351 N.C. 115

Petition by defendant pro se to rehear the denial of petitions by this Court on 4 November 1999 dismissed 2 December 1999.

STATE v. MESSER

No. 373P99

Case below: 134 N.C.App. 187

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 December 1999. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

STATE v. MOORE

No. 450P99

Case below: 131 N.C.App. 65

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 December 1999. Justice Martin recused.

STATE v. SARTORI

No. 356P99

Case below: 134 N.C.App. 188

Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999. Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 2 December 1999.

STATE v. TROGDEN

No. 466P99

Case below: 135 N.C.App. 85

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

STATE v. WARD

No. 411P99

Case below: 133 N.C.App. 446

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 December 1999.

STATE v. WHITE

No. 511PA99

Case below: 135 N.C.App. 349; 351 N.C. 120

Joint motion by plaintiff and defendant to dissolve stay and supersedeas and to withdraw grant of discretionary review allowed 2 December 1999. Motion by defendant to dismiss petition for discretionary review dismissed as moot 2 December 1999. Motion by defendant to dissolve temporary stay supersedeas dismissed as moot 2 December 1999.

WATSON v. DIXON

No. 103A99

Case below: 130 N.C.App. 47

Petition by defendant for writ of supersedeas allowed 2 December 1999. Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 2 December 1999.

PETITION TO REHEAR

SARA LEE CORP. v. CARTER

No. 271P98-2

Case below: 351 N.C. 27

Petition by defendant to rehear pursuant to Rule 31 denied 2 December 1999.

STATE OF NORTH CAROLINA v. JAMES ALAN GELL

No. 469A98

(Filed 4 February 2000)

1. Jury— voir dire—plea agreement by witnesses—truthful testimony

The trial court did not abuse its discretion in allowing the prosecutor to ask prospective jurors in a capital case a question about their ability to believe witnesses who testified pursuant to a plea agreement in which they promised to give "truthful" testimony in this case. The question did not invade the province of the jury to judge the credibility of the State's witnesses or suggest that the jury could disregard its duty to decide which testimony to believe, and the jurors were instructed that they were the sole judges of the credibility of each witness they heard.

2. Jury— selection—challenge for cause—ability to set aside opinion

The trial court in a capital case did not abuse its discretion in denying defendant's challenge for cause of a prospective juror, a State Highway Patrol trooper, who had discussed some facts about the case with the police chief, and a prospective juror who knew the victim and his family, was a friend of two potential State's witnesses, had discussed the case with people in town, and had formed an opinion as to who could have committed the crime, where the first juror clearly stated that he would not give the police chief's testimony any greater weight than that of a witness he did not know, and both jurors indicated unequivocally that they could set aside any previous opinions and render a decision based only on the evidence presented.

3. Evidence— corroboration—prior statements—slight variations

The trial court did not err by allowing an SBI agent to read two statements given to him by a State's witness for the purpose of corroborating the trial testimony of the witness, although the statements contained slight variations and some additional information, where the statements were substantially similar to and tended to strengthen and confirm the trial testimony of the witness, and they contained nothing directly contradicting the trial testimony.

4. Evidence— attorney-client privilege—prior inconsistent statement

The trial court did not improperly permit a State's witness to assert her attorney-client privilege with regard to a prior inconsistent statement she made in conference with her attorney where the record reveals that defendant was specifically allowed to question the witness on the subject matter of her previous statement, her assertion of the attorney-client privilege did not prevent defendant from cross-examining the witness to ask her whether she had made the prior inconsistent statement, and there is no indication in the record that defendant desired to pursue any other aspect of the prior statement.

5. Criminal Law— expression of opinion—denigration of counsel—comments by trial court—absence of prejudice

The trial court did not express an opinion, denigrate defense counsel, or comment on witnesses and testimony in violation of N.C.G.S. §§ 15A-1222 and 15A-1223. Rather, the trial court made appropriate inquiries into evidentiary issues, asked questions designed to promote a proper understanding of the testimony, and generally supervised and controlled the course of the trial and the scope and manner of witness examination with care and prudence.

6. Evidence— hearsay—inculpatory statements—motions to suppress and supporting affidavits

The trial court did not err by refusing to permit defense counsel in a capital trial to cross-examine two State's witnesses about whether they claimed in motions to suppress their inculpatory statements and supporting affidavits signed by their attorneys that their statements were coerced since those documents were inadmissible hearsay, and the trial court did not prevent defendant from impeaching the witnesses by questioning them about the voluntariness of their statements.

7. Homicide; Robbery— robbery and murder—conspiracy—sufficiency of evidence

The State's evidence was sufficient for the jury on issues of defendant's guilt of conspirary with two codefendants to rob and murder the victim where it tended to show that one codefendant telephoned defendant from the victim's house, and defendant said that "he would be there in a little while"; defendant also told

this codefendant to look for the victim's money and that "when he got there he would have to hurt our friend"; defendant met the two codefendants at a store and told them he was going to rob the victim and showed them a knife concealed in his coat; defendant inquired if the victim kept guns in his house, and one codefendant told defendant that he did; defendant told the two codefendants to return to the victim's house and leave the back door open so that he could get in; the two codefendants did return to the victim's house, and the second codefendant entered and exited the house through the back door several times, and spoke with defendant, who was hiding in the barn; defendant entered the house undetected; after defendant shot the victim, the first codefendant showed him where the victim's money was kept; defendant and the two codefendants then left the house together and walked to one codefendant's grandmother's house; and defendant discarded evidence in the woods along the way.

8. Criminal Law— prosecutor's argument—references to witness as liar—no gross impropriety

Although the prosecutor's jury argument that a defense witness was lying and his references in the argument to the witness as a liar were improper, the argument was not so grossly improper that the trial court erred by failing to intervene ex mero motu where the witness had been impeached by prior convictions for embezzlement and writing worthless checks, and the evidence at trial supported the assertion that the witness testified falsely.

9. Sentencing— capital—mitigating circumstances—no significant criminal history—pending collateral attack on conviction

It was not error for the trial court to include a felony larceny conviction in the jury's consideration of the (f)(1) "no significant history of prior criminal activity" mitigating circumstance in a capital sentencing proceeding because the conviction was the subject of a collateral attack by a pending motion for appropriate relief at the time of defendant's murder trial. N.C.G.S. § 15A-2000(f)(1).

10. Sentencing— capital—mitigating circumstances—no significant criminal history—felonious larceny after murder—harmless error

It was error for the trial court in a capital sentencing proceeding to permit the jury to consider defendant's conviction for felonious larceny of the victim's truck in its consideration of the (f)(1) "no significant history of prior criminal activity" mitigating circumstance where the theft of the truck occurred after the murder for which defendant was being sentenced, since the (f)(1) mitigating circumstance pertains only to criminal activity committed before the murder. However, this error was not prejudicial and did not entitle defendant to a new sentencing proceeding where evidence of defendant's theft of the victim's truck was already properly before the jury in the guilt phase of the trial, and the jury had before it evidence of defendant's conviction of misdemeanor larceny and extensive evidence of defendant's drug activity.

11. Criminal Law— prosecutor's argument—capital sentencing—biblical reference—not impropriety

The prosecutor's closing argument in a capital sentencing proceeding that "From the Old Testament and the Book of Numbers anyone who kills a person is to be put to death as a murderer upon the testimony of witnesses" and that the jury had heard testimony from witnesses supporting its verdict of guilty was not an improper use of religious sentiment, especially where, immediately preceding this argument, the prosecutor clearly referred to the secular laws of North Carolina by telling the jury that "the State has proven to you what is required by law for the imposition of the death penalty in this case."

12. Criminal Law— prosecutor's argument—capital sentencing—biblical reference—not gross impropriety

The prosecutor's closing argument in a capital sentencing proceeding that it is stated in Deuteronomy that "Cursed is the man who kills his neighbor secretly and all the people shall say amen" and that it was time to sentence defendndat to die "and let the people of Bertie County say amen" fell within the permissible practice of urging the jury to act as the voice of the community and was not so grossly improper that the trial court erred by failing to intervene ex mero motu.

13. Criminal Law— prosecutor's argument—capital sentencing—addressing jurors by name

The trial court did not err by allowing the prosecutor, after reminding jurors that they had affirmed that they could follow the law if the State proved what was required to impose the death penalty, to address the jurors by name and inform them that it ws time for them to impose the death penalty in this case.

14. Criminal Law— prosecutor's argument—capital sentencing—absence of acknowledgment of wrongdoing—not comment on right to silence

The prosecutor did not improperly comment on defendant's right to remain silent during closing argument in this capital sentencing proceeding when he stated that defendant had not acknowledged wrongdoing and asked the jurors if they had heard defendant apologize or express sorrow or remorse.

15. Sentencing— capital—mitigating circumstances—nonstatutory—peremptory instruction not required

The trial court did not err by refusing to give a peremptory instruction on the nonstatutory mitigating circumstance of "defendant having found a closer path to the Lord" where the testimony of a pastor who visited defendant in jail could support the jury's finding of this mitigating circumstance but was not uncontroverted evidence that defendant had "found" a closer path to the Lord.

16. Sentencing— capital—mitigating circumstances—instructions—use of "must" and "may"

The trial court's instructions in a capital sentencing proceeding that the jurors "must" consider mitigating circumstances in deciding Issue Three and that they "may" consider found mitigating circumstances in deciding Issue Four did not confuse the jury or create a contradiction in the instructions leaving the jury unguided in determining defendant's sentence. The instructions were nearly identical to those approved in prior cases, did not preclude a juror from considering mitigating circumstances he or she may have found, and properly instructed that the evidence in mitigation must be weighed against the evidence in aggravation.

17. Sentencing— capital—constitutionality of statute

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

18. Sentencing— capital—death penalty not disproportionate

A sentence of death imposed upon defendant was not excessive or disproportionate where the jury found defendant guilty of first-degree murder under the theories of malice, premeditation, and deliberation, lying in wait, and felony murder; the victim was shot twice at close range in his own home; the jury found as an aggravating circumstance that the murder was committed while defendant was engaged in the commission of an armed robbery; defendant engaged in a conspiracy with two young girls to commit the robbery and murder, relying on the victim's familiarity with and trust of the girls to gain entry to the victim's home; and although the jury considered twenty-four statutory and nonstatutory mitigating circumstances, only the catchall mitigating circumstance and the nonstatutory mitigating circumstance that defendant had a substance abuse problem were found by at least one juror to exist and to have mitigating value.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Meyer, J., on 2 March 1998 in Superior Court, Bertie County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments was allowed by the Supreme Court on 22 March 1999. Heard in the Supreme Court 13 October 1999.

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

Nora Henry Hargrove for defendant-appellant.

FRYE, Chief Justice.

Defendant was indicted on 7 August 1995 for first-degree murder, conspiracy to commit murder, armed robbery, and conspiracy to commit armed robbery. He was tried capitally, and the jury returned a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation; under the theory of lying in wait; and under the felony murder rule. The jury also found defendant guilty of conspiracy to commit murder, robbery with a firearm, and conspiracy to commit robbery with a firearm.

In a separate capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury found as an aggravating circumstance that defendant committed the murder while engaged in the commis-

sion of robbery with a firearm. At least one juror found the existence of one nonstatutory mitigating circumstance and an unspecified catchall mitigating circumstance. The jury recommended and the trial court imposed a sentence of death for the conviction of first-degree murder. The trial court also sentenced defendant to terms of imprisonment for the armed robbery and conspiracy convictions.

For the reasons discussed herein, we conclude that defendant's trial and capital sentencing proceeding were free of prejudicial error and that the death sentence is not disproportionate. Accordingly, we uphold defendant's convictions and sentence of death.

The State's evidence presented at trial tended to show that the victim, Allen Jenkins, was killed in his home in Aulander, North Carolina, by two shotgun wounds to the chest, fired at close range by his own shotgun, sometime during the evening of 3 April 1995. The State's primary witnesses were two girls, aged fifteen at the time of the murder, Crystal Morris and Shanna Hall. Morris and Hall both testified pursuant to plea agreements; the girls pled guilty to second-degree murder and armed robbery in exchange for their truthful testimony, and charges against them of first-degree murder and conspiracy were dropped.

In April of 1995, Crystal Morris lived with Shanna Hall and Hall's parents in their home. Hall was dating defendant, and defendant, Hall, and Morris used drugs together. Morris and Hall also knew the victim, Allen Jenkins; he allowed the girls to visit his home and drink alcohol there.

The day of the murder, defendant drove Morris and Hall to Aulander. Morris and Hall went to Jenkins' home, and all three were drinking wine coolers. At one point in the afternoon, Jenkins left his home to go to the nearby Red Apple store to purchase more wine coolers. While Jenkins was gone, Morris telephoned defendant. During the telephone conversation, defendant told Morris that he would have to "hurt our friend," referring to Jenkins, and that he would meet Morris and Hall at the Red Apple. When Jenkins returned home, Morris and Hall walked to the Red Apple, where they met defendant. Morris, Hall, and defendant left the store and began walking. At some point, the three stopped to talk. Defendant was carrying a knife inside his coat, and he told Hall and Morris that he was going to rob Jenkins.

Morris and Hall returned to Jenkins' home and entered through the back door. Morris went with Jenkins to his bedroom to help him

connect a VCR. Hall used the bathroom, then left the house and saw defendant, who was outside. Hall exited and reentered the house several times, speaking once to defendant, who did not respond. Morris remained in the house with Jenkins, and the two went into the kitchen to get ice for a drink. Morris testified that as she followed Jenkins from the kitchen back toward his bedroom, defendant, standing partially behind the bedroom door, shot Jenkins twice. Hall testified that she was outside the house when she heard one shot fired. Hall went inside and saw defendant with a gun, yelling at Morris to tell him where the money was. Morris told defendant that Jenkins kept his money in a cabinet. Defendant pried open the cabinet and took money and a checkbook; defendant also carried away from the house a set of keys, the shotgun, a box of shotgun shells, and two empty shells.

After the murder, Morris, Hall, and defendant left, walking across a field behind Jenkins' house. Defendant threw the gun, shells, knife, and keys into some woods that bordered the field. As they walked, defendant stopped under a street light and said, "Let's see how much his life cost him," and counted out approximately $400.00 from the victim's wallet.

The three then walked to Morris' grandmother's home, where Morris called her boyfriend, Gary Scott. Scott arrived shortly thereafter and drove the three home, dropping off defendant first and then taking Morris and Hall to Hall's house. Lacy White testified that he gave defendant a ride about midnight and that when defendant gave him gas money, it looked like defendant had about $500.00.

In the early hours of the morning of 4 April 1995, defendant went to Hall's home. Hall eventually accompanied defendant to Virginia and Maryland in a stolen pickup truck. While defendant was driving, Hall tossed a wallet, some keys, and a checkbook out the window off a bridge. Defendant returned Hall to North Carolina on 6 April 1995. The gun and other evidentiary items were retrieved in July 1995, after Morris showed police their location in the woods behind Jenkins' house.

Jenkins' body was found on 14 April 1995, and an autopsy was performed the next day. The state of decomposition of the body indicated a time of death of between one and two weeks prior to the autopsy. Additionally, development of larvae found on the body was consistent with Jenkins having been killed on 3 April 1995.

Defendant did not testify. However, several witnesses testified on defendant's behalf. The primary theory of the defense was that the date of death proposed by the State was incorrect and that defendant was not involved in the murder at all. Defendant also presented testimony and evidence attempting to impeach the State's two main witnesses, Morris and Hall.

[1] In defendant's first assignment of error, he contends the trial court erred by allowing the prosecutor to refer repeatedly to the potential testimony of State's witnesses as "truthful" during jury *voir dire*. Specifically, defendant objected to the following question asked of prospective jurors:

> You may hear testimony from a witness who is testifying pursuant to a plea agreement. This witness has pled guilty to a lesser degree of murder in exchange for their promise to give truthful testimony in this case.
>
> Do you have any opinions about plea agreements that would make it difficult or impossible for you to believe the testimony of a witness who might testify under a plea agreement?

Defendant contends that whether testimony is truthful is for the jury to decide after hearing the evidence and that it was error to indoctrinate jurors into thinking of the State's witnesses as truthful because they had promised to give truthful testimony.

The goal of jury selection is to ensure that a fair and impartial jury is empaneled. *See State v. Fullwood*, 343 N.C. 725, 732, 472 S.E.2d 883, 886 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997); *State v. Gregory*, 340 N.C. 365, 388, 459 S.E.2d 638, 651 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Regulation of the *voir dire* is a matter within the broad discretion of the trial court. *Fullwood*, 343 N.C. at 732, 472 S.E.2d at 887. " '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.* (quoting *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)).

The trial court in this case did not abuse its discretion by allowing the disputed question. The prosecutor's *voir dire* inquiry merely outlined the plea agreement under which witnesses might testify and sought to determine whether a plea agreement would have a negative effect on prospective jurors' ability to believe testimony from such

witnesses. The question did not invade the province of the jury to judge the credibility of the State's witnesses, nor did it suggest that the jury could disregard its duty to decide which testimony to believe.

Further, at trial, the jurors were instructed that they were the sole judges of the credibility of each witness they heard. They were additionally instructed as follows:

> Now, there is evidence which tends to show that two witnesses were testifying under an agreement with the prosecutor for a charge reduction in exchange for their testimony. If you find that they or either of them testified in whole or in part for this reason, you should examine that testimony with great care and caution in deciding whether or not to believe it.
>
> If after doing so, you believe that testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

Jurors are presumed to follow the court's instructions. *See Gregory*, 340 N.C. at 408, 459 S.E.2d at 663. We conclude that the trial court did not abuse its discretion in permitting the prosecutor to engage in this questioning during *voir dire* and that defendant was in no way prejudiced by the questioning. This assignment of error is without merit.

[2] By his next two assignments of error, defendant contends that the trial court erred in refusing to excuse prospective jurors Owens and Lassiter for cause and in later denying his motion for additional peremptory challenges. Defendant asserts that both prospective jurors exhibited an extensive knowledge of people involved in the investigation and people who testified at trial and that they had been privy to conversations about the case by those "in the know." Defendant also contends that Owens' answers indicated he would give greater credibility to a law enforcement witness he knew personally.

Prospective juror Owens was a State Highway Patrol trooper, and he admitted that he had discussed with his friend Police Chief Gordon Godwin some facts about the case. Prospective juror Lassiter knew the victim and his family, and he was a friend of two potential witnesses for the State. Lassiter also had discussed the case with people in town and had formed an opinion "as to how this case happened

and who could have done it." However, after a careful review of the *voir dire* transcript, it is clear that both Owens and Lassiter indicated unequivocally that they could listen to the evidence and render an impartial decision based solely on the evidence presented in court. The trial court engaged in the following colloquy with prospective juror Owens:

> Q. Mr. Owens, if Chief Godwin testified and you found his testimony to be believable and then someone you did not know testified and you found their testimony to be believable, would you give the Chief's testimony any greater weight than that other believable witness?
>
> A. No, sir.
>
> Q. Do you have any reservations at all about your ability to set aside what you heard and decide this case solely on what you hear from this witness stand, the arguments of the attorneys, and the instructions of the court?
>
> A. No, sir.
>
> Q. You have no reservations about that?
>
> A. No, sir.

Likewise, the trial court confirmed Lassiter's ability to set aside any opinion he might have formed previously, as demonstrated by the following questioning:

> Q. Mr. Lassiter, you heard me say to the jurors as a body earlier that the question is not whether you ever had an opinion about the case but whether you can set it aside, put it out of your mind and decide this case solely on the basis of the evidence you hear from the stand, the arguments of the attorneys and the charge of the court. Do you remember me saying that?
>
> A. Yes, sir.
>
> Q. And the question is can you do that?
>
> A. Yes, sir.
>
> Q. Do you have any reservation at all about your ability to do that?
>
> A. No, sir.

Q. All right, sir. You firmly believe that you can set aside anything you knew or any opinion you had formed at an earlier time and decide this case based solely on the evidence, the arguments of counsel, and the charge of the court?

A. Yes, sir.

The granting of a challenge for cause rests in the sound discretion of the trial court and will not be disturbed absent a showing of abuse of that discretion. *See State v. Trull*, 349 N.C. 428, 441-42, 509 S.E.2d 178, 188 (1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 80, 68 U.S.L.W. 3224 (1999); *State v. Hartman*, 344 N.C. 445, 458, 476 S.E.2d 328, 335 (1996), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997). Because both prospective jurors indicated that they could render an impartial decision based only on the evidence presented and because Owens clearly stated that he would not give Chief Godwin's testimony greater weight than that of a witness he did not know, defendant shows no abuse of discretion in the trial court's denial of his challenges for cause. *See Hartman*, 344 N.C. at 461, 476 S.E.2d at 337; *State v. Cummings*, 326 N.C. 298, 308, 389 S.E.2d 66, 71 (1990). These assignments of error are rejected.

[3] Next, defendant assigns error to the trial court's allowing SBI Agent Dwight Ransome to read to the jury two statements given to him by Crystal Morris on 26 July 1995 and 12 August 1997. The jurors were furnished copies of each statement as Ransome read it. Defendant objected, arguing that the statements were not corroborative and that they contained inadmissible hearsay. The objections were overruled and defendant moved for a mistrial, which was also denied.

Defendant asserts that this issue is similar to that raised in *State v. Frogge*, 345 N.C. 614, 481 S.E.2d 278 (1997). In *Frogge*, the defendant allegedly described to a fellow inmate the murders of the defendant's father and stepmother. The inmate later gave a statement to the police regarding the defendant's admissions. However, at trial, the inmate, testifying as a witness for the State, recounted a different version of the events. The trial court permitted a police detective to read the contents of the witness' prior statement, which was offered for corroborative purposes. This Court concluded that the witness' prior statement "contained information manifestly contradictory to his testimony at trial and did not corroborate the testimony" and, therefore, held that it was error for the trial court to admit the prior statement for the purpose of corroboration. *Id.* at 618, 481 S.E.2d at 280.

It is well established that a witness' prior consistent statements may be admitted to corroborate the witness' sworn trial testimony but prior statements admitted for corroborative purposes may not be used as substantive evidence. *See, e.g., State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303-04 (1991). However, "[i]n order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986); *see also State v. Mickey*, 347 N.C. 508, 519, 495 S.E.2d 669, 676, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998); *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991). However, the State may not introduce as corroboration prior statements that actually, directly contradict trial testimony. *See McDowell*, 329 N.C. at 384, 407 S.E.2d at 212.

Defendant points to several instances in which he contends Morris' earlier statements to police were not corroborative of her testimony at trial. For example, Morris' statement of 26 July 1995, State's exhibit 10, contained the following statement: "The plan was for Morris and Shanna to get Alan Gell into Allen Ray Jenkins' house or to keep Allen Ray so that he could not see Alan Gell come into the house." At trial, Morris testified that "Alan told Shanna and I to go back to the residence and leave the back door open so that when he came he could get in." We disagree with defendant's characterization of Morris' prior statements and trial testimony. While the earlier statements contained slight variations and some additional information, they contained nothing directly contradicting the witness' trial testimony, as was the case in *State v. Frogge*.

Upon careful review of both Morris' out-of-court statements and her trial testimony, we conclude that the prior statements were substantially similar to and tended to strengthen and confirm her trial testimony. Both the earlier statements and the trial testimony indicated that Morris was aware of defendant's intention "to hurt our friend," referring to Jenkins. Both revealed that defendant sought Morris' and Hall's assistance in entering Jenkins' home through an unlocked door, and both revealed that defendant had a knife and intended to use it to rob Jenkins. In both her prior statements and in her testimony, Morris related that she told defendant there was a gun in the house. Further, the description of events immediately surrounding Jenkins' shooting recounted in Morris' 26 July 1995 statement was consistent with her trial testimony. For these reasons, we

conclude that it was not error for the trial court to permit Agent Ransome to read Morris' prior statements to the jury.

Morris' 26 July 1995 statement also contained the phrase, "Dewayne said that 'Alan has told me all about it.' " Defendant contends this was inadmissible double hearsay which implied that defendant told Dewayne Conner about the robbery and murder. However, Morris' prior statement, which contained this reference to what Conner said, was not offered to prove the truth of the matter asserted, but rather to bolster the testimony Morris gave at trial. Therefore, the statement was not hearsay. *See* N.C.G.S. § 8C-1, Rule 801(c) (1999).

[4] By his next assignment of error, defendant argues that the trial court erred in permitting witness Shanna Hall to assert her attorney-client privilege with regard to a prior inconsistent statement Hall made in conference with her attorney. Defendant contends that Hall's prior statement was admissible and that the court's ruling denied him the right of confrontation, the right to cross-examination, and the right to present a defense. We disagree.

During a conference with her attorney on 5 July 1995, and in the presence of Crystal Morris, Hall made a statement concerning the events surrounding the murder, which was recorded and later reduced to writing. In this statement, Hall said that she was sitting on the porch when she heard the gunshot, yet she testified at trial that she was standing by the barn. When defendant attempted to cross-examine Hall about this statement, the trial court allowed her to assert her attorney-client privilege. Defendant contends that the privilege was waived, because the statement was later published to others, and that the statement should have come in under N.C.G.S. § 8C-1, Rule 106.

We have fully examined the transcript surrounding the cross-examination of Hall. It reveals that defendant was specifically allowed to question Hall on the subject matter of her previous statement and that her assertion of attorney-client privilege did not prevent defendant from cross-examining Hall to obtain the information he sought. During a *voir dire* of the witness out of the presence of the jury, defense counsel questioned Hall as follows:

> Q. Ms. Hall, do you recall making a statement on July 5, 1995, in a conference with you, Crystal Morris, and your attorney, Mr. Perry Martin? Do you recall that?

A. Yes, sir.

Q. Do you recall in that statement of July 5, 1995, that you made the statement that I was feeling kind of sick, so after I went into the bathroom, I walked outside and was sitting there. I was sitting on the porch getting some air and I heard—I didn't hear but one gunshot. And so I walked in and when I walked in, I was behind [Crystal] and I didn't see him do it, but I walked in after he did it.

Do you now recall making that statement that you were sitting on the porch when you heard the shot?

A. No, I don't recall that. I was not sitting on the porch.

Q. I understand you've testified that you were not sitting on the porch, but my question is did you ever make that statement to you[r] lawyer that you were, in fact, sitting on the porch?

A. Yes, I did.

. . . .

Q. . . . That would be in contradiction as to what you testified on direct examination; would that be correct? In other words, you said on direct, and I believe also on cross, that you were standing out by the barn, I believe, when you heard the first shot.

A. Yes, that is where I was.

Q. But you do admit to making the statement about being on the porch when you heard the shot. Is that what I understood you to say? I'm not saying it's correct. I'm just saying that you made the statement.

A. Yes.

THE COURT: Anything further?

[DEFENSE COUNSEL]: No, sir.

After further discussion between defense counsel, the prosecutor, and the trial court, the court ruled as follows:

The witness has not published the statement to anyone. Therefore, I'm going to recognize and uphold her exercise of her privilege, her attorney-client privilege with regard to the statement.

> Because the State doesn't object, I'm going to allow the defense attorney to ask her the question in the presence of the jury as to whether or not she had previously told anyone that she heard the gunshot while she was seated on Mr. Jenkins' back porch and allow her to explain her answer.

Without objection, and without Hall's asserting any attorney-client privilege, defense counsel did ask Hall the question. Further, defense counsel read that portion of the statement to Hall, and she confirmed making it. Although defense counsel originally proposed questioning Hall as to "statements that she gave on July 5th, 1995," there is no indication in the transcript of Hall's *voir dire*, or her later questioning before the jury, that defendant wanted to or attempted to pursue any other aspect of the 5 July 1995 statement. Defendant's argument that he was not permitted to fully cross-examine Hall is not credible in light of the trial record.

[5] Defendant's next issue concerns numerous instances in which defendant contends the trial court expressed an opinion, denigrated defense counsel, and commented on witnesses and testimony, violating N.C.G.S. § 15A-1222 and § 15A-1232 and depriving defendant of a fair trial, due process, and an impartial tribunal in violation of the state and federal Constitutions.

N.C.G.S. § 15A-1222 provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury," and N.C.G.S. § 15A-1232 requires that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved." This Court has said that "[i]n evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). Further, a defendant claiming that he was deprived of a fair trial by the judge's remarks has the burden of showing prejudice in order to receive a new trial. *See State v. Barnard*, 346 N.C. 95, 105-06, 484 S.E.2d 382, 388 (1997).

Defendant makes sixteen assignments of error regarding the trial court's alleged improper expressions of opinion and improper comments. We have fully examined the trial transcript and conclude that, when viewed in the totality of circumstances, defendant fails to show prejudice. The trial court made appropriate inquiries into evidentiary issues, asked questions designed to promote a proper understanding of the testimony, and generally supervised and controlled

the course of the trial and the scope and manner of witness examination with care and prudence. These assignments of error are without merit.

[6] Defendant next raises two assignments of error regarding the trial court's prohibition of evidence that witnesses Morris and Hall previously had alleged that their inculpatory statements were coerced. Prior to tendering their pleas, Morris and Hall had filed motions to suppress their statements of 26 July 1995, alleging, *inter alia*, that the statements had been coerced and were otherwise taken in violation of their constitutional rights. These motions were subsequently allowed in part and denied in part, after which Morris and Hall immediately entered pleas.

Defendant wanted to question Morris and Hall about whether they had claimed the statements were coerced. The trial court refused to permit Morris and Hall to be cross-examined with regard to the motions to suppress and supporting affidavits because the documents had been signed by the witnesses' attorneys and not the witnesses personally. Defendant contends this ruling was erroneous because it limited his right to impeach Morris and Hall.

A review of the trial record reveals that after a lengthy discussion of the issue, out of the presence of the jury, between the trial court, the prosecutor, and defense counsel, the following colloquy occurred:

> [COURT]: All right. Essentially what you are doing is you have marked as defendant's exhibit number 4, Mr. Warmack's motion to suppress in the case of State against Crystal A. Morris, which is not this case that we're trying. Do you want to cross-examine her concerning a statement in Mr. Warmack's motion to suppress. The State has objected to it. All right.
>
> [DEFENSE]: Yes, sir.
>
> [COURT]: I'm going to sustain the State's objection.
>
> [DEFENSE]: Yes, sir, we note an exception.
>
> [COURT]: If you haven't had your say, you go ahead.
>
> [DEFENSE]: I think I have indicated to the court.
>
> [COURT]: All right. I'm going to sustain the State's objection. There may be another method that you would want to pursue.

[DEFENSE]: Well, I think I can probably ask her directly on examination was she coerced into making it.

[COURT]: Certainly. And if you want to show that her attorney made some statement, I suppose you could call him.

The trial court ruled similarly regarding defendant's attempt to introduce the motion to suppress in Shanna Hall's case.

The motions to suppress and supporting affidavits were inadmissible hearsay. *Cf. State v. Edwards*, 315 N.C. 304, 337 S.E.2d 508 (1985) (search warrant and supporting affidavit); *Gouldin v. Inter-Ocean Ins. Co.*, 248 N.C. 161, 102 S.E.2d 846 (1958) (motion and affidavit for leave to file supplemental answer). Therefore, the trial court correctly prohibited defendant from questioning Morris and Hall regarding the specific documents filed on their behalf in their individual cases. However, the record shows that defendant was not prevented from impeaching the witnesses by questioning them about the voluntariness of their statements. We find no error in the trial court's handling of this issue, and therefore, we reject defendant's argument.

[7] By his next assignment of error, defendant asserts that the evidence was insufficient to prove beyond a reasonable doubt that there was a conspiracy to commit murder or a conspiracy to commit armed robbery. A criminal conspiracy is an agreement, express or implied, between two or more persons, to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *See State v. Barnes*, 345 N.C. 184, 216, 481 S.E.2d 44, 61 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). Defendant contends that Crystal Morris' and Shanna Hall's testimony did not support a finding of an agreement between the three codefendants to rob or kill Jenkins.

The State presented the following evidence from which the jury could conclude that a conspiracy existed between Morris, Hall, and defendant to rob and murder Jenkins. Morris telephoned defendant from the victim's house, and defendant said that "he would be there in a little while." Defendant also told Morris to look for Jenkins' money and that "when he got there he would have to hurt our friend." Defendant said he would meet Morris and Hall at the Red Apple store, and the three codefendants did in fact meet there. Defendant told Hall and Morris that he was going to rob Jenkins and showed them a knife concealed in his coat. Defendant inquired if Jenkins kept guns in his house, and Morris told defendant that he did. Defendant told Morris and Hall to return to Jenkins' house and leave the back door

open so that he could get in. Morris and Hall did return to Jenkins' home. Hall entered and exited the house through the back door several times, speaking to both Morris, who was in the house with Jenkins, and defendant, who was hiding in the barn. Defendant entered the house undetected. After defendant shot Jenkins, Morris showed him where Jenkins' money was kept. The three codefendants then left the house together and walked to Morris' grandmother's house, and defendant discarded evidence in the woods along the way.

"Direct proof of the charge [of conspiracy] is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933), *quoted in State v. Gibbs*, 335 N.C. 1, 48, 436 S.E.2d 321, 348 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). Further, a conspiracy may be an implied understanding rather than an express agreement. *See State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 831 (1991). Viewing the evidence in the light most favorable to the State, *see State v. Williams*, 345 N.C. 137, 142, 478 S.E.2d 782, 784 (1996), we conclude that the evidence in this case was sufficient to submit the conspiracy charges to the jury.

[8] Defendant's eighth argument is that the trial court erred in failing to intervene *ex mero motu* when the prosecutor argued to the jury that witness Peggy Johnson was lying. Johnson testified that Crystal Morris told her that defendant was not the person who committed the murder. The conversation between Johnson and Morris allegedly occurred while the two were in the Bertie Martin Regional Jail in August of 1997, at the time Morris entered her plea agreement. On rebuttal, Johnson's testimony was discredited by jail records indicating that she and Morris had never been incarcerated at the same time. However, overnight, defense counsel found computer records showing that Morris had been in the Bertie Martin Regional Jail from 25-27 June 1997, a time when Johnson was also incarcerated there. Defendant was permitted to reopen the case to present the surrebuttal evidence, but Johnson was not reexamined.

During his closing argument, the prosecutor told the jury:

> The last witness of theirs I want to mention is this Peggy Johnson. Now, Peggy Johnson was lying. There's just no other way to put it. Peggy Johnson sat on that witness [sic] and told you—I know you heard it—that Crystal Morris told her after her

> plea agreement that she did that because her family pressured her to do it, and that the defendant didn't do the murder.
>
> Well, that is baloney. Peggy Johnson was not even in jail with Crystal Morris when Crystal Morris did her plea. That was an out and out lie. How can you base reasonable doubt or any doubt on the testimony of a liar? You can't. She's even a convicted liar.

Defendant contends, and we agree, that this argument was improper. While a prosecutor may argue to the jury that it should not believe a witness, *see State v. Scott*, 343 N.C. 313, 344, 471 S.E.2d 605, 623 (1996), it is improper for a lawyer to call a witness a liar, *see State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978); *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967). The prosecutor violated this rule in the instant case.

Nevertheless, we have said that "the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979); *see also Barnard*, 346 N.C. at 106, 484 S.E.2d at 388. In order to establish that the trial court abused its discretion by failing to intervene *ex mero motu*, a "defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 45, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). Defendant has not done so in this case.

We note initially that Johnson's credibility had been impeached by her prior convictions for embezzlement and for writing worthless checks. In her direct testimony, Johnson claimed to have talked to Morris while the two were jailed together in the Bertie Martin Regional Jail when Morris was there "to sign a plea bargain for a murder charge." Subsequently, records presented by Captain William White of the Bertie Martin Regional Jail showed that Johnson was not incarcerated there during the time period, 8-13 August 1997, when Morris was there to enter her plea. Therefore, although jail records admitted on surrebuttal showed that Morris and Johnson may have been in jail together for two days in June 1997, there could have been no such conversation as Johnson contended at the time she testified that it occurred. Thus, the evidence presented during trial supported the assertion that Johnson testified falsely, and we conclude that the prosecutor's argument was not so grossly improper that the trial

court erred by failing to intervene *ex mero motu*. This assignment of error is rejected.

By two assignments of error, defendant next contends that the trial court erred in its treatment of the (f)(1) mitigating circumstance, that "[t]he defendant has no significant history of prior criminal activity." *See* N.C.G.S. § 15A-2000(f)(1) (1999). In support of this mitigating circumstance, defendant sought to admit his prior criminal record consisting of one conviction for misdemeanor larceny of a tractor. The State successfully argued that the trial court should also admit defendant's conviction for felonious larceny resulting from the theft of the truck in which defendant and Hall fled on the night of the murder. Despite defendant's objection, the trial court instructed the jury that "defendant's record consisted of one felony larceny conviction of a truck and one misdemeanor larceny conviction of a tractor."

[9] Defendant contends that it was error to include the felony larceny conviction in the jury's consideration of the (f)(1) mitigating circumstance because the conviction for the truck theft was the subject of collateral attack by a pending motion for appropriate relief at the time of defendant's murder trial. Defendant cites no authority in support of this position, and we have found none. This argument is rejected.

[10] Defendant also contends that it was error to permit the jury to consider his felony larceny conviction because the theft of the truck occurred after the homicide for which defendant was being sentenced, citing *State v. Coffey*, 336 N.C. 412, 418, 444 S.E.2d 431, 434 (1994). We agree. This Court stated in *Coffey* that "it is clear that the mitigating circumstance at N.C.G.S. § 15A-2000(f)(1) pertains only to that criminal activity committed *before* the murder." *Id.* (emphasis added). We reject the State's argument that the felony larceny was properly considered in the instant case because it was part of a "continuous transaction" with the murder. The continuous transaction analysis is misplaced in this context. The language of N.C.G.S. § 15A-2000(f)(1) is clear, and we reaffirm our decision in *Coffey* that "history of prior criminal activity" as used in that statute "refers to criminal activity occurring before the murder." *Id.*

Nevertheless, this case is distinguishable from *Coffey*, in which we ordered a new sentencing proceeding because the trial court improperly allowed consideration of criminal activity occurring after the murder for which the defendant was being sentenced. In *Coffey*, the defendant was convicted of the first-degree murder of a child.

The murder had occurred in 1979; however, the trial court permitted the jury to consider, in rebuttal of the (f)(1) mitigating circumstance, the defendant's convictions on nine counts of indecent liberties and indecent exposure that occurred in 1986, seven years after the murder. In *Coffey*, the State "emphasized defendant's pedophilia, and history of sexual abuse of children, in closing arguments when it repeatedly referred to the defendant as a 'child molester.' " *Id.* at 422, 444 S.E.2d at 437. We concluded that evidence of the defendant's 1986 convictions was "extremely prejudicial" and was inadmissible either to rebut the (f)(1) mitigating circumstance or to explore the bases of the opinions of the defendant's expert witnesses. *Id.*

In this case, we first note that while defendant's conviction of felony larceny was improperly admitted during the sentencing proceeding, evidence of defendant's theft of Dewayne Conner's truck was already properly before the jury, having been presented during the guilt phase of the trial. Further, the evidence of defendant's larceny conviction was not of the same highly prejudicial nature as the improper evidence allowed in *Coffey*. Additionally, the jury in this case had before it extensive evidence of defendant's drug activity. The prosecutor sought to show during the trial that defendant's drug activity was an important factor leading to the murder, and she emphasized this in closing arguments:

> Now, the first proposed mitigating [sic] is that the defendant has no significant history of prior criminal activity. Now, the word significant is very important in that sentence. You've only had evidence of 2 prior convictions.
>
> The defendant stole the tractor and the defendant stole the truck. You might say well, that's not all that significant. Then you will also note that this circumstance says criminal activity, not criminal convictions.
>
> And you've heard evidence that this defendant was a crack user, cocaine user, marijuana user, and that not only that, but he provided cocaine and marijuana to 2 15-year old girls.
>
> So I argue to you that you cannot find that that is not a significant history of prior criminal activity. I argue to you that you should vote no, each and every one of you, to that first proposed mitigating circumstance because his prior criminal activity is significant. It's significant in that it led us to this point.

For the foregoing reasons, we conclude that the trial court's errors on this issue do not require a new sentencing proceeding.

[11] Defendant next assigns error to the trial court's overruling of his objection to the prosecutor's biblical argument during closing arguments of the capital sentencing proceeding. The argument went as follows:

> From the Old Testament and the Book of Numbers anyone who kills a person is to be put to death as a murderer upon the testimony of witnesses.
>
> [DEFENSE COUNSEL]: Objection, your Honor.
>
> [PROSECUTOR]: That's what we've done in this case, ladies and gentlemen.
>
> [COURT]: Overruled.
>
> [PROSECUTOR]: You've heard the testimony of witnesses. You have convicted this man and rightly so, of murder in the first degree. The death penalty is here. Now, they might argue to you the New Testament changes all that. No, it doesn't. Jesus didn't come to destroy the law or the prophesies of the Old Testament. He came to fulfill them.
>
> Listen to this in Deuteronomy. Cursed is the man who kills his neighbor secretly and all the people shall say amen. Cursed is the man who kills an innocent person for money, and all the people shall say amen. It's time to sentence this man, a murderer, to die and let the people of Bertie County say amen. Thank you.

Defendant contends that this argument was improper on several grounds. First, because the prosecutor invoked a biblical reference specifically as to the people of Bertie County, it made the death penalty *in this case* appear to be ordained by the Bible. Second, allowing such a religious-based argument violates the separation of church and state. Third, it is constitutionally impermissible to relieve the jury of its responsibility for deciding defendant's sentence by arguing that the death penalty is divinely inspired. Finally, the religious argument injects an arbitrary and inflammatory element into the capital sentencing decision because the Bible is not relevant to the facts or law of this case.

We begin by repeating our recent warning to counsel

> that they should base their jury arguments solely upon the secular law and the facts. Jury arguments based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials.

State v. Williams, 350 N.C. 1, 27, 510 S.E.2d 626, 643, *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 162, 68 U.S.L.W. 3228 (1999).

However, we also note that " 'more often than not,' we have concluded that such biblical arguments are within permissible margins given counsel in arguing 'hotly contested cases.' " *State v. Bond*, 345 N.C. 1, 36, 478 S.E.2d 163, 182 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997); *see also State v. Holden*, 346 N.C. 404, 433, 488 S.E.2d 514, 530 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998). We conclude that such is the case here and that the trial court did not err in overruling defendant's objection to the first part of the above argument or in failing to intervene *ex mero motu* as to the remainder.

The first part of the prosecutor's argument, to which defendant objected, emphasized "the testimony of witnesses" and sought to remind the jury that it had heard testimony from witnesses supporting its verdict of guilty. This is not the type of argument that we have in the past found to be an "improper use of religious sentiment." *State v. Ingle*, 336 N.C. 617, 648, 445 S.E.2d 880, 896 (1994) (citing *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984) (disapproving argument that the power of public officials is ordained by God), and *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983) (noting the impropriety of arguing that the death penalty is divinely inspired)), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995). Further, immediately preceding the challenged argument, the prosecutor clearly referred to the secular laws of North Carolina, telling the jury, "[t]he State has proven to you what is required by law for the imposition of the death penalty in this case." *See Bond*, 345 N.C. at 36-37, 478 S.E.2d at 182; *State v. Walls*, 342 N.C. 1, 61, 463 S.E.2d 738, 770 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996).

[12] As to the remainder of the prosecutor's argument, defendant did not object at trial. Again, the prosecutor did not say that the law of North Carolina is divinely inspired or that law officers are ordained by God. *Walls*, 342 N.C. at 61, 463 S.E.2d at 770; *see also Davis*, 349 N.C. at 47, 506 S.E.2d at 480. Defendant particularly complains that the prosecutor's argument "takes the Biblical mandate and applies it

to Bertie County, making it appear that the death penalty *in this case* is ordained by the Good Book." We disagree. The prosecutor said, "and let the people of Bertie County say amen." This falls within the permissible practice of "urg[ing] the jury to act as the voice and conscience of the community." *State v. Peterson*, 350 N.C. 518, 531, 516 S.E.2d 131, 139 (1999). Thus, while we do not approve of the prosecutor's use of biblical references in the closing arguments of this sentencing proceeding, we do not find the argument to be so grossly improper that the trial court erred by failing to intervene *ex mero motu*. This assignment of error is rejected.

[13] Defendant's next assignment of error also concerns the prosecutor's closing arguments at sentencing. Defendant contends that the trial court erred in allowing the prosecutor, over objection, to address the jurors by name and inform them that it was time for them to impose the death penalty, citing *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In *Holden*, this Court found no error where the trial court sustained the State's objection to the defense counsel's attempt to ask each juror individually to spare the defendant's life. We held that the argument "was improper in that it asked each individual juror to decide defendant's fate on an emotional basis, in disregard of the statutorily prescribed procedure of N.C.G.S. § 15A-2000, and in disregard of the jurors' duty to deliberate with the entire jury toward the end of reaching a unanimous verdict." *Id.* at 163, 362 S.E.2d 537.

In this case, the prosecutor reminded the jurors that, during *voir dire*, each had answered "yes" when asked whether he or she could return a sentence of death "[i]f the State proves to you what is required by law for the imposition of the death penalty." The prosecutor then called out the jurors' names and said, "The State has proven to you what is required by law for the imposition of the death penalty in this case. The time has come for you to impose the sentence of death in this case."

The basis for the Court's decision in *Holden* was that the defendant's argument attempted to persuade jurors to decide the defendant's sentence "on an emotional basis, in disregard of the statutorily prescribed procedure . . . and in disregard of the jurors' duty to deliberate." *Id.* In the instant case, the State's argument merely sought to remind the jurors that they had affirmed that they could follow the law if the State proved what was required to impose the death penalty. This case is similar to *State v. Wynne*, in which we held that

the rule of *Holden* was not violated where the prosecutor, in closing arguments, called the jurors by name and asked them to "have no doubt." 329 N.C. 507, 525, 406 S.E.2d 812, 821 (1991). This assignment of error is rejected.

[14] By two assignments of error, defendant next contends that the trial court erred by failing to intervene *ex mero motu* to prevent the prosecutor from commenting on defendant's exercise of his right to remain silent. During the closing arguments of the sentencing proceeding, the prosecutor stated that defendant had not acknowledged wrongdoing and asked the jurors if they had heard defendant apologize or express sorrow or remorse. This Court has previously held that similar statements do not constitute an impermissible comment on a defendant's absolute right to remain silent. *See, e.g., State v. McNatt*, 342 N.C. 173, 175-76, 463 S.E.2d 76, 77-78 (1995); *State v. Hill*, 311 N.C. 465, 474-75, 319 S.E.2d 163, 169 (1984). We reject this assignment of error.

[15] By another assignment of error, defendant claims that the trial court erred and violated N.C.G.S. § 15A-2000 and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when it denied defendant's request for a peremptory instruction on the nonstatutory mitigating circumstance of "[t]he defendant having found a closer path to the Lord." In support of this mitigating circumstance, defendant presented the testimony of Richard Hayes, a pastor who visited defendant in jail. Hayes and defendant prayed together and read and discussed scriptures and salvation.

A defendant is entitled to a peremptory instruction when a mitigating circumstance is supported by uncontroverted evidence. *See State v. White*, 349 N.C. 535, 568, 508 S.E.2d 253, 274 (1998), *cert. denied*, — U.S. —, 144 L. Ed. 2d 779 (1999); *State v. Bonnett*, 348 N.C. 417, 446, 502 S.E.2d 563, 582 (1998), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999). Reverend Hayes testified, "I believe that [defendant] is seeking a closer walk with the Lord, and I hope he's finding that." During the charge conference, the prosecutor argued that "[t]here is testimony that the reverend has an opinion on that [mitigating circumstance], but there is no evidence as to what the defendant has really discovered," and the trial court declined to give a peremptory instruction. We conclude that while Reverend Hayes' testimony could support the jury's finding the mitigating circumstance, it is not uncontroverted evidence that defendant had "found" a closer path to the Lord. The trial court did not err in failing to give

a peremptory instruction as to this mitigating circumstance, and this assignment of error is rejected.

Defendant next asserts that the trial court erred and violated N.C.G.S. § 15A-1340.16 when it aggravated defendant's armed robbery sentence by finding that defendant was armed with a deadly weapon at the time of the offense. The State argues that the trial court did not in fact find the use of a deadly weapon as an aggravating factor in sentencing defendant for armed robbery. We agree. The transcript fully supports the State's position; it clearly indicates that the trial court did not—and recognized that it could not—find this aggravating factor in sentencing defendant for the armed robbery conviction. The fact that box number 10 on the "Felony Judgment Findings of Aggravating and Mitigating Factors" form was checked is an obvious clerical error because it is inconsistent with the trial court's actual findings. Defendant is not entitled to a new sentencing hearing on the armed robbery conviction.

[16] In his next assignment of error, defendant contends that the trial court erred in its instructions on Issues Three and Four of the sentencing instructions. Defendant argues that the trial court instructed the jury in contradictory terms, at one point telling jurors that they "must" consider mitigating circumstances in deciding Issue Three and then that they "may" consider found mitigating circumstances in Issue Four. Defendant contends that the two different treatments of the mitigating circumstances were confusing, leading to an unreliable and unguided jury decision. We disagree.

Because defendant did not object at trial, this issue is reviewed for plain error. *See State v. Adams*, 347 N.C. 48, 69, 490 S.E.2d 220, 231 (1997), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998); *State v. Jones*, 342 N.C. 523, 541, 467 S.E.2d 12, 23 (1996). "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. King*, 342 N.C. 357, 365, 464 S.E.2d 288, 293 (1995).

The instructions of which defendant now complains are as follows:

> Now, please look at Issue Number 3 on your form. That issue reads do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are,

insufficient to outweigh the aggravating circumstance or circumstances found by you?

If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstance found by you against the mitigating circumstances when deciding this issue.

When you decide this issue, each juror *must* consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue 2. In so doing, you are the sole judges of the weight to be given any individual circumstance which you find, whether it be aggravating or mitigating.

. . . .

If you answer Number 3, yes, you must consider then Issue Number 4. Look at it on your form. It reads do you unanimously find beyond a reasonable doubt that the aggravating circumstance you found is sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

Now, in deciding this issue, you are not to consider the aggravating circumstance standing alone. You must consider it in connection with any mitigating circumstances found by one or more of you. When you make this comparison, every juror *may* consider any mitigating circumstance or circumstances that juror determined to exist by a preponderance of the evidence.

(Emphasis added.)

We do not accept defendant's contention that the use of the word "must" in the instruction on Issue Three and the word "may" in the instruction on Issue Four confused the jury or created a contradiction in the instructions leaving the jury unguided in determining defendant's sentence. The above-quoted instructions given by the trial court in this case are virtually identical to the pattern capital sentencing instructions. *See* N.C.P.I.—Crim. 150.10 (1998). As this Court said in *State v. Lee*, approving the pattern instructions:

> The rule of *McKoy [v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990),] is that jurors may not be prevented from considering mitigating circumstances which they found to exist

> in Issue Two. Far from precluding a juror's consideration of mitigating circumstances he or she may have found, the instant instruction expressly instructs that the evidence in mitigation *must* be weighed against the evidence in aggravation.

335 N.C. at 287, 439 S.E.2d at 569-70.

The trial court's instructions in this case were nearly identical to the jury instructions approved in *State v. Lee* and in numerous other cases. *See, e.g., Gregory*, 340 N.C. at 417-18, 459 S.E.2d at 668; *State v. Conaway*, 339 N.C. 487, 532-33, 453 S.E.2d 824, 852-53, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). Most important, the instructions in this case did not preclude a juror from considering mitigating circumstances he or she may have found, and they instructed that the evidence in mitigation must be weighed against the evidence in aggravation. *See Lee*, 335 N.C. at 287, 439 S.E.2d at 570. We find no error, plain or otherwise.

Also under this assignment of error, defendant raises the claim, repeatedly rejected by this Court, that use of the word "may" in the trial court's instructions on sentencing Issue Four was error. We decline to depart from our prior decisions on this issue. *See, e.g., State v. McNeill*, 349 N.C. 634, 653, 509 S.E.2d 415, 426 (1998), *cert. denied*, —— U.S.——, 145 L. Ed. 2d 87, 68 U.S.L.W. 3225 (1999).

[17] By another assignment of error, defendant challenges the trial court's denial of his motion to bar the request for or imposition of the death penalty. Defendant acknowledges that this Court has consistently upheld the constitutionality of North Carolina's death penalty statute, N.C.G.S. § 15A-2000. *See, e.g., Williams*, 350 N.C. at 35, 510 S.E.2d at 648; *State v. Stephens*, 347 N.C. 352, 368, 493 S.E.2d 435, 445 (1997), *cert. denied*, 525 U.S. 831, 142 L. Ed. 2d 66 (1998). Defendant, however, requests that this Court reconsider its previous decisions upholding the death penalty, citing Justice Blackmun's dissent in *Callins v. Collins*, 510 U.S. 1141, 1143, 127 L. Ed. 2d 435, 436 (1994) (Blackmun, J., dissenting). We have considered this argument before, and defendant presents no new compelling reason for this Court to change its position. *See Williams*, 350 N.C. at 36, 510 S.E.2d at 648. Additionally, defendant contends that the death penalty is unconstitutional as applied to defendant in this case because "defendant's sentencing procedure did not conform to N.C.G.S. [§] 15A-2000." We disagree, having found no reversible error in defendant's capital sentencing proceeding. This assignment of error is rejected.

Defendant raises eight additional issues that he concedes have been previously decided adversely to his position. Defendant raises the following issues for purposes of requesting that this Court reconsider its prior holdings and to preserve the issues for subsequent review: (1) whether the trial court erred by denying defendant's motion to preclude the prosecution from using peremptory challenges to strike jurors who indicated uncertainty about the death penalty, (2) whether the trial court erred by denying defendant's motion for individual jury *voir dire*, (3) whether the trial court's instruction that all evidence in both phases of the trial was competent for the jurors' consideration violated defendant's constitutional rights, (4) whether the trial court erred in submitting the aggravating circumstance that the murder was committed by defendant while engaged in the commission of robbery with a firearm, (5) whether the trial court erred in denying defendant's motion for additional peremptory challenges, (6) whether the trial court erred in denying defendant's motion to prohibit death-qualification of the jury, (7) whether the trial court erred in instructing the jurors that they must consider whether the nonstatutory mitigating circumstances have mitigating value and may reject those that do not, and (8) whether the trial court's use of the terms "satisfaction" and "satisfy" in instructions defining the burden of proof applicable to mitigating circumstances was plain error. After carefully considering defendant's arguments on these issues, we find no compelling reason to depart from our prior holdings.

Having concluded that defendant's trial and separate capital sentencing proceeding were free of prejudicial error, we turn to the duties reserved exclusively for this Court in capital cases. It is our duty under N.C.G.S. § 15A-2000(d)(2) to ascertain: (1) whether the record supports the jury's finding of the aggravating circumstance 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.

In this case, the sole aggravating circumstance submitted to and found by the jury was that the murder was committed by defendant while defendant was engaged in the commission of robbery with a firearm, N.C.G.S. § 15A-2000(e)(5). After thoroughly examining the record, transcripts, and briefs in this case, we conclude that the jury's finding of the (e)(5) aggravating circumstance was fully supported by

evidence presented at defendant's trial. Further, there is no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We now turn to our final statutory duty of proportionality review.

[18] We begin our proportionality review by comparing 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*, 522 U.S. 900, 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; *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. We note several features of this case that distinguish it from the cases in which we have found the death sentence to be disproportionate. First, it is significant that the jury found defendant guilty of first-degree murder under the theories of malice, premeditation, and deliberation; lying in wait; and felony murder. 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). "A defendant's lying in wait to commit murder has also been recognized by this Court as a significant consideration in proportionality review." *State v. LeGrande*, 346 N.C. 718, 730, 487 S.E.2d 727, 733 (1997). Additionally, the victim was shot twice at close range in his own home. This Court has emphasized that a murder committed in the home particularly "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987), *quoted in Adams*, 347 N.C. at 77, 490 S.E.2d at 236. In this case, defendant engaged in a conspiracy with two young girls to commit the armed robbery and murder, relying on the victim's familiarity

with and trust of the girls to gain access to the victim's home. Finally, although the jury considered a total of twenty-four statutory and nonstatutory mitigating circumstances, only two were found by at least one juror to exist and to have mitigating value: the (f)(9) catchall mitigating circumstance, unspecified; and the nonstatutory mitigating circumstance that defendant had a substance abuse problem at the time of the incident.

It is also proper to compare this case to those where the death sentence was found proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. However, it is unnecessary to cite every case used for comparison. *Id.*; *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 "in a particular case 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).

We cannot conclude, after comparing this case to other roughly similar cases in which the death penalty was imposed and considering both the crime and defendant, that the death penalty was disproportionate or excessive as a matter of law. Accordingly, the judgments of the trial court must be and are left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC. (APPLICANT); PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION (INTERVENOR); AND MICHAEL F. EASLEY, ATTORNEY GENERAL (INTERVENOR) v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC. (INTERVENOR)

No. 170A99

(Filed 4 February 2000)

1. Utilities— natural gas rates—evidence presented—nonunanimous agreement—standard of review

The Utilities Commission's order in a natural gas rate case will not be subjected to a heightened standard of review because the witnesses testified according to a nonunanimous private

agreement between the utility and the Public Staff regarding the evidence to be presented. The proper standard of review requires only that the Commission make an independent determination supported by substantial evidence on the record.

2. Utilities— natural gas rates—rate of return

The Utilities Commission's adoption of an 11.4% rate of return on common equity for a natural gas company was supported by the evidence where the rate of return was based upon the direct testimony and exhibits of a witness for the Public Staff, and the Commission carefully reviewed testimony by a witness for the utility and a witness for a utility customers association before concluding that the testimony of the witness for the Public Staff was the most credible and objective.

3. Utilities— natural gas rates—short-term debt ratio

The Utilities Commission's conclusion that a natural gas company's capital structure should include a short-term debt ratio based upon the company's stored gas inventory included in the rate base, rather than upon the amount of short-term debt employed during the most recent year, was supported by substantial evidence where the Commission adopted the capital structure recommended by the Public Staff's witness and accepted by the gas company; the Commission carefully reviewed the testimony of witnesses for the gas company and a utility customers association before accepting the Public Staff witness's recommended capital structure; and witnesses for the gas company and the association acknowledged that the association's proposed capital structure would jeopardize the gas company's "A" bond rating.

4. Utilities— natural gas rates—cost of service—peak and average method

The Utilities Commission did not err by adopting a peak and average cost-of-service methodology for allocating fixed gas costs between a natural gas company's customer classes rather than peak responsibility or imputed load factor methodologies proposed by a utility customers association. The evidence and the Commission's findings supported the Commission's conclusion that the peak and average method properly allocates fixed costs between annual use and peak day utilization of the facilities.

5. Utilities— natural gas rates—nondiscriminatory rate structure—necessary findings and conclusions

The Utilities Commission, in designing a nondiscriminatory rate structure, must set forth sufficient evidence, findings of fact, and conclusions of law to permit adequate appellate review. The Commission satisfies this standard by explaining its consideration of non-cost-related factors and by setting forth the factual basis for its conclusion that the approved rate structure does not result in discrimination among customer classes.

6. Utilities— natural gas rates—sufficiency of order

The Utilities Commission's order in a natural gas rate case satisfied the minimal requirements set forth in *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 348 N.C. 452, 500 S.E.2d 693 (1998), where the Commission's findings and conclusions demonstrate that the Commission appropriately considered factors other than cost of service in adopting a rate design that would be just and reasonable for all customer classes; the findings are supported by substantial evidence in view of the whole record; and the order contains sufficient findings to justify the Commission's conclusion that the approved rates of return are just and reasonable and do not unreasonably discriminate among the various classes of the gas company's customers.

7. Utilities— natural gas rates—bifurcated full-margin transportation rates

The evidence was sufficient to support the Utilities Commission's approval of a natural gas company's bifurcated full-margin transportation rates, under which transportation customers pay Commission-approved transportation rates and sales customers pay established transportation rates and a monthly commodity gas cost, and its rider setting forth the method for calculating the monthly commodity cost of gas where the gas company's witness emphasized that the gas company's bifurcated rates are still full margin since the transportation and sales rates differ only by the amount of the commodity cost of gas; the Public Staff's witness underscored the neutrality of the gas company's full-margin rates since both transportation and sales rates contain the same margin and the rates differ only by the cost of the gas provided by the gas company to its sales customers; and a witness for a utility customers association testified that the gas company's system simply reverses the typical full-margin calcula-

tion, resulting in sales customers, rather than transportation customers, paying duplicative charges for interstate transportation.

Appeal as of right by intervenor-appellant Carolina Utility Customers Association pursuant to N.C.G.S. § 7A-29(b) from an order of the Utilities Commission entered 30 October 1998 in a general rate case granting applicant-appellee Public Service Company of North Carolina, Inc., a partial rate increase. Heard in the Supreme Court 13 October 1999.

J. Paul Douglas, Corporate Counsel, for applicant-appellee Public Service Company of North Carolina, Inc.

Robert P. Gruber, Executive Director, by Antoinette R. Wike, Chief Counsel, and Amy Barnes Babb, Staff Counsel, for intervenor-appellee Public Staff.

Michael F. Easley, Attorney General, by Margaret A. Force, Assistant Attorney General, intervenor-appellee.

Sutherland, Asbill & Brennan, LLP, by Keith R. McCrea, pro hac vice; and West Law Offices, P.C., by James P. West, for intervenor-appellant Carolina Utility Customers Association, Inc.

PARKER, Justice.

On 2 April 1998 applicant-appellee Public Service Company of North Carolina, Inc. ("PSNC") filed an application with the North Carolina Utilities Commission ("the Commission") seeking a rate increase of $21,518,027 per year.[1] The Commission allowed the formal intervention of Carolina Utility Customers Association, Inc. ("CUCA") by order dated 7 April 1998. On 28 April 1998 the Commission entered an order setting PSNC's application for investigation and hearing and declared this case a general rate case pursuant to N.C.G.S. § 62-137. The intervention and participation of the Public Staff-North Carolina Utilities Commission ("Public Staff") and the Attorney General was recognized pursuant to statute.

After the parties submitted prefiled direct and rebuttal testimony to the Commission, PSNC, in an effort to expedite this proceeding, met privately with the Public Staff to negotiate an agreement regard-

1. PSNC amended the requested increase to $11,843,472 through its prefiled rebuttal testimony. PSNC later revised the requested increase to $14,045,773 through PSNC witness Boone's supplemental testimony.

ing revenue requirements. No other parties were included in those negotiations. Neither PSNC nor the Public Staff filed a stipulation or formal settlement with the Commission as a result of their negotiations. Rather, PSNC and the Public Staff each agreed to present their own witnesses. The Public Staff's witnesses would testify according to the negotiated terms, and PSNC agreed not to challenge the Public Staff's testimony pertaining to the private agreement.

On 8 July 1998 pursuant to legislative mandate, the Commission entered an order requiring a study of natural gas transportation rates and setting the Commission's transportation rate study for hearing beginning 31 August 1998. The Commission noted that its order would establish an expedited schedule for the study but emphasized the importance of coordinating the transportation rate study with this pending general rate case.

This matter came on for hearing before the Commission on 25 August 1998. The Commission entered an "Order Granting Partial Rate Increase" on 30 October 1998. The Commission authorized a $12,394,757 increase of PSNC's annual revenues. PSNC filed revised tariffs and rate schedules that were designed to implement the Commission's 30 October 1998 order. On 2 December 1998 the Commission entered an order approving the revised tariffs. CUCA now appeals from the Commission's order granting a partial rate increase.

CUCA contends that the Commission committed reversible error by (1) relying on the private agreement between PSNC and the Public Staff to resolve contested issues; (2) adopting a return on equity of 11.4%; (3) adopting a capital structure composed of 51.91% common equity, 4.02% short-term debt, and 44.07% long-term debt; (4) adopting the "peak and average" cost-of-service allocation methodology; (5) failing to make sufficient findings of fact regarding the cost-of-service to the various classes of customers in adopting a rate design; and (6) failing to address the impact of rider D on rate schedules 145 and 150. For the reasons stated herein, we affirm the decision of the North Carolina Utilities Commission.

In fixing rates to be charged by a public utility, 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." *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 348 N.C. 452, 457, 500 S.E.2d 693, 698 (1998). The Commission must follow the steps set forth in N.C.G.S. § 62-133

in fixing rates in a general rate case. *See State ex rel. Utils. Comm'n v. General Tel. Co. of Southeast*, 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972). 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 ascertained . . . 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(a), (b), (d) (1999). The Commission must determine, in accordance with the direction of this section, what constitutes a reasonable charge for proposed services. *See Carolina Util.*

Customers Ass'n, 348 N.C. at 459, 500 S.E.2d at 699; *see also State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 267, 177 S.E.2d 405, 413 (1970).

The rates fixed by the Commission are deemed *prima facie* just and reasonable pursuant to N.C.G.S. § 62-94(e). This Court will uphold the Commission's decision unless it may be attacked on one of the statutory grounds enumerated in N.C.G.S. § 62-94(b). *See Carolina Util. Customers Ass'n*, 348 N.C. at 459, 500 S.E.2d at 699. Section 62-94 provides in pertinent 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:
>
> (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) (1999).

Under section 62-94(b) this Court must review the Commission's order on appeal to determine whether the findings of fact are sup-

ported by competent, material, and substantial evidence in view of the entire record. *See Carolina Util. Customers Ass'n*, 348 N.C. at 460, 500 S.E.2d at 699. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229, 83 L. Ed. 126, 140 (1938).

This Court cannot affirm the Commission's order unless the facts and findings included therein are contained in the record. *See Carolina Util. Customers Ass'n*, 348 N.C. at 460, 500 S.E.2d at 700. Section 62-79(a) establishes the standard against which Commission orders will be analyzed on appeal:

> (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) (1999). "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." *Carolina Util. Customers Ass'n*, 348 N.C. at 460, 500 S.E.2d at 700.

I. Private Agreement

CUCA argues that the Commission's reliance upon the private agreement between PSNC and the Public Staff constitutes prejudicial error. Further, CUCA contends that a heightened standard of review should be applied on appeal where the Commission adopts the recommendations of parties who testified according to negotiated terms between fewer than all of the parties to the dispute. We disagree.

This Court addressed the issue of nonunanimous agreements in *Carolina Util. Customers Ass'n*, 348 N.C. at 466, 500 S.E.2d at 701. In that case, the utility and the Public Staff filed a stipulated agreement resolving all revenue requirements and rate design issues. *See id.* at 455, 500 S.E.2d at 697. The Commission subsequently adopted a rate of return on equity directly from that stipulation without any deduction. *See id.* at 461, 500 S.E.2d at 700. On appeal, the utility and the

Public Staff argued that this Court should apply a lower standard of review and that the Commission's order should be reviewed for reasonableness as a whole since the nonunanimous stipulation fulfilled the "substantial evidence" requirement in N.C.G.S. § 62-94(b)(5). *See id.* at 462, 500 S.E.2d at 701.

This Court recognized that "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." *Id.* at 463, 500 S.E.2d at 701. The Court acknowledged the value of settlements to the efficient administration of justice but emphasized that "[c]hapter 62 contemplates a full and fair examination of evidence put forth by *all* of the parties." *Id.* at 464, 500 S.E.2d at 702. Permitting the Commission to adopt a stipulation between fewer than all of the parties "would effectively absolve the Commission of its statutory and due process obligations to afford all parties a fair hearing." *Id.*

We held that the Commission should afford full consideration to nonunanimous stipulations along with all other evidence presented by any of the parties in the proceeding. *See id.* at 466, 500 S.E.2d at 703. The Court further reasoned:

> 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.

Id. Thus, we rejected the argument that the Commission's order should be subjected to a lower standard of review where the Commission adopts a nonunanimous stipulation. *See id.*

[1] Applying the foregoing principles to this case, we similarly reject CUCA's argument that the Commission's order should be subjected to a heightened standard of review where the witnesses testified according to a nonunanimous private agreement. We hold that the proper standard of review requires only that the Commission made an independent determination supported by substantial evidence on the record. Even where the parties negotiate a private agreement regarding the evidence to be presented, the Commission satisfies the requirements of chapter 62 by independently considering and analyz-

ing all the evidence and any other facts relevant to a determination that the proposal is just and reasonable to all parties.

In this case the Public Staff presented six witnesses whose testimony addressed every issue of material fact. Although PSNC did not contest the Public Staff's testimony on issues covered by the private agreement, PSNC also never withdrew its prefiled testimony. Therefore, the Commission could have rejected the Public Staff's testimony in favor of the evidence supporting PSNC's original application. However, as we shall discuss further, the Commission considered and analyzed the evidence presented by all parties before independently adopting the Public Staff's recommendations. We hold that the Commission's order contains findings sufficient to justify its conclusions. Further, the Commission's findings are supported by competent, material, and substantial evidence in view of the entire record.

II. Return on Equity

[2] CUCA maintains that the Commission's conclusion of an 11.4% return on equity is unsupported by competent, material, and substantial evidence in view of the entire record. We disagree.

The "rate of return" on equity, PSNC'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.' " *Carolina Util. Customers Ass'n*, 348 N.C. at 461, 500 S.E.2d at 700. Several variables factor into determining a "just and reasonable" rate of return, 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.

Id. at 461-62, 500 S.E.2d at 700.

The Commission's conclusion of what constitutes a fair rate of return on common equity must be predicated on adequate factual findings. *See State ex rel. Utils. Comm'n v. Public Staff*, 322 N.C. 689, 693, 370 S.E.2d 567, 570 (1988). The Commission must consider and make its determination based upon all factors particularized in N.C.G.S. § 62-133, including "all other material facts of record" that

will aid the Commission in determining what are just and reasonable rates. N.C.G.S. § 62-133(d); *see also Carolina Util. Customers Ass'n*, 348 N.C. at 462, 500 S.E.2d at 701. "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." *Carolina Util. Customers Ass'n*, 348 N.C. at 462, 500 S.E.2d at 701 (quoting *State ex rel. Utils. Comm'n v. State*, 239 N.C. 333, 344, 80 S.E.2d 133, 141 (1954)) (alteration in original).

A thorough review of the record in this case, including particularly the Commission's order, reveals that the Commission's 11.4% rate of return on common equity conclusion comes from the direct testimony and exhibits of Public Staff witness Hinton. The Commission complied with the standards established by sections 62-79(a), -94(b) and -133 by independently analyzing the testimony of PSNC witness Andrews, CUCA witness O'Donnell, and Public Staff witness Hinton before reaching its conclusion that 11.4% was the appropriate cost of common equity.

PSNC witness Andrews employed three different methodologies in determining the appropriate rate of return on common equity. Andrews performed two separate analyses using the "discounted cash flow" ("DCF") model. Andrews' first DCF analysis focused entirely on historical dividend data, although Andrews "cautioned repeatedly" against using the DCF model in light of the irregular dividend history of the natural gas industry. Andrews compiled a composite of twenty-one gas distributing companies which, like PSNC, derived more than 80% of their total revenues from the sale of gas or similar business. From that composite group, Andrews selected the four companies with the highest costs of common equity ("the first quartile") and averaged their costs of common equity, resulting in a return requirement of 9.33%. Andrews' second DCF analysis involved a "rolling 5-year" approach in which Andrews averaged the costs of common equity of the first quartile for the years 1993-1997, producing an average cost of common equity of 11.21%.

Andrews also incorporated his DCF model into a risk premium analysis, which he referred to as a hybrid premium DCF-over-debt analysis, resulting in costs of common equity of 11.74% for treasury bills, 11.26% for intermediate-term government bonds, and 11.12% for long-term government bonds. Finally, Andrews performed a "capital asset pricing model" ("CAPM") analysis using as the expected return

on the market the average annual returns of the Standard & Poor's 500 from 1988 through 1997 as reported by Ibbotson & Associates. Andrews' CAPM analysis yielded a cost of common equity ranging from 11.41% to 14.35%. Overall, Andrews recommended a point estimate of cost of common equity of 12.10% in a range from 11.60% to 12.60%.

CUCA witness O'Donnell developed his recommended required return on common equity according to two different methodologies. First, O'Donnell used the DCF method to analyze the dividend yield and anticipated dividend growth of PSNC. O'Donnell performed a DCF study specific to PSNC which produced a return requirement between 10.3% and 11.3%. O'Donnell "checked" this result by applying the DCF method to a group of twenty-one companies that he "consider[ed] to be of comparable risk" to PSNC. This study produced a return on equity range of 9.80% to 10.80%. Second, O'Donnell used the "comparable earnings" method to assess the reasonableness of his DCF results. O'Donnell studied the actual historical earned returns on common equity of all industries, natural gas companies, and companies comparable in risk to PSNC. Based upon this analysis O'Donnell concluded that a reasonable estimate of the cost of equity to PSNC was within the range of 10.5% to 11.5%. Overall, O'Donnell recommended a return requirement for PSNC of 10.8%.

Public Staff witness Hinton also based his recommendation on the DCF model and the comparable earnings approach. First, Hinton applied the DCF model to PSNC and two groups of comparable risk companies. From this analysis Hinton concluded that the appropriate cost of equity was within the range of 10.5% to 11.5%. Second, Hinton tested the reasonableness of his DCF results by employing a comparable earnings analysis for comparable local gas companies with a "B+" Standard & Poor's stock ranking. That analysis indicated historical earned returns on equity ranging from 11.0% to 12.0%. Overall, Hinton recommended 11.4% as the appropriate point-specific cost of common equity for PSNC.

The Commission's ultimate conclusion approving an 11.4% rate of return on equity meets the standards established by section 62-133 specifically and by chapter 62 as a whole. The Commission's conclusion that Public Staff witness Hinton's testimony was the most credible and objective is fully supported by competent, material, and substantial evidence in view of the entire record. The final order shows that the Commission carefully reviewed the testimonies of PSNC witness Andrews and CUCA witness O'Donnell before adopting

Public Staff witness Hinton's recommended return on common equity.

The Commission concluded that PSNC witness Andrews skewed his results toward a higher cost of common equity by including only the four companies with the highest cost of common equity in his DCF model and hybrid premium DCF-over-debt analysis. Andrews' third approach, CAPM, was similarly flawed in that Andrews calculated an equity risk premium over a ten-year period rather than over a period dating back to the 1920s as recommended by Ibbotson & Associates.

The Commission also concluded that CUCA witness O'Donnell skewed his results. O'Donnell created a downward bias in his DCF model and comparable earnings approach by ignoring data in his own exhibits and including certain companies with poor earnings and growth records. Additionally, O'Donnell's recommended cost of common equity would jeopardize PSNC's ability to attract capital by placing its current "A-" bond rating at considerable risk for a possible downgrade.

In contrast, the Commission gave the greatest weight to Public Staff witness Hinton's testimony in determining the cost of common equity. Hinton's DCF analysis included only companies with sufficient dividend histories to calculate ten-year *Value Line* growth rates. Hinton also performed a comparable earnings analysis that indicated a range of historical returns of 11.0% to 12.0%. Overall, Hinton recommended a point-specific cost of common equity of 11.4%, which would produce a level of interest coverage consistent with an "A" bond rating.

After weighing the conflicting evidence of the expert witnesses, the Commission accepted Public Staff witness Hinton's recommendation of 11.4% based on the credibility and objectivity of his PSNC-specific DCF analysis. Thus, the Commission adduced its own independent conclusion as to the appropriate rate of return on equity as required by N.C.G.S. § 62-133. We hold that this conclusion, being fully supported by substantial evidence in view of the entire record, should not be disturbed on appeal.

III. Capital Structure

[3] CUCA next contends the Commission's conclusion that PSNC's capital structure should include a short-term debt ratio of 4.02% is not supported by substantial evidence. We disagree.

The Commission must determine the appropriate capital structure for PSNC in order to achieve an overall fair rate of return. "Capital structure" refers to PSNC's percentages of debt and equity relative to its total capital. "The ratios [of capital components] used for rate-making purposes are important because of the relative expense to the utility of each form of capital accumulation." *Public Staff*, 322 N.C. at 701, 370 S.E.2d at 575. Both long-term debt and common equity are more expensive forms of capital for the ratepayers than short-term debt. A capital structure containing a higher ratio of a more expensive form of capital will result in higher rates to provide the higher return demanded by investors. *See id.* at 701-02, 370 S.E.2d at 575.

In this proceeding, the Commission approved a capital structure consisting of 51.91% common equity, 4.02% short-term debt, and 44.07% long-term debt. CUCA contends that the capital structure should include a higher percentage of short-term debt since PSNC's use of short-term debt consistently exceeds its balance of stored gas inventory. However, the Commission has historically relied upon a utility's average stored gas inventory as the measure of short-term debt to be included in the capital structure. *See, e.g., In re Application of Public Serv. Co.*, 84 N.C.U.C. Report 159, 206 (1994); *In re Application of Piedmont Natural Gas Co.*, 79 N.C.U.C. Report 348, 371 (1989). CUCA failed to present any evidence supporting the unreasonableness of the Commission's reliance upon PSNC's gas inventory as a measure of short-term debt. *See State ex rel. Utils. Comm'n v. Thornburg*, 316 N.C. 238, 242, 342 S.E.2d 28, 31 (1986) (explaining that the attacking party bears the burden of proving the Commission's order unjust and unreasonable). Further, the Commission's findings of fact and conclusions of law are supported by competent, material, and substantial evidence in view of the entire record.

In this case, the Commission considered the recommendations of PSNC witness Mason and CUCA witness O'Donnell before giving the greatest weight to the capital structure proposed by Public Staff witness Hinton. PSNC witness Mason indicated PSNC's willingness to accept the Public Staff's recommended capital structure.

Public Staff witness Hinton emphasized that "an important goal with [PSNC's] capital structure is to ensure that the debt and equity ratios adopted in determining the overall rate of return on rate base investment are no greater than those required to allow [PSNC] to

qualify for reasonable credit ratings and to provide [PSNC] the ability to attract capital." Hinton recommended a capital structure "based on 13 month averages of recent data and an adjustment for cost free capital associated with prior Transco [Transcontinental Pipe Line Corporation] refunds." Hinton included in his proposed capital structure an amount of short-term debt equal to the stored gas inventory included in rate base. Hinton noted that, by using the average stored gas inventory as the measure of short-term debt, his approach appropriately accounted for seasonal fluctuations in PSNC's inventory.

PSNC witness Mason testified that PSNC originally requested a capital structure composed of 52.33% common equity, 3.66% short-term debt, and 44.01% long-term debt. Mason based his recommendation on "PSNC's projected average capital structure for the thirteen months ended July 31, 1998." Like Public Staff witness Hinton, Mason included in PSNC's requested capital structure a short-term debt ratio equal to the amount of PSNC's stored gas inventory. Mason reiterated the Commission's practice of including an amount of short-term debt "reasonably representative of and approximately equivalent to the level of gas inventory included in rate base." *In re Application of Public Serv. Co.*, 84 N.C.U.C. Report at 206.

PSNC witness Mason testified on rebuttal that PSNC periodically refinances with equity capital or issuance of long-term debt any short-term debt in excess of its stored gas inventory. Mason also explained that PSNC expects to experience a decline in its use of short-term debt as recent extraordinary projects are completed. Mason further testified that PSNC's use of short-term debt to finance deferred gas costs has significantly decreased due to recent changes in gas pricing for full-margin customers. Finally, Mason emphasized that CUCA's recommended capital structure would jeopardize PSNC's current "A-" credit rating. Under CUCA's capital structure, PSNC's credit rating would drop to "BBB" and result in additional interest costs of $4.5 million for a thirty-year bond offering.

CUCA witness O'Donnell recommended a capital structure consisting of 48.81% common equity, 9.76% short-term debt, and 41.43% long-term debt. O'Donnell designed his capital structure "based upon a 13 month average capital structure which includes the FULL amount of short-term debt which [PSNC] employed during the most recent year." O'Donnell acknowledged the Commission's practice of using the stored gas inventory balance as the measure of short-term debt. However, O'Donnell asserted that PSNC's recent use of short-

term debt has consistently exceeded its investment in stored gas inventory.

CUCA witness O'Donnell proposed a new method for this proceeding under which the Commission would adopt a capital structure "that includes the daily average balance amount of short-term debt for the most recent twelve month period." Such an approach would recognize that PSNC consistently uses short-term debt to finance corporate functions other than gas inventory, such as construction work in progress ("CWIP"). As an alternative, O'Donnell proposed a capital structure composed of 50.15% common equity, 7.28% short-term debt, and 42.57% long-term debt. O'Donnell's alternative capital structure includes an amount of short-term debt equal to PSNC's average short-term debt for the most recent twelve month period less PSNC's average CWIP balance outstanding for the most recent twelve month period.

CUCA witness O'Donnell also addressed the effect of CUCA's capital structure on PSNC's bond rating. According to O'Donnell, the Commission owes no duty to set rates that would guarantee a specific bond rating. Further, O'Donnell asserted that neither PSNC witness Mason nor Public Staff witness Hinton offered any specific evidence that CUCA's capital structure would jeopardize PSNC's bond rating. Finally, O'Donnell concluded that the capital structure proposed by the Public Staff and accepted by PSNC ignores PSNC's financing activities and unjustifiably charges higher rates by including only a small portion of PSNC's outstanding short-term debt.

The Commission's ultimate conclusion adopting the capital structure recommended by the Public Staff and accepted by PSNC is fully supported by competent, material, and substantial evidence in view of the entire record. The Commission's order demonstrates that the Commission carefully reviewed the testimony of PSNC witness Mason and CUCA witness O'Donnell before accepting Public Staff witness Hinton's recommended capital structure.

The Commission concluded that the capital structure proposed by Public Staff witness Hinton was the most appropriate capital structure for purposes of this general rate case. The capital structure adopted by the Commission consisted of 51.91% common equity, 4.02% short-term debt, and 44.07% long-term debt. According to the Commission, "[t]hat capital structure reflects a level of short-term debt that is approximately equal to the level of gas inventory included in rate base."

The Commission emphasized the persuasiveness of PSNC's and the Public Staff's evidence and arguments. The Commission particularly underscored the evidence that CUCA's proposed capital structure would jeopardize PSNC's "A-" bond rating. The Commission noted CUCA witness O'Donnell's acknowledgment that his recommended capital structure would result in a "BBB" bond rating. The Commission ultimately concluded that the Public Staff's recommended capital structure "should allow PSNC the opportunity to maintain its current 'A-' bond rating so as to enable it to attract capital on reasonable terms to fund its expansion of natural gas service, which [PSNC] is being urged to do."

After a careful review of the record, we hold that the Commission's order satisfies the requirements of section 62-94 specifically and of chapter 62 as a whole. Here, the Commission did not merely summarize the arguments of the parties and then reject those offered by appellants. Instead, the Commission considered and necessarily gave greater weight to PSNC's and the Public Staff's evidence, which supported a short-term debt ratio of 4.02%, than to CUCA's evidence, which supported a short-term debt ratio of 9.76%. Therefore, we conclude that the Commission's order is supported by competent, material, and substantial evidence in view of the entire record and that the Commission evaluated the evidence and made an independent determination.

IV. Cost-of-service

[4] CUCA next argues that the Commission's conclusions regarding cost-of-service are deficient in two respects: (i) the Commission's adoption of the peak and average cost-of-service allocation methodology is unsupported by competent, material, and substantial evidence; and (ii) the Commission erred in failing to adopt the imputed load factor methodology. We disagree.

Cost-of-service to PSNC's customer classes significantly affects this general rate case for two reasons. First, cost-of-service factors into the mathematical computation required by N.C.G.S. § 62-133 for determining the appropriate rate of return for a particular customer class. *See Carolina Util. Customers Ass'n*, 348 N.C. at 467, 500 S.E.2d at 704. Second, cost-of-service impacts whether the rate design unjustly discriminates between the various classes of customers. *See id.*

Before the Commission can design rates that are just and reasonable for all customer classes, it must first determine the cost-of-serv-

ice for which each class of customers is responsible. *See Carolina Util. Customers Ass'n*, 348 N.C. at 471, 500 S.E.2d at 705-06. As the United States Supreme Court explained, "[t]he outlays that exclusively pertain to a given class of [customers] must be assigned to that class, and the other expenses must be fairly apportioned." *Northern Pac. Ry. Co. v. North Dakota ex rel. McCue*, 236 U.S. 585, 597, 59 L. Ed. 735, 742 (1915). Therefore, the Commission must allocate between the various customer classes their fair share of the fixed costs. *See Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 588, 89 L. Ed. 1206, 1215 (1945). However, "[a]llocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Id.* at 589, 89 L. Ed. at 1216.

The first step in allocating cost-of-service among customer classes is selecting an appropriate allocation methodology. In *Carolina Util. Customers Ass'n*, 348 N.C. at 470-71, 500 S.E.2d at 705-06, this Court found insufficient the Commission's findings of fact regarding the allocation of cost-of-service. The Court rejected the Commission's order on the basis that

> the only determination made regarding the cost of service calculation . . . 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.

Id. at 471, 500 S.E.2d at 706. Thus, this Court required the Commission to independently identify and apply an appropriate cost-of-service allocation methodology before designing a nondiscriminatory rate structure.

In this case the Commission concluded that the peak and average cost allocation methodology was the appropriate method for allocating fixed gas costs between PSNC's customer classes. Both PSNC witness Barkley and Public Staff witness Larsen recommended the peak and average method. However, CUCA witness Schoenbeck preferred either the peak responsibility method or the imputed load factor approach.

PSNC witness Barkley and Public Staff witness Larsen used the peak and average method to allocate between customer classes costs that could not be directly assigned. Larsen explained that the peak and average method allocates fixed costs on the basis of 50% peak day demand and 50% annual sales. Barkley recommended the peak and average method for allocating cost-of-service because that method "recognizes that most customers receive service most days of the year." Barkley contrasted his approach with CUCA's recommended peak responsibility method. Barkley testified that, under CUCA's approach, many interruptible customers will experience relatively little curtailment during the winter season without paying the fixed costs attributable to providing that service. Further, both Barkley and Larsen recognized that the Commission has traditionally employed the peak and average allocation methodology.

CUCA witness Schoenbeck recommended either the peak responsibility method or the imputed load factor approach. Under the peak responsibility method, customers who receive service on the utility's peak day are responsible for fixed costs while interruptible customers who experience curtailment avoid the cost incurred in providing service to them. Schoenbeck preferred the peak responsibility approach to the peak and average method based on his opinion that the peak and average method distorts the cost of serving each customer class.

According to Schoenbeck, "[t]he purpose of performing a cost-of-service study is to ascertain the cost of serving customers with different usage and size characteristics, qualities of service . . . , and types of service." Schoenbeck argued that PSNC and the Public Staff ignored the substantial capacity that a utility must acquire in order to meet the peak day demands of the utility's firm customers. The peak and average method apportions costs based on "fairness," not actual cost determinations. *See In re Atlantic Seaboard Corp.*, 11 F.P.C. 43, 55 (1952) (developing the peak and average method to more fairly allocate costs between demand and volumetric services). Overall, Schoenbeck recommended the peak responsibility method as a more accurate determination of the actual cost of serving each customer class.

CUCA witness Schoenbeck recommended the imputed load factor approach as a second best alternative allocation methodology. Schoenbeck explained the application of this method:

> [T]he demand-related allocation factor is derived using the peak or contractual demands of all firm customer classes plus an imputed load for the interruptible customers. The imputed interruptible load is calculated using the annual throughput for this class coupled with a load factor reflective of the quality of service being provided these customers. The lower the quality of service—reflecting more interruptions—the higher the load factor used in the calculation.

Schoenbeck further emphasized the costs associated with the full expected peak demand that firm customer classes can impose on the utility. Schoenbeck argued that the imputed load factor approach "directly determine[s] cost responsibility while at the same time recognizing the lower quality of service provided to interruptible customers."

After fully considering each approach, the Commission concluded that the peak and average method was the most appropriate cost-of-service methodology. The Commission rejected CUCA's peak responsibility method as "unfair in that it gives interruptible customers a 'free ride' on the utility system that provides them with natural gas service for the vast majority of the year." The Commission also rejected the imputed load factor method. The Commission noted that while that approach does allocate some fixed costs to interruptible customers, Schoenbeck presented only a summary of his cost-of-service study using this methodology. As a result, neither the Commission nor the other parties could adequately analyze the imputed load factor approach recommended by CUCA. As this Court has previously stated:

> It is not the function of this Court to determine whether there is evidence to support a position the Commission did not adopt. *State ex rel. Utilities Comm'n v. Eddleman*, 320 N.C. 344, 355, 358 S.E.2d 339, 347 (1987). . . . The credibility of the testimony and the weight to be accorded it are for the Commission to decide, *State ex rel. Utilities Comm'n v. City of Durham*, 282 N.C. 308, 322, 193 S.E.2d 95, 105 (1972), and this Court presumes that the Commission gave proper consideration to all competent evidence presented, *State ex rel. Utilities Comm'n v. Thornburg*, 316 N.C. 238, 245, 342 S.E.2d 28, 33 (1986). This Court may not properly set aside the Commission's recommendation merely because different conclusions could have been reached from the evidence. *State ex rel. Utilities Comm'n v. General Tel. Co. of Southeast*, 281 N.C. 318, 354, 189 S.E.2d 705, 728 (1972).

State ex rel. Utils. Comm'n v. Piedmont Natural Gas Co., 346 N.C. 558, 569, 488 S.E.2d 591, 598 (1997).

The Commission ultimately concluded that the peak and average method properly allocates fixed costs between annual use and peak day utilization of the facilities. Thus, the Commission appropriately considered and analyzed the evidence presented by all parties before giving greater weight to the Public Staff's proposed cost-of-service allocation methodology. We hold that the Commission's order contains sufficient findings of fact to justify its conclusions. Further, the Commission's findings of fact are supported by competent, material, and substantial evidence in view of the entire record.

V. Rate Design

Once fixed costs have been allocated among the various customer classes, the Commission must design a just and reasonable rate structure that does not subject any customer class to discrimination or "rate shock." Three basic components must be ascertained in making that computation:

> (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.

Carolina Util. Customers Ass'n, 348 N.C. at 467, 500 S.E.2d at 704. Unjust or unreasonable discrimination among customer classes is prohibited by N.C.G.S. § 62-140, which provides in relevant part:

> (a) No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service.

N.C.G.S. § 62-140(a) (1999); *see also Carolina Util. Customers Ass'n*, 348 N.C. at 467-68, 500 S.E.2d at 704.

The Commission may classify customers or charge different rates based on reasonable differences in conditions so long as the variance in charges bears a reasonable proportion to the variance in conditions. *See Carolina Util. Customers Ass'n*, 348 N.C. at 468, 500 S.E.2d at 704. "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.*" *Id.*

In the present case, CUCA contends that the discrimination in the rates of return among PSNC's several customer classes approved by the Commission is not justified by adequate findings supported by the whole record; therefore, by approving the various rates of return, the Commission exceeded its statutory authority. Appellees counter that the evidence and findings adequately justify that the approved rates do not unreasonably discriminate among PSNC's classes of customers.

[5] This Court addressed the issue of discriminatory rate design in *Carolina Util. Customers Ass'n*, 348 N.C. at 470-71, 500 S.E.2d at 705-06. In that case, this Court held that the Commission failed to make sufficient findings of fact to justify its approval of the proposed stipulated rate design. *See id.* at 472, 500 S.E.2d at 706. The Court identified, *inter alia*, the relevant insufficiencies of the Commission's order as follows:

> [T]he 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. [Also,] 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."

Id. at 471, 500 S.E.2d at 706. The Commission will not satisfy those requirements in this proceeding simply by setting out the differences in rates of return and cost-of-service for the various customer classes. We hold that the Commission, in designing a nondiscriminatory rate structure, must set forth sufficient evidence, findings of fact, and conclusions of law to permit adequate review by this Court. The Commission satisfies this standard by explaining its consideration of non-cost-related factors and by setting forth the factual basis for its conclusion that the approved rate structure does not result in discrimination among customer classes.

[6] The Commission's order in this proceeding satisfies the above standard. First, the Commission considered a number of other factors in addition to cost-of-service in designing a nondiscriminatory rate structure. Second, the Commission considered the results of several cost-of-service studies before adopting the Public Staff's proposed rate design.

The Commission found that "[c]ost-of-service studies are subjective and imprecise and are useful only as a guide along with other factors in setting natural gas rates." As an example, the Commission referred to the widely divergent results of the cost-of-service studies presented in this proceeding by PSNC, the Public Staff, and CUCA. Further, Public Staff witness Davis testified that cost-of-service studies overstate returns for large industrial and commercial customers by failing to reflect negotiated rate discounts. The Commission declined to place a great emphasis on the results of the studies since "[t]he rates of return shown in a cost-of-service study do not necessarily reflect the actual return the Company garners from each class."

The Commission concluded that a number of other factors in addition to cost-of-service must be considered in designing rates. The Commission stated:

> The Commission agrees with witnesses Barkley and Davis that it is appropriate to consider a number of factors in addition to cost-of-service when designing rates. Such other factors include value of service, quantity of natural gas used, the time of use, the manner of use, the equipment which the Company must provide and maintain in order to meet the requirements of its customers, competitive conditions and consumption characteristics.

The Commission's order does not specifically address each of these factors. However, the order does set forth evidence, findings of fact, and conclusions of law which demonstrate that the Commission gave consideration to these factors and their applicability to each customer class.

First, the Commission concluded that an attempt to equalize returns among the classes would significantly impact Rate Schedule 105 Residential—Year Round customers. The evidence indicated that those customers would experience "rate shock" due to their inability to switch fuels easily. The Commission emphasized that the "long-established expectations of these customers at the time they bought

their heating systems should be taken into consideration in setting rates."

Second, the Commission ultimately concluded that Public Staff witness Davis properly considered all appropriate factors in designing a nondiscriminatory rate structure. Davis testified that he considered the following factors:

> (1) value of service, (2) the type of service, (3) the quantity of use, (4) the time of use, (5) the manner of service, (6) competitive conditions relating to acquisition of new customers, (7) historical rate design, (8) the revenue stability to the utility, and (9) economic and political factors.

Davis emphasized that the value paid for natural gas service cannot be significantly greater than a satisfactory alternative. Additionally, Davis considered the different needs of different types of customers. Type of service, quantity of use, time of use, and manner of service required by the various customer classes will affect the rate design. For example, some industrial customers require a more firm supply, while heat-sensitive customers require more security of service during peak winter days.

Davis also testified that his proposed rate structure would enable PSNC to attract new customers and retain current customers. Davis further explained that his rate design is consistent with historical rate design over the past several PSNC general rate cases. Finally, Davis designed rates intended to facilitate economic growth in PSNC's service territory.

After considering the non-cost-related factors emphasized by Public Staff witness Davis, the Commission adopted the Public Staff's recommended rate design. The Commission recognized that the proposed rate structure "essentially places the entire increase on residential and small general service customers, while decreasing the revenue burden on large commercial and industrial customers." However, the Commission found that such a rate design would be consistent with the results of other recent general rate cases. Therefore, the Commission's findings of fact and conclusions of law demonstrate that the Commission appropriately considered factors other than cost-of-service in adopting a rate design that would be just and reasonable for all customer classes.

The Commission's order in this proceeding also sets forth the factual basis for its conclusion that the approved rate structure does not

result in discrimination between customer classes. *See Carolina Util. Customers Ass'n*, 348 N.C. at 471, 500 S.E.2d at 706. As discussed above in relation to cost-of-service allocation, the Commission considered the results of several cost-of-service studies before adopting the Public Staff's proposed rate design. The Commission's order included two sets of data that delineate the existing rate structure and the new rate structure proposed by the Public Staff. The following table reflects the existing rates of return for each of PSNC's customer classes:

Rate Schedule Number	Customer Class	Rate of Return
105	Residential—Year Round	5.83%
110	Residential—Seasonal	5.03%
125	Small General Service	10.22%
145/175	Large Quantity General	17.17%
150/180	Large Quantity Interruptible	15.65%
	Overall	7.51%

The second table indicates the impact of the Public Staff's proposed rate design on customer class rates of return in this proceeding:

Rate Schedule Number	Customer Class	Rate of Return
105	Residential—Year Round	6.98%
110	Residential—Seasonal	7.29%
125	Small General Service	13.70%
145/175	Large Quantity General	14.78%
150/180	Large Quantity Interruptible	10.90%
	Overall	9.81%

The Commission noted that the Public Staff's proposed rate design, when analyzed according to the peak and average allocation methodology discussed previously, yields class rates of return that are closer to the overall rate than the Commission has historically approved. Although disparities still exist in the rates of return between the various customer classes, "the approved rates at least move in the direction of more nearly equalizing the rates of return among all [PSNC] customer classes." *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 323 N.C. 238, 251, 372 S.E.2d 692, 700 (1988). Based upon the narrowed range of rates established by

the Public Staff's proposed rate design, the Commission concluded that no customer or class of customers will suffer from "rate shock" or discriminatory rates. Since this Court has affirmed rate structures with greater disparities among the classes, it follows that the rate design approved here must not be unreasonably discriminatory. *See State ex rel. Utils. Comm'n v. Public Staff*, 323 N.C. 481, 505, 374 S.E.2d 361, 374 (1988).

After a careful review of the record, we hold that the Commission's order satisfies the minimal requirements we set out in *Carolina Util. Customers Ass'n*, 348 N.C. at 470-71, 500 S.E.2d at 705-06. The Commission's order contains findings sufficient to justify its conclusion that the approved rates of return are just and reasonable and do not unreasonably discriminate among the various classes of PSNC customers. Furthermore, the Commission's findings are supported by substantial evidence in view of the whole record.

VI. Rider D

[7] Finally, CUCA contends that the Commission committed prejudicial error by failing to address the discriminatory impact of PSNC's rider D on rate schedules 145 and 150. We disagree.

In November 1997 the Commission approved PSNC's bifurcated full-margin pricing mechanism on a two-year experimental basis. "Full margin" generally refers to transportation rates that are calculated by deducting the cost of gas from established sales rates. However, PSNC's pricing system reverses that method: PSNC's transportation customers pay Commission-approved transportation rates under rate schedules 175 and 180, while sales customers who purchase natural gas under rate schedules 145 and 150 pay established transportation rates plus a "monthly commodity gas cost."

In this proceeding, the Commission approved Rider D, which defines "monthly commodity gas cost" as "the sum of the Monthly Index Price, the 100% Load Factor equivalent of Transcontinental Pipe Line Corporation's Zone 3 to Zone 5 Maximum FT Rate, fuel, Other Gas Supply Charges, and Gross Receipts Taxes." CUCA contends that PSNC's application of rider D to large-volume sales customers who purchase natural gas under rate schedules 145 and 150 unjustly discriminates against those customers by forcing them to pay twice for interstate transportation. Appellees respond that the Commission adequately addressed this issue in its final order.

As we discussed earlier, the Commission may classify customers or charge different rates based on reasonable differences in conditions so long as the variance in charges bears a reasonable proportion to the variance in conditions. *See Carolina Util. Customers Ass'n*, 348 N.C. at 468, 500 S.E.2d at 704. Additionally, this Court has consistently affirmed the Commission's approval of full-margin rates. *See id.* at 472, 500 S.E.2d at 707; *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 328 N.C. 37, 46, 399 S.E.2d 98, 103 (1991); *Carolina Util. Customers Ass'n*, 323 N.C. at 253-54, 372 S.E.2d at 701; *State ex rel. Utils. Comm'n v. N.C. Textile Mfrs. Ass'n*, 313 N.C. 215, 225, 328 S.E.2d 264, 270 (1985).

In our most recent general rate case, *Carolina Util. Customers Ass'n*, 348 N.C. at 472-74, 500 S.E.2d at 707, we reviewed our prior decisions concerning full-margin rates:

> 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.

After reviewing this line of cases, the Court held that full-margin transportation rates are proper so long as they are supported by competent, material, and substantial evidence in view of the entire record as required by N.C.G.S. § 62-94. *See Carolina Util. Customers Ass'n*, 348 N.C. at 473, 500 S.E.2d at 707.

In this general rate proceeding, substantial evidence supports the Commission's approval of PSNC's full-margin transportation rates. In its order, the Commission made the following findings of fact regarding PSNC's transportation rates:

> 74. The Commission has consistently calculated full-margin transportation rates by subtracting the benchmark commodity

cost of gas, applicable gross receipts taxes, and any temporary increments and/or decrements from the sales rate schedule under which the transportation customer would otherwise be buying natural gas from PSNC.

75. PSNC's bifurcated benchmark, by which large commercial and industrial customers receive monthly market based rates, does not affect the use of the full-margin concept for transportation in this case.

76. The Commission concludes that the transportation rates for PSNC in this docket should be based on the full-margin concept. . . .

77. The transportation rate design proposed by the Public Staff is based on the full-margin concept and is just and reasonable.

Although the Commission did not specifically address CUCA's argument that PSNC's rates double-charge sales customers for interstate transportation, the Commission did thoroughly review the record evidence supporting PSNC's bifurcated full-margin pricing method. The order reveals that the Commission relied upon the testimony of PSNC witness Barkley, Public Staff witness Davis, and CUCA witness Schoenbeck for its findings of fact and conclusions of law.

PSNC witness Barkley emphasized that PSNC's bifurcated rates are still "full margin" since the transportation and sales rates differ only by the amount of the commodity cost of gas. Public Staff witness Davis underscored the neutrality of PSNC's full-margin rates since both transportation and sales rates contain the same margin; the rates differ only by the cost of the gas provided by PSNC to its sales customers. Additionally, Davis emphasized the Commission's long history of using the full-margin principle to calculate transportation rates.

In contrast CUCA witness Schoenbeck argued that PSNC's bifurcated method unjustifiably results in sales customers paying twice for interstate transportation: once as a component of the monthly commodity cost of gas and again as a component of the Commission-approved transportation rates. However, the record reveals Schoenbeck himself testified that PSNC's system simply reverses the typical full-margin calculation, resulting in sales customers, rather than transportation customers, paying duplicative charges for interstate transportation.

The Commission emphasized that "the services performed by [PSNC] are substantially the same whether service is provided under the sales rate or transportation rate, especially given the customer's option to select monthly which service is more desirable." The Commission additionally noted that PSNC's mechanism for calculating the commodity cost of gas took effect less than a year before this proceeding. Thus, the Commission was "reluctant to change an experimental program that has been in effect only a short time and has not been shown to have an adverse impact on the competitive market."

The Commission ultimately concluded that "the Public Staff's proposed transportation rates based on the full-margin concept are just and reasonable." We hold that the record evidence, combined with the Commission's analysis of prior cases addressing the lawfulness of full-margin transportation rates, is more than adequate to support the Commission's approval of PSNC's bifurcated full-margin pricing mechanism.

In conclusion and for the reasons stated, we hold that the Commission did not err in this proceeding.

AFFIRMED.

STATE OF NORTH CAROLINA v. CLINTON CEBERT SMITH

No. 396A98

(Filed 4 February 2000)

1. Jury— capital case—jury selection—death penalty views—excusal for cause

The trial court did not abuse its discretion in excusing for cause in a capital trial a prospective juror who stated that he did not think he could tell the court that he would honestly, fairly, and equally consider the death penalty, who also stated that "if circumstances are just tremendously in favor, maybe [he could consider a sentence of death], but [he is] 99% against it though," and who did not state clearly that he was willing to temporarily set aside his own beliefs in deference to the rule of law.

2. Jury— capital case—peremptory challenge—racial discrimination—failure to make prima facia showing

The trial court did not err in finding that defendant failed to make a prima facie showing that the State's peremptory challenge of a black prospective juror was based on race where defendant showed only that the State exercised six of its eight peremptory challenges to excuse blacks and that blacks make up fifty to sixty percent of the county; defendant did not make any specific Batson challenge to the other five peremptorily excused black prospective jurors, and the trial court thus had no obligation to inquire into the reasons for striking those jurors; the prosecutor had accepted the first black to enter the jury box and had also struck whites before striking this prospective juror; defendant, the victims, and the State's key witnesses were all black; the prosecutor did not make any racially motivated comments or ask any racially motivated questions of the black prospective jurors; and seven of the fourteen prospective jurors accepted by both the State and defendant were black.

3. Evidence— DSS investigation—bad character—admissibility to show motive—hearsay—harmless error

In a prosecution of defendant for the first-degree murder of his six-year-old daughter and the attempted murder of his ex-girlfriend and his other two children, testimony by a DSS program manager concerning her investigation showing that defendant had lied in court in a hearing to terminate his child support payments was not improperly admitted to show his bad character but was properly admitted to show that his motive for the murder and attempted murders was so that he would not have to pay child support. Even if this evidence was hearsay, its admission was harmless error since it was already before the jury without objection by defendant.

4. Evidence— statement to co-worker—bad character—motive and plan

Evidence that defendant told a co-worker that DSS was taking over half his paycheck for child support and he was tired of paying was admissible under Rule 404(b) to show motive and plan in a prosecution for the first-degree murder by poisoning of defendant's six-year-old daughter and the attempted murders by poisoning of his ex-girlfriend and his other two children. N.C.G.S. § 8C-1, Rule 404(b).

5. Evidence— bad character—failure to object—not plain error

Testimony that defendant told a witness that he used to drown puppies and kittens in a peanut sack and that he saw a farmer's dog eat peanuts contaminated with a pesticide and that it did not take much to make the dog sick was not improperly admitted in a prosecution of defendant for first-degree murder by poisoning of his six-year-old daughter and attempted murder of his ex-girlfriend and other two children, even if the testimony was used to show defendant's bad character, where defendant failed to object to this testimony at trial and failed to show plain error in light of the overwhelming evidence of defendant's guilt, including defendant's threats to kill his ex-girlfriend and their children, his trip to a farm to obtain a pesticide he knew was extremely deadly, his showing the pesticide to two people in a brown paper grocery bag, his trip to his ex-girlfriend's house to put the pesticide in Kool-Aid, and his later refusal to say anything at the hospital about the real reason for his children's grave illness even while medical personnel fought to save their lives.

6. Homicide— murder and attempted murder by poison—malice instruction not required

The trial court did not err in denying defendant's request to instruct the jury on the element of malice for charges of first-degree murder by means of poison and attempted first-degree murder by means of poison since malice is implied by law for a murder by poison, and a separate showing of malice is not necessary.

7. Homicide— first-degree murder by poison—attempted first-degree murder by poison—involuntary manslaughter instruction not warranted

Defendant was not entitled to an instruction on the lesser-included offense of involuntary manslaughter in a prosecution for first-degree murder by means of poison and attempted first-degree murder by means of poison where the evidence showed that defendant had knowledge of and experience with farm pesticides; he made a trip to a farm to obtain the deadly pesticide used in the murder; he concocted a story as to why he needed the poison; he showed the poison in a brown paper grocery bag to two people; he went to his ex-girlfriend's house to put the pesticide in Kool-Aid; and as his children lay dying or deathly ill, he failed to say anything at the hospital as to the real reason his children were sick.

8. Sentencing— capital—evidence of indecent liberties conviction—not prosecutorial misconduct

The prosecutor did not engage in "abusive gamesmanship" and defendant was not prejudiced in a capital sentencing proceeding when the prosecutor introduced testimony by defendant's cousin concerning defendant's prior conviction of taking indecent liberties with the cousin's teenage daughter and a detective's testimony about the prior conviction where the jury had prior knowledge from the testimony of defendant's own character witnesses during the sentencing proceeding concerning defendant's guilty plea and conviction for indecent liberties, and the trial court sustained defendant's objection to further questioning of the detective after he stated only that he began his investigation of the indecent liberties case with the cousin's family.

9. Criminal Law— prosecutor's argument—capital sentencing—remarks about defendant's psychologist

The prosecutor's argument in a capital sentencing proceeding that defendant's expert in clinical psychology could not possibly tell what was going on in defendant's mind two years ago, that it was amazing what people would do for money, that the psychologist's report showed nothing but that defendant was sleep deprived, and that the psychologist ought to be on the Psychic Friends Network was not so grossly improper as to require the trial court to intervene ex mero motu. The thrust and bulk of the argument was that the expert testimony did not provide a factual basis for finding that defendant murdered while under the influence of an emotional or mental condition.

10. Sentencing— capital—instructions—meaning of life imprisonment

Although the better practice would be for the trial court to instruct the jury in a capital sentencing proceeding in the words of N.C.G.S. § 15A-2002 that "a sentence of life imprisonment means a sentence of life without parole," the trial court did not err by instructing that "[i]f you unanimously recommend a sentence of life imprisonment without parole, the Court will impose a sentence of life imprisonment without parole."

11. Sentencing— capital—mitigating circumstances—no significant criminal history—failure to submit—assaultive behavior

The trial court did not err by failing to submit to the jury in a capital sentencing proceeding the (f)(1) mitigating circumstance of no significant history of prior criminal activity where defendant planned and carried out the murder of his six-year-old daughter and attempted murders of his ex-girlfriend and their other two children by means of poison, and the evidence of defendant's prior criminal activity was a conviction for indecent liberties with a minor approximately one year prior to this offense, previous assaults on his ex-girlfriend, recently communicated death threats against the ex-girlfriend, recently communicated death threats against the ex-girlfriend's new boyfriend, and defendant's history of drowning young puppies and kittens. N.C.G.S. § 15A-2000(f)(1).

12. Sentencing— capital—mitigating circumstances—peremptory instruction not warranted

The trial court did not err in refusing to give peremptory instructions to the jury in a capital sentencing proceeding on the (f)(2) mental or emotional disturbance and the (f)(6) impaired capacity mitigating circumstances where defendant's evidence supporting these mitigating circumstances was controverted by the State's evidence. N.C.G.S. § 15A-2000(f)(2) and (f)(6).

13. Sentencing— capital—death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where the evidence showed that defendant coldly and designedly planned and carried out the murder of his six-year-old child and attempted to murder his other two children and their mother, his ex-girlfriend, by means of poison because he did not want to pay child support and because he did not want anyone else to date his former girlfriend; defendant placed the poison in Kool-Aid in the home of the ex-girlfriend and the three children; the poisoning caused a long, lingering, painful, and agonizing death of an innocent child; and the jury found the (e)(9) heinous, atrocious, or cruel aggravating circumstance and the (e)(11) course of conduct aggravating circumstance. N.C.G.S. § 15A-2000(e)(9) and (e)(11).

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Butterfield, J., on 13 April 1998 in Superior Court, Halifax County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments was allowed by the Supreme Court on 11 June 1999. Heard in the Supreme Court 15 November 1999.

Michael F. Easley, Attorney General, by Valérie B. Spalding, Special Deputy Attorney General, for the State.

Leslie Ann Laufer for defendant-appellant.

FREEMAN, Justice.

On 7 April 1998, defendant Clinton Cebert Smith was found guilty of the January 1996 first-degree murder by poisoning of his six-year-old daughter, Britteny, and the attempted murders by poisoning of his ex-girlfriend, Sylvia Cotton (Cotton); his three-year-old son, Jamal; and his four-year-old daughter, Breanca.

The State's evidence tended to show that defendant dated Cotton for a number of years before they broke off their relationship. They had three children together, including Britteny, Jamal, and Breanca. Although all three children were born locally, defendant did not attend their births, and Cotton did not know where defendant was when each child was born. In 1992, when Cotton was asked to name the father of her children, she lied at defendant's request and gave a fictitious name because defendant was already paying child support for another child and could not afford to pay for Cotton's children. Defendant played no role in the upbringing of Cotton's three children and would only, if pressed very hard, give Cotton money.

The State's evidence revealed that defendant wanted to resume his relationship with Cotton but that Cotton was not interested because she had a new boyfriend whom she had met at her job in Tarboro in 1995. Cotton testified that on 25 December 1995, defendant asked her whether she was sleeping with her co-worker/new boyfriend. Cotton replied yes. Defendant became angry and told her if he could not have her, then her new boyfriend could not have her either. He also stated that he was not going to let anyone else raise his children. In another conversation that month, defendant told Cotton he was going to go to her job to pick her up and if he saw her walk out with her new boyfriend, he would shoot them both.

The State presented evidence that defendant worked part-time for Bruce Josey at Gallberry Farm. In connection with his duties at the farm, defendant handled farm chemicals and had access to the locked chemical bins containing Di-Syston and Temik, both lethal pesticides. All the farm workers were verbally warned of the dangers in handling the farm chemicals. The State also presented evidence that defendant worked part-time at an Etna gas station. In October 1995, when defendant discovered Cotton had a new boyfriend, he told Jimmy Brinson, an Etna co-worker, that if he found out who the new boyfriend was, he would "get him." Thurman Arrington, one of defendant's co-workers at Gallberry Farm, also testified that on another occasion, defendant said he was going to Tarboro, the town where Cotton worked, to beat up her boyfriend.

The State's evidence further tended to show that around Christmas 1995, defendant asked Brinson whether police would have sufficient evidence to convict defendant if he told somebody he was going to kill a person and then did so. Brinson also testified that defendant told him the Department of Social Services (DSS) was taking over half his paycheck for child support for the three children, and he was tired of paying.

On 16 January 1996, Arrington arrived at the Etna gas station at 6:30 a.m. to get some refreshments. Defendant was inside the Etna gas station and asked Arrington what time they were supposed to report to work at the farm. Defendant then said he was going to get some Temik because his father wanted to kill some big rats at his house. Defendant left the gas station in his truck. At about 7:30 a.m. or 8:30 a.m., Arrington was sitting in his truck outside a barbecue diner, along with co-worker Anthony Hines, when defendant drove up behind him.

Defendant got out of his truck and walked to the driver's side of Arrington's truck carrying a brown paper grocery bag. Defendant told Arrington that he got the Temik to kill the rats at his father's house. Defendant opened the bag so Arrington could see. Arrington told defendant the chemical was dangerous and to be careful with it. Hines got out of Arrington's truck and walked around it to talk to defendant. Hines also saw the contents of defendant's bag. After defendant drove away, Arrington told Hines the contents of the bag looked like Di-Syston. Defendant did not work at the farm that day.

On her way to work that same day, Cotton took her three children across the street from her house to babysitter Ellen Lassiter's house

at the usual time of about 5:30 a.m. Cotton dropped her children off early in the mornings because she did not own a car; she had to catch a ride from a co-worker; and it took about thirty minutes to get to her work. Lassiter put Jamal and Breanca on the school bus at 7:00 a.m. Between 7:30 a.m. and 8:00 a.m., while Britteny was still at Lassiter's house waiting for her late school bus, Lassiter and Britteny saw defendant go into Cotton's house. As the morning wore on, Lassiter saw the pickup truck defendant was driving parked about four or five houses away from Cotton's house. Around 10:00 a.m. or 10:30 a.m., Lassiter noticed the truck again, but this time it was parked beside defendant's sister Patty's house, directly across the street from Lassiter, and next door to Cotton's house. Lassiter last noticed the truck around 4:00 p.m.

Nathaniel Williams, who lived on the same street as Cotton and Lassiter, testified that about 10:00 a.m. he saw defendant coming out of Cotton's house. A short time later, at 10:15 a.m., he again saw defendant coming out of Cotton's house, this time with a folded over brown grocery bag in his hand. Nathaniel Williams shouted a greeting to defendant, and they both laughed.

A few minutes after 5:00 p.m. that day, Cotton got home from work, went inside her house, and noticed some balloons and a box on top of her VCR in the living room. She knew they had to be from defendant because he was the only one who went into her house without her permission. Cotton testified she had never given defendant a key to her house. In fact, Cotton had lost her own key to the house a while back and had to get in her house through the front window.

Around 5:30 p.m., Cotton arrived at Lassiter's house to pick up her three children. Lassiter told Cotton that defendant had gone into her house. Cotton replied that defendant had left balloons and other items there in an attempt to get back together again. Thereafter, Cotton and her three children went to their home, and Cotton began cooking dinner. Cotton noticed the kitchen had a funny smell. Cotton later testified that it was the same smell as the State's exhibit of Di-Syston.

While Cotton was preparing dinner, Breanca asked for some Kool-Aid. Cotton got a pitcher of cherry Kool-Aid out of the refrigerator and poured the drink into glasses for her three children. One of the children told Cotton the Kool-Aid did not taste right. Thereafter, Cotton tasted the Kool-Aid and found it to be gritty and bitter.

Looking into the Kool-Aid pitcher, she saw something that looked like grit and little red strings in the liquid. She subsequently dumped out the contents of the pitcher. Cotton then prepared a fresh batch of Kool-Aid and gave it to her children, along with their dinner.

Sometime after 11:00 p.m., Breanca awakened Cotton because Britteny had wet the bed, she was crying, she had bubbly spit coming from her mouth, and her stomach was hurting. Britteny's stomach appeared swollen. Shortly thereafter, Jamal had diarrhea, and Cotton noticed that his lips were chapped. Cotton tended to her sick children and put them back to bed. Around 11:30 p.m. or 11:45 p.m., Breanca reawakened Cotton because Britteny had wet the bed again. Cotton called her aunt, Carolyn Williams, who took Cotton and the children to the hospital during the early morning hours of 17 January 1996. A doctor gave Britteny and Jamal an injection for vomiting and diarrhea because he thought the problem might be a twenty-four hour virus.

On the way home from the hospital, Breanca began complaining that her stomach was hurting. All three children were sick throughout the night. At about 4:00 a.m., Cotton cleaned the kitchen floor because the children had vomited all over it. Later that morning, when Cotton went to wake her children, she noticed that Britteny's mouth was purplish-grey and that she appeared to have no heartbeat. Cotton called 911, and the ambulance took Britteny and Jamal to the hospital. Cotton and Breanca followed the ambulance in a separate car, driven by Carolyn Williams, to the Our Community Emergency Room in Scotland Neck. Defendant arrived at the emergency room about an hour after Cotton and the others.

While waiting in the emergency room, Breanca began vomiting. The doctors took Breanca where the other two children were in order to monitor her condition as well. Shortly thereafter, Cotton began to feel sick herself. A doctor checked Cotton, who complained about a terrible headache and being disoriented. The doctor gave Cotton oxygen and a tranquilizer. Subsequently, a doctor told Cotton that Britteny had died, and the other two children were being transferred to Pitt Memorial Hospital.

Cotton was allowed to see Britteny for a few minutes. When she got to Britteny's room, Cotton's aunt, one of her cousins, defendant, and a nurse were already there. Defendant asked the nurse whether Britteny had died from carbon monoxide poisoning, and she said it looked like it, but she was not sure. Defendant repeatedly blurted out, without being questioned, that Britteny died from carbon monox-

ide poisoning because of Cotton's cooking stove. The nurse reminded him that they did not know what caused her death. Thereafter, defendant left the room so he could visit his other two children at Pitt Memorial Hospital.

After a few minutes, Cotton began having a terrible headache and became disoriented. She was taken to Nash General Hospital by ambulance. After Cotton checked out of the hospital, her aunt drove her to Cotton's house. Cotton was not permitted to enter her own house, so she went to her aunt's house.

Dr. John Meredith was working at Pitt Memorial on 17 January 1996. Dr. Meredith testified about the steps taken to treat Breanca and Jamal, stating tests revealed the two children were not suffering from carbon monoxide poisoning but had symptoms consistent with organophosphate poisoning. Dr. Meredith also testified that defendant appeared, stating that he was the father of the two children and that they had been poisoned by their mother.

Alice Daniels, a social worker at Pitt Memorial Hospital, testified she was on duty and saw defendant talking to Dr. Meredith on 17 January 1996. Her job was to give emotional support to the family of Breanca and Jamal. Daniels later spoke to defendant, asked him what had happened to the children, and what if anything he had given them to eat or drink. Defendant replied that he had not done anything and that Cotton must have given the children some Kool-Aid.

Later that evening, Cotton went to Pitt Memorial to see Breanca and Jamal. Jamal was in intensive care hooked up to a number of machines because he had great difficulty breathing and had suffered several seizures. Breanca was in a regular room. As Cotton went to see Breanca, she passed defendant in the hallway. Breanca immediately told Cotton that defendant said Cotton was a bad person because she gave bad chicken to the children.

Breanca was released from Pitt Memorial after about a week. Jamal spent two or three days in intensive care and then was moved to a regular room. He was released from Pitt Memorial about two days after Breanca. DSS then took the two children, and Cotton returned to her aunt's house. Cotton was eventually reunited with her children.

On 19 January 1996, defendant saw co-worker Arrington again and told him defendant's mother and father asked that Arrington say nothing about the "rat" poison. While officers were investigating the

case, they found a brown paper grocery bag with traces of Di-Syston in Cotton's trash can. Defendant was arrested on 2 February 1996.

[1] Defendant's first issue on appeal is whether the trial court erred in excusing for cause prospective juror Alfonzia Knight, who indicated he might have difficulty voting in favor of a death sentence. To determine whether a prospective juror may be excused for cause in a capital punishment case, the trial court must consider whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985). Prospective jurors may also be properly excused for cause if they are unable to " 'state clearly that they are willing to temporarily set aside their own beliefs, in deference to the rule of law.' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149-50 (1986)) (emphasis omitted).

This Court has previously noted that "a prospective juror's bias for or against the death penalty cannot always be proven with unmistakable clarity." *State v. Miller*, 339 N.C. 663, 679, 455 S.E.2d 137, 145, *cert. denied*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995). Thus, the trial court's decision to dismiss a juror for cause is discretionary and will not be disturbed absent an abuse of discretion. *State v. Jaynes*, 342 N.C. 249, 270, 464 S.E.2d 448, 461 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

In the instant case, prospective juror Knight stated he was not really "for" the death penalty. He told the trial court it would be possible for him to recommend death, but he did not think he could tell the court that he would honestly, fairly, and equally consider the death penalty. He also stated that "[i]f circumstances are just tremendously in favor, maybe [he could consider a sentence of death], but [he is] ninety-nine percent against it though." The trial court carefully and meticulously considered this matter, as evidenced by the transcript concerning the *voir dire* of this particular juror. Since Knight did not state clearly that he was willing to temporarily set aside his own beliefs in deference to the rule of law, the trial court did not abuse its discretion in excusing him for cause. Thus, this assignment of error is overruled.

[2] In his second assignment of error, defendant claims the trial court erred in denying his motion to preclude the State from using its peremptory challenges in a racially discriminatory manner during the

jury selection process. 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, 106, 90 L. Ed. 2d 69 (1986). The North Carolina Constitution, Article I, Section 26, also prohibits the exercise of peremptory challenges solely on the basis of race. *See State v. Ross*, 338 N.C. 280, 284, 449 S.E.2d 556, 560 (1994). Defendant contends the State's use of a peremptory challenge to remove prospective juror Freeman Reynolds was race-based and is not supported by the record. He asserts Reynolds' responses to questioning demonstrated he had a good layman's understanding of the law requiring him to weigh the circumstances surrounding the crime.

When evaluating a claim of racial discrimination based on the prosecution's use of peremptory challenges, (1) defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race, and if this showing is made; (2) the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case; and (3) the trial court must determine whether defendant has proven purposeful discrimination. *State v. Cummings*, 346 N.C. 291, 308-09, 488 S.E.2d 550, 560 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

In the instant case, the trial court concluded that defendant had not made a *prima facie* showing that the peremptory challenge was exercised on the basis of race, but the trial court permitted the State to make any comments for the record that it chose to make. Where the trial court rules that a defendant has failed to make a *prima facie* showing, our review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges. *State v. Hoffman*, 348 N.C. 548, 554, 500 S.E.2d 718, 722-23 (1998).

One of the factors to review in determining whether a defendant has made a *prima facie* showing that the peremptory challenge was exercised on the basis of race is whether the prosecutor used a disproportionate number of peremptory challenges to strike African-American jurors in a single case. *State v. Gregory*, 340 N.C. 365, 397-98, 459 S.E.2d 638, 656 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Defendant notes the State exercised six of its eight peremptory challenges to excuse blacks, and that number was disproportionate to the fifty to sixty percent of blacks in Halifax County. Defendant claims the trial court also failed to undertake a

further inquiry into the other five black prospective jurors who had previously been peremptorily excused by the State. Not until the State exercised a peremptory challenge against Reynolds, its eighth, did defendant make his first *Batson* challenge. Further, defendant did not make any specific *Batson* challenge to the other five peremptorily excused black prospective jurors, and therefore, the trial court had no obligation to inquire into the reasons for striking those jurors.

Although not dispositive, one factor tending to refute an allegation of peremptory challenges being exercised on the basis of race is the acceptance rate of black jurors by the prosecution. *Id.* at 398, 459 S.E.2d at 656-57. Here, the prosecutor had accepted the first black to enter the jury box, and had also struck whites before striking prospective juror Reynolds.

Other factors to review in determining whether a defendant has made a *prima facie* showing of peremptory challenges being exercised on the basis of race include defendant's race, the victim's race, the race of the State's key witnesses, and whether the prosecutor made racially motivated statements or asked racially motivated questions of black prospective jurors that raise an inference of discrimination. *Gregory*, 340 N.C. at 397-98, 459 S.E.2d at 656. In the instant case, defendant is black; the murdered child victim, Britteny, was black; and the surviving three victims, two of whom were the State's key witnesses, are black. After carefully reviewing the record, we also conclude that the prosecutor did not make any racially motivated comments, nor did he ask racially motivated questions of the black prospective jurors.

We conclude the trial court did not err in finding that defendant failed to make a *prima facie* showing and, thus, the trial court did not err in denying defendant's challenge to the State's use of its peremptory challenges. Additionally, we note the record shows that the jury was composed of four black males, one black female, three white males, and four white females. The alternates were one black female and one black male. Thus, of the fourteen jurors accepted by both sides, seven were black and seven were white. This assignment of error is overruled.

[3] In his third assignment of error, defendant contends the trial court erred in admitting hearsay, bad character, and prior bad acts evidence in the State's case. More specifically, defendant claims the trial court erred in admitting: (1) alleged hearsay statements of DSS

Program Manager, Melody Beaver; (2) alleged hearsay statements of defendant's daughter, Breanca; (3) certain inadmissible statements made to defendant's Etna co-worker, Jimmy Brinson; and (4) statements allegedly violating evidence Rules 403 and 404. "The erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986). Defendant has the burden of showing error and that there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred. N.C.G.S. § 15A-1443(a) (1999).

In the instant case, DSS worker Melody Beaver testified that beginning 8 November 1994, defendant was ordered to pay child support for his three children. On 13 December 1995, approximately one month before Britteny's death, defendant moved to terminate child support payments, stating as a circumstance that both parents were working and that they had been living together for the past few years. Cotton was not at the courthouse when the motion came on for hearing. Defendant explained his story to a district court judge, who temporarily suspended the child support order. The judge further ordered DSS to investigate Cotton for possible welfare fraud and continued the case. DSS investigated the fraud allegation, finding there was no fraud, Cotton was not receiving welfare, and defendant was not living in her home. On 10 January 1996, Beaver told defendant's lawyer that DSS planned to put on evidence in court showing defendant had lied because he was not living with Cotton, and that DSS would seek to have the child support order reinstated. However, this matter was not pursued because defendant was arrested for the murder of Britteny.

Defendant contends Beaver's testimony was hearsay because the information was not really a personal investigation. Also, defendant claims Beaver's testimony is prejudicial because it tends to show motive and bad character, identifying defendant as the perpetrator. Defendant contends that although Beaver personally checked her computer for certain information, she talked only to her staff, who in turn talked to the people in Scotland Neck, where Cotton and her children had lived. Further, defendant claims there were no notes in Beaver's file describing the conversations with people in Scotland Neck.

"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 con-

formity 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) (1999). 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). The State contends one of defendant's motives for killing his child, and attempting to kill his other two children and ex-girlfriend Cotton, was so he would not have to pay child support. Contrary to defendant's assertions, this evidence was not admitted to show his bad character. Instead, it was properly used to show his motive for the murder and attempted murders, and to show the particular circumstances leading up to them.

Moreover, a review of the record shows that Beaver testified several times concerning this information and that defendant at least twice failed to object. Therefore, even if this evidence was deemed to be hearsay, its admission was harmless error since it was already before the jury.

The trial court admitted several statements by defendant's daughter Breanca, who was four years old at the time of the attempted murder but six years old at the time of trial, including a statement that defendant said Cotton was a bad person because she gave her children some bad chicken. The prosecutor informed the trial court he would not be calling Breanca because she was too young. The trial court concluded Breanca was unavailable because of her tender age. During Cotton's testimony, defendant objected to hearsay statements from Breanca concerning the children's physical suffering. Defendant contends the trial court erred by allowing Cotton to testify without personally examining or observing Breanca before it made a determination that Breanca was not available. *See State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 555 (1985). Defendant further claims this testimony was unfairly prejudicial because it tended to show he was trying to cover up his tracks; he was throwing blame on Cotton; and therefore, that he was the perpetrator. Defendant did not assign error to the trial court's ruling on this issue, and therefore, he has abandoned it pursuant to N.C. R. App. P. 28(b)(5). In addition, defendant has failed to show plain error in light of the overwhelming evidence in the record of defendant's guilt.

[4] The State also presented evidence that defendant told an Etna coworker, Jimmy Brinson, that DSS was taking over half his paycheck for child support, and he was tired of paying. Defendant contends this testimony was prejudicial because it showed he had a motive and started to formulate a plan to poison someone, and it therefore led to the conclusion that he was the perpetrator. As previously mentioned, motive and plan are proper methods for use of this type of evidence under Rule 404(b). In addition, the trial court initially sustained defendant's objections regarding this issue and allowed his motions to strike. The trial court further instructed the jury to disregard the witness' answer. Only after the prosecutor framed the questions in a permissible manner did the trial court overrule defendant's objections. This Court presumes that a jury follows a trial court's instructions. *See State v. Trull*, 349 N.C. 428, 455, 509 S.E.2d 178, 196 (1998), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 68 U.S.L.W. 3224 (1999). These statements were properly admitted.

[5] Defendant told Brinson he used to take puppies and kittens, put them in a peanut sack, and drown them. He also told Brinson he saw farmer Josey's dog eat peanuts contaminated with Temik, it was "bad stuff," and it did not take much to make the dog sick. Defendant claims this evidence was used to show only his bad character. However, defendant failed to object to this testimony at trial and has failed to show plain error in light of the overwhelming evidence. This evidence includes defendant's threats to kill Cotton and their children, his trip to the farm to obtain a pesticide he knew was extremely deadly, his showing the pesticide to two people in a brown paper grocery bag, his trip to Cotton's house to put it in the Kool-Aid, and his later refusal to say anything at the hospital about the real reason for his children's grave illness even while medical personnel fought to save their lives. Thus, this assignment of error is overruled.

[6] Fourth, defendant claims the trial court erred in denying his request to instruct the jurors on the element of malice for the charges of first-degree murder by means of poison and attempted first-degree murder by means of poison. *See State v. Johnson*, 317 N.C. 193, 201, 344 S.E.2d 775, 780 (1986). The trial court charged the jury as to the murder of Britteny that if it found beyond a reasonable doubt that defendant intentionally administered a substance known to him to be poison to the victim, thereby proximately causing her death, the jury should find defendant guilty of first-degree murder by means of poison. The trial court repeated the above charge for the three first-degree attempted murders as well.

This Court has previously concluded that N.C.G.S. § 14-17 "separat[es] first-degree murder into four distinct classes as determined by the proof: (1) murder perpetrated by means of poison, lying in wait, imprisonment, starving, or torture; (2) murder perpetuated by any other kind of willful, deliberate, and premeditated killing; (3) murder committed in the perpetration or attempted perpetration of certain enumerated felonies; and (4) murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon." *Johnson*, 317 N.C. at 202, 344 S.E.2d at 781. "Any murder committed by means of poison is automatically first-degree murder." *Id.* at 204, 344 S.E.2d at 782. As this Court has previously stated, "premeditation and deliberation is not an element of the crime of first-degree murder perpetrated by means of poison, lying in wait, imprisonment, starving, or torture; and . . . an intent to kill is not an element of first-degree murder where the homicide is carried out by one of these methods." *Id.* at 203, 344 S.E.2d at 781.

"[M]alice, as it is ordinarily understood, means not only hatred, ill will, or spite, but also that condition of mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life." *State v. Crawford*, 329 N.C. 466, 481, 406 S.E.2d 579, 587 (1991). This Court has already stated that murder by torture, which is in the same class as murder by poison, "is a dangerous activity of such reckless disregard for human life that, like felony murder, malice is implied by the law. The commission of torture implies the requisite malice, and a separate showing of malice is not necessary." *Id.* at 481, 406 S.E.2d at 587-88. We hold that the same reasoning applies for the crime of first-degree murder by poison and conclude that a separate showing of malice is not necessary. Thus, this assignment of error is overruled.

[7] Fifth, defendant claims the trial court erred in denying his request to instruct the jurors on the lesser included offenses of involuntary manslaughter and voluntary manslaughter because they do not require malice. 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. *State v. Brown*, 300 N.C. 731, 735-36, 268 S.E.2d 201, 204 (1980). If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant's

denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense. *Johnson*, 317 N.C. at 205, 344 S.E.2d at 782.

"Involuntary manslaughter has been defined as the unlawful and unintentional killing of another without malice which proximately results from an unlawful act not amounting to a felony [and not] naturally dangerous to human life, or by an act or omission constituting culpable negligence." *Id.* at 205, 344 S.E.2d at 782-83. In the instant case, defendant was not entitled to an instruction on involuntary manslaughter. The evidence presented showed defendant had knowledge of and experience with farm pesticides; he made a trip to the farm to obtain the deadly pesticide used in the murder; he concocted a story as to why he needed the poison; he showed the poison in a brown paper grocery bag to two people; he went to Cotton's house to put it in the Kool-Aid; and as his children lay dying or deathly ill, he failed to say anything at the hospital as to the real reason his children were sick. Since the State's evidence was sufficient to fully satisfy its burden of proving each element of first-degree murder by means of poison and attempted first-degree murder by means of poison, and there was no other evidence to negate these elements other than defendant's denial that he committed the offense, defendant was not entitled to an instruction on the lesser included offense of involuntary manslaughter. *See State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 657-58 (1983), *overruled in part on other grounds by Johnson*, 317 N.C. 193, 344 S.E.2d 775.

Defendant also appears to contend an instruction on voluntary manslaughter should have been given. This contention is not raised in any assignment of error and is therefore abandoned. N.C. R. App. P. 28(b)(5).

Next, defendant claims the trial court erred in allowing prosecutorial misconduct in the sentencing proceeding of this trial concerning: (1) improper "gamesmanship," and (2) an improper closing argument. As a general rule, counsel is allowed wide latitude in the jury argument during the capital sentencing proceeding. *State v. Soyers*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). Counsel is permitted to argue the facts that have been presented as well as reasonable inferences that can be drawn therefrom. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Further, arguments 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*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997).

[8] In the instant case, defendant contends the prosecutor engaged in "abusive gamesmanship" because he put on testimony by defendant's cousin, Mary Ann Pittman, concerning defendant's prior conviction for taking indecent liberties with his cousin's teenage daughter. Defendant claims this evidence was already declared inadmissible by the trial court, but the prosecutor introduced it in order to rebut the testimony of twelve witnesses who testified as to defendant's good character. The prosecutor also called Detective Wheeler to further testify about the conviction for taking indecent liberties. Defendant contends the prosecutor flagrantly misrepresented that the detective was going to testify about his investigation of that case.

A review of the record reveals defendant has failed to show prejudice in light of the jury's prior knowledge, including the testimony of defendant's own character witnesses during the sentencing proceeding, concerning defendant's guilty plea and conviction for indecent liberties. Moreover, the trial court immediately instructed the jury to disregard Pittman's answer when the prosecutor sought to elicit hearsay testimony. Further, the trial court sustained defendant's objection to any further questioning of the detective after he was permitted to state to the jury only that he began his investigation with the Pittman family. Thus, the trial court did not err.

[9] Defendant also claims the prosecutor made an improper closing argument because he undertook to discredit Dr. Claudia Coleman, a clinical psychologist, through insult and unwarranted personal attacks. Defendant points to the prosecutor's claims that: it was amazing what people would do for money, Coleman could not possibly tell what was going on in defendant's mind two years ago, Coleman's report showed nothing but that defendant was sleep deprived, and Coleman ought to be on the Psychic Friends Network.

Defendant failed to object during closing arguments and "the trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 1036 (1999). "Trial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom." *State v. Guevara*,

349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, U.S. , 143 L. Ed. 2d 1013, (1999). "Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976).

Rather than merely focusing on the fact that the witness had been paid, the thrust and bulk of the prosecutor's argument was that the expert testimony did not provide a factual basis for finding that defendant murdered while under the influence of an emotional or mental condition. Consequently, the prosecutor's argument was not so "grossly improper" as to require the trial court to intervene *ex mero motu*.

[10] Next, defendant contends the trial court erred in denying his motion to instruct the jury in the sentencing proceeding about the meaning of life imprisonment. The trial court stated it would "adhere precisely" to the pattern jury instructions. For first-degree murder offenses occurring on or after 1 October 1994, the phrase "without parole" is required when instructing on life imprisonment. N.C.G.S. § 15A-2002 (1999). N.C.G.S. § 15A-2002 provides:

> If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison, without parole.
>
> The judge shall 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.

Id.

The transcript reveals the trial court instructed the jury, verbatim from the pattern jury instruction, that "[i]f you unanimously recommend a sentence of life imprisonment without parole, the Court will impose a sentence of life imprisonment without parole." N.C.P.I.—Crim. 150.10 (1998). In addition, the verdict sheet stated the jurors could choose between "Life Imprisonment Without Parole" or "Death." While we find the trial court's instructions are substantially equivalent to the statutory requirement, the better practice would be to charge precisely as the statute states: "a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002.

Thus, the trial court did not err in failing to give the requested instruction.

[11] Further, defendant contends the trial court erred by failing to submit to the jury in the sentencing proceeding the statutory mitigating circumstance that defendant had no significant history of prior criminal activity pursuant to N.C.G.S. § 15A-2000(f)(1). N.C.G.S. § 15A-2000(b) provides:

> Instructions determined by the trial judge to be warranted by the evidence *shall* be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge *shall* include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) *which may be supported by the evidence*, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

N.C.G.S. § 15A-2000(b) (1999) (emphasis added). Although the better practice is to request submission of a mitigator at trial, if the evidence is sufficient, 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).

"When the trial court is deciding whether a rational juror could reasonably find this mitigating circumstance to exist, the nature and age of the prior criminal activities are important, and the mere number of criminal activities is not dispositive." *State v. Geddie*, 345 N.C. 73, 102, 478 S.E.2d 146, 161 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997). Unadjudicated crimes may properly be considered in determining the sufficiency of the evidence under (f)(1). *State v. Ingle*, 336 N.C. 617, 643, 445 S.E.2d 880, 893 (1994), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995). However, the length of a defendant's criminal history, by itself, is not determinative for purposes of submitting the (f)(1) mitigator. *Jones*, 346 N.C. at 715, 487 S.E.2d at 721.

"A significant history of prior criminal activity for purposes of N.C.G.S. § 15A-2000(f)(1) is one likely to influence the jury's sentence recommendation." *Atkins*, 349 N.C. at 88, 505 S.E.2d at 113. A 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 *State v. Quick*, 337 N.C. 359, 363, 446 S.E.2d 535, 538 (1994)).

In the instant case, defendant did not request that the (f)(1) circumstance be submitted to the jury, thus implying defendant felt his prior history of criminal activity did not warrant its submission. The evidence of defendant's prior criminal activity was a conviction for indecent liberties with a minor approximately one year prior to this offense, previous recent assaults on Cotton, recently communicated death threats against Cotton, recently communicated death threats against Cotton's new boyfriend, and defendant's history of drowning young puppies and kittens. Given the extent of this recent criminal activity, the trial court properly could have determined that no reasonable juror could conclude that defendant's history of prior criminal activity was insignificant.

This case is more similar to cases where this Court has determined the trial courts have correctly not submitted the (f)(1) mitigator. *See, e.g., Atkins*, 349 N.C. at 88, 505 S.E.2d at 114; *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). As in those cases, in the case *sub judice*, "defendant's prior history of criminal activity . . . is mainly related to assaultive behaviors which were primarily directed toward the ultimate victim of his violence and the ultimate cause of his being convicted of murder." *Atkins*, 349 N.C. at 89, 505 S.E.2d at 114. As previously mentioned, the record reveals defendant threatened Cotton because of her new boyfriend and defendant said if he could not have her, then her new boyfriend could not have her either. Defendant also threatened Cotton when he told her he was going to go to her job to pick her up one day, and if he saw her walk out with her new boyfriend, he would shoot them both. The record reveals defendant told two separate co-workers, Brinson and Arrington, that he was going to beat up Cotton's new boyfriend, and he also threatened to kill him.

Further, Cotton's aunt, Carolyn Williams, told officers investigating the case that defendant had threatened Cotton quite a few times and had beaten her a couple of times. Cotton also told Williams that defendant had threatened her since defendant had gone to court on 4 January 1996 concerning the child support matter. Cotton testified that on another occasion, defendant came to her house and

demanded to know with whom she was speaking on the phone. When Cotton said it was her new boyfriend, defendant grabbed the phone and threw it against the wall, breaking the phone. He also threw Cotton down on the sofa and struck her a couple of times in the face with his fists. When Cotton told their daughter Britteny to go across the street to Lassiter's house to call the police, defendant grabbed the child. Cotton told defendant to let go of the child, which he did, and Lassiter came over to see if Cotton was okay. Cotton testified she did not tell the police about the incident because of her shame at being beaten by defendant.

Defendant had a history of violence against Cotton, and he had also previously harmed another child when he took indecent liberties with a family member, his cousin's defenseless minor daughter. Moreover, defendant was still on probation for the conviction for indecent liberties with a minor when he planned and carried out the murder and attempted murders of his ex-girlfriend and their three children. Defendant's history of significant criminal conduct is one likely to influence the jury to recommend death, rather than life. "Combined with the evidence of his other prior criminal activities, these assaultive criminal activities make defendant's case for submission of the (f)(1) mitigating circumstance at least as weak, if not weaker, than the argument which we rejected [in other cases]." *Id.* Given the nature and recency of his record of assault, we cannot say the trial court erred in its determination to decline to submit the (f)(1) mitigator.

[12] Defendant also claims the trial court erred in denying his request for peremptory instructions on the statutory mitigating circumstances that the capital felony was committed while defendant was under the influence of mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, as set forth in N.C.G.S. § 15A-2000(f)(2) and (f)(6), respectively. Even though the trial court refused to give the requested peremtory instruction on the (f)(2) mitigating circumstance that the murder was committed while defendant was under the influence of a mental or emotional disturbance, one or more of the jurors still found it to exist. However, none of the jurors found the (f)(6) mitigator that defendant's ability to conform his conduct to the law was impaired.

A trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted evidence. *See State v. White*, 349

N.C. 535, 568, 508 S.E.2d 253, 274 (1998), *cert. denied*, — U.S. —, 144 L. Ed. 2d 779 (1999). In the instant case, defendant's evidence supporting the (f)(2) and (f)(6) mitigating circumstances was in fact controverted. Defendant's experts both testified defendant had borderline mental intelligence and a reading disorder. However, the psychologist conceded defendant worked, earned his living, had a driver's license, and functioned within the limits of his intelligence. Neither expert and no other witness testified that defendant was in any way enraged or intoxicated at the time of the crimes. In contrast, the State's evidence tended to show defendant cold-heartedly and calmly planned to obtain a pesticide he knew was lethal from the farm where he worked; he did so and showed it to two people; he concocted a story for his need of the poison; he went to Cotton's house and put the poison in the Kool-Aid; he was seen after he had done so and appeared to be normal; he appeared at the hospital cunningly passing the blame to his girlfriend for his children's illness; and as they lay deathly ill or dying, he remained silent as to the actual cause of his children's and former girlfriend's suffering. Because we conclude that the evidence as to the (f)(2) and (f)(6) mitigating circumstances was conflicting, we overrule this assignment of error.

Defendant next raises four additional issues which he concedes this Court has previously decided against his position, including: (1) the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," as set forth in N.C.G.S. § 15A-2000(e)(9), is vague and overbroad; (2) the trial court erred in instructing the jury that it had the duty to impose the death penalty if it found that the mitigators failed to outweigh the aggravators; (3) the trial court erred by its use of the word "may" in sentencing Issues Three and Four; and (4) the trial court erred in instructing that nonstatutory mitigators are not mitigating as a matter of law. 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. Therefore, these assignments of error are overruled.

Having concluded that defendant's trial and capital sentencing proceeding were free of prejudicial error, we must now review the record and determine: (1) whether the evidence supports the aggravating circumstances found by the jury and upon which the sentencing court based its sentence of death; (2) whether the sentence was

entered under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

We have thoroughly reviewed the record, transcript, and briefs in this case. We conclude the record fully supports the aggravating circumstances found by the jury. As aggravating circumstances, the jury found this crime: (1) was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (2) 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). The evidence reveals that defendant coldly and designedly planned and carried out the murder of his child, and attempted to murder his other two children and their mother, his ex-girlfriend, because he did not want to pay child support and because he did not want anyone else to date his former girlfriend. 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 factor. We therefore turn to our final statutory duty of proportionality review.

[13] We begin our proportionality analysis by comparing this case to those cases in which this Court has determined the death penalty to be disproportionate. "One purpose of proportionality review 'is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *Atkins*, 349 N.C. at 114, 505 S.E.2d at 129 (quoting *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)). 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 (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.

The instant case is distinguishable because this Court has emphasized that a murder in the home "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the

surreptitious invasion of an especially private place, one [in which] a person has a right to feel secure.' " *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). In addition, "[w]e note that none of the cases in which the death penalty has been held disproportionate has involved the murder of a small child." *State v. Walls*, 342 N.C. 1, 71, 463 S.E.2d 738, 776-77 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). Further, "[w]e find it significant that none of the cases in which this Court has found the death penalty disproportionate involved multiple child victims." *State v. Billings*, 348 N.C. 169, 191, 500 S.E.2d 423, 436, *cert. denied*, — U.S. —, 142 L. Ed. 2d 431 (1998). "This Court weighs such a factor heavily against this adult defendant, as we have stated before that murders of small children, as well as teenagers, 'particularly shock[] the conscience.' " *Walls*, 342 N.C. at 72, 463 S.E.2d at 777 (quoting State *v. Artis*, 325 N.C. 278, 344, 384 S.E.2d 470, 508 (1989), *sentence judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)). Further, the poisoning caused a long, lingering, painful, and agonizing death of an innocent child. Accordingly, the facts and circumstances distinguish the instant case from those in which this Court held the death penalty disproportionate.

We also compare this case with the cases in which this Court has found the death penalty to be proportionate. While we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty, we have previously stated that we will not undertake to discuss or cite all of these 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 we conclude that this 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. Thus, the sentence of death was neither excessive nor disproportionate.

We therefore conclude that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error, and that the judgment of death recommended by the jury and entered by the trial court for the first-degree murder conviction, as well as the sentences imposed for the three first-degree attempted murder convictions, must be left undisturbed.

NO ERROR.

STATE v. HINNANT

[351 N.C. 277 (2000)]

STATE OF NORTH CAROLINA v. GEORGE ELTON HINNANT

No. 22A99

(Filed 4 February 2000)

1. Evidence— hearsay—victim's statements to clinical psychologist

Testimony by a clinical psychologist recounting an alleged child sexual assault victim's out-of-court statements to her was hearsay where it was offered to prove that defendant committed various sexual offenses against the alleged victim.

2. Evidence— hearsay—medical diagnosis or treatment exception—declarant's intent

To insure the inherent reliability of evidence admitted under the Rule 803(4) medical diagnosis or treatment exception to the hearsay rule, the proponent of such testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment. This holding applies only to trials commencing on or after the certification date of this opinion or to cases on direct appeal. To the extent that cases such as *State v. Jones*, 89 N.C.App. 584, 367 S.E.2d 139 (1988), are inconsistent with this holding, they are overruled.

3. Evidence— hearsay—medical diagnosis or treatment exception—declarant's intent—objective circumstances of record

The trial court should consider all objective circumstances of record surrounding a declarant's statements in determining whether he or she possessed the requisite intent to receive medical treatment for purposes of the medical diagnosis or treatment exception to the hearsay rule.

4. Evidence— hearsay—medical diagnosis or treatment exception—two-part inquiry

Hearsay evidence is admissible under the medical diagnosis or treatment exception to the hearsay rule only when two inquiries are satisfied: (1) the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment and may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent; and (2) the trial court

must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.

5. Evidence— hearsay—medical diagnosis or treatment exception—no intent to obtain treatment

Out-of-court statements made by an alleged child victim of sexual abuse to a clinical psychologist were not made with the intent to obtain medical treatment and thus were not admissible under the medical diagnosis or treatment exception to the hearsay rule where the record does not disclose that the psychologist or anyone else explained to the child the medical purpose of the interview or the importance of truthful answers; the interview was not conducted in a medical environment; and the entire interview consisted of a series of leading questions whereby the psychologist systematically pointed to the anatomically correct dolls and asked whether anyone had or had not performed various acts with the child.

6. Evidence— hearsay—medical diagnosis or treatment exception—statements not pertinent to treatment

Out-of-court statements made by an alleged child victim of sexual abuse to a clinical psychologist were not reasonably pertinent to medical diagnosis or treatment and thus were not admissible under the medical diagnosis or treatment exception to the hearsay rule where the psychologist did not meet with the child until approximately two weeks after the child had received her initial medical examination on the night of the crimes, and the initial examination did not reveal any signs of trauma.

7. Evidence— hearsay—erroneous admission—harmless or prejudicial error

The erroneous admission of hearsay testimony by a clinical psychologist relating statements made to her by a child victim of alleged sexual offenses was not prejudicial error as to defendant's convictions of first-degree sexual offense and taking indecent liberties with a minor. However, the admission of this testimony was prejudicial error as to defendant's conviction of first-degree rape where the psychologist's hearsay testimony was the only noncorroborative evidence of penetration presented at trial.

Justice LAKE concurring.

STATE v. HINNANT

[351 N.C. 277 (2000)]

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 131 N.C. App. 591, 508 S.E.2d 537 (1998), finding no error in a judgment entered 14 March 1997, in Superior Court, Wake County. On 24 June 1999 the Supreme Court retained defendant's notice of appeal as to a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) and allowed discretionary review of additional issues. Heard in the Supreme Court 15 November 1999.

Michael F. Easley, Attorney General, by Kendrick C. Fentress and Amy C. Kunstling, Assistant Attorneys General, for the State.

John F. Oates, Jr., for defendant-appellant.

MARTIN, Justice.

On 19 February 1996 defendant was indicted for one count of first-degree rape, one count of first-degree sexual offense, and one count of taking indecent liberties with a minor. Defendant was tried before a jury at the 10 March 1997 Criminal Session of Superior Court, Wake County. The jury found defendant guilty of all charges. After finding factors in aggravation and mitigation, the trial court sentenced defendant to a consolidated active term of 384 to 460 months. After discovering an incorrect sentence calculation, the trial court entered a corrected judgment and commitment providing for a maximum sentence of 470 months. The Court of Appeals, with one judge dissenting, found no error. *See State v. Hinnant*, 131 N.C. App. 591, 597, 508 S.E.2d 537, 541 (1998). Defendant appealed to this Court as a matter of right based on the dissent below and a constitutional question. On 24 June 1999 we allowed defendant's petition for discretionary review of additional issues.[1]

At trial the state called the five-year-old alleged victim, J., as its first witness. Defendant objected to J. being permitted to testify on the ground that J., being of tender years and limited understanding, could not understand the meaning of the oath. Defendant then made a motion for the trial court to determine whether J. was competent to

1. We note that defendant abandoned review of the admission of hearsay statements made by the alleged victim to Officer Taylor and Theresa Burnett by not presenting arguments or citing authority against their admission in his brief. N.C. R. App. P. 28(a); *State v. Kilpatrick*, 343 N.C. 466, 475, 471 S.E.2d 624, 630 (1996); *Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 481 S.E.2d 349, *disc. rev. denied*, 346 N.C. 281, 487 S.E.2d 551 (1997).

testify. As the state proceeded to conduct *voir dire* of J., J. started crying and had to leave the courtroom. Despite repeated attempts, J. could not be calmed. During a fifteen-minute recess J. broke down crying and screaming.

Because J. could not be calmed, the state called Kim Alexander (Alexander), a clinical social worker for the Wake County Department of Human Resources. Alexander testified that, in her opinion, it was traumatizing and detrimental to J.'s well-being to be in the courtroom with defendant. Thereafter, based on J.'s continued emotional state, the trial court concluded, over defendant's objection, that J. was unable to testify and was, therefore, unavailable as a witness.

The state's evidence at trial tended to show that at the time of the alleged incidents, defendant lived at his mother's home along with his sister, Theresa Burnett (Burnett), Burnett's four-year-old daughter, J., and Burnett's infant daughter, Jaylan. On 16 December 1995 defendant left the residence and walked to a nearby store to drink alcoholic beverages with friends. Around 12:00 p.m. Burnett took J. and Jaylan to meet defendant at the store, and Burnett began drinking. Upon arriving home that afternoon, defendant entered the kitchen to cook dinner, and J. accompanied him. Burnett and Jaylan sat in the living room and watched television. Five or ten minutes later, J. ran into the living room, "running and crying and saying [defendant] had touched her." When asked where defendant had touched her, J. replied that he had touched her "on her butt" and pointed to the area. Burnett called the police, and Officers J.A. Taylor (Officer Taylor) and Sean R. Woolrich (Officer Woolrich) of the Raleigh Police Department responded to the call.

The police arrived around 4:00 p.m. and met defendant, Burnett, and J. on the porch. Burnett and defendant were intoxicated at the time. Burnett told the officers that J. told her defendant touched J.'s buttocks and vagina. J. told Officer Taylor that "[m]y uncle touched my butt this morning. When he touched me, it hurt." J. pointed to her vagina and buttocks to show both officers where defendant had touched her. J. also told Officer Woolrich that defendant put his hands into her pants that morning when she was getting out of bed and that he had also touched her buttocks and vagina when she was playing outside on her bicycle that morning.

The police transported defendant, Burnett, J., and Jaylan to the police station for further interviews. At the police station Burnett was

uncooperative. She told Detective Albert O'Connell that defendant could not have done what J. indicated and that J. "would lie about most anything." Detective O'Connell interviewed J. in a separate room. J. told Detective O'Connell that defendant had hurt her. When asked how he hurt her, J. pointed to her crotch and her buttocks and said, "here and here." The detective handed J. an anatomically correct doll and asked her to show him where she had been hurt on the doll. J. took the clothes off the doll and pointed to the doll's vagina. J. undressed a male doll, pointed to his penis, and said, "he hurt me with that." J. then took the male doll and placed it facedown on top of the female doll.

That evening J. was taken to Wake Medical Center for an external genital examination. The doctor performing the exam reported no signs of trauma to J.'s genitals. A follow-up examination was conducted on 2 January 1996, approximately two weeks after the reported abuse. Prior to receiving follow-up medical attention, J. was interviewed by Lauren Rockwell-Flick (Rockwell-Flick), a clinical psychologist specializing in child sexual abuse.

Rockwell-Flick testified that she talked with J. about the alleged sexual abuse to obtain information for the examining physician in this case, Dr. Vivian Denise Everett (Dr. Everett). Over objection, Rockwell-Flick testified as to what J. told her prior to Dr. Everett's physical examination. Using an anatomically correct doll, Rockwell-Flick asked J. if anyone had ever touched her vagina. J. said defendant "put his hand down there" and "it hurt." Rockwell-Flick asked J. whether defendant had "kissed or licked her any place." J. said defendant had licked her and pointed to her vagina. Rockwell-Flick asked J. if she had seen defendant's penis, and J. said yes. When asked what defendant did with his penis, J. responded, "He took it off." When Rockwell-Flick asked whether defendant ever touched J. with his penis, J. said yes. Rockwell-Flick asked J. where defendant placed it. J. pointed directly between her own legs to her vagina. When asked whether he put it on the inside or the outside, J. said, "the inside."

Dr. Everett performed a follow-up examination of J. after Rockwell-Flick's interview. Dr. Everett was concerned because J.'s hymenal tissue was very narrow, but testified that such a finding does not "definitely mean sexual abuse." Dr. Everett also stated that the exam was "consistent with the history [J.] gave Ms. Flick, which was a history of genital fondling, digital vaginal penetration and cunnilingus."

Alexander began treating J. on 7 May 1996. Alexander was qualified at trial as an expert clinical social worker with an emphasis on sexually abused children. During the course of treatment, J. told Alexander that defendant had touched her and pointed to her vagina and buttocks. Alexander testified J.'s conduct was consistent with that of a child who had been sexually abused because J. "expresses fear and anger toward the perpetrator" and demonstrates some sexualized behavior.

Defendant offered evidence at trial which tended to show as follows: On 16 December 1995 defendant did not see Burnett or J. until they arrived at the store around noon. After returning home, Burnett began arguing with defendant about the whereabouts of her boyfriend, Thomas Rice (Rice). Defendant told Burnett he did not know where Rice was. Defendant then went into the kitchen to cook dinner. According to defendant, he saw J. in the kitchen and told her to get out because grease was popping on the stove. Defendant left food in the kitchen for the others and took his meal into the dining room. The police arrived approximately thirty minutes after defendant finished his meal. Defendant testified that he was not aware Burnett had called the police until he met them on his way out the door. Defendant denied having ever touched J. in an inappropriate fashion.

Defendant also introduced the testimony of his daughter, Doralena Hayes (Hayes). Hayes testified that she arrived at defendant's residence after the alleged incident in the kitchen and heard Burnett and defendant arguing. Burnett told Hayes that defendant had touched J. When Hayes asked J. about the accusation, J. told her that Burnett had told J. to say that because Burnett was upset that Rice had not come home the previous night.

At the conclusion of trial, the jury found defendant guilty of first-degree rape, first-degree sexual offense, and taking indecent liberties with a minor. Defendant appealed.

On appeal to the Court of Appeals, defendant argued that the trial court improperly admitted hearsay testimony into evidence in violation of defendant's right to confront witnesses under the Sixth Amendment Confrontation Clause of the United States Constitution. *See Hinnant*, 131 N.C. App. at 594, 508 S.E.2d at 539. Defendant asserted that the trial court, in order to admit the proffered hearsay evidence, was required to make specific findings of fact concerning the trustworthiness and probative value of J.'s statements. *Id.*

Defendant also argued that the trial court erred in denying his motion to dismiss the charge of first-degree rape at the close of the state's evidence. *Id.* at 596, 508 S.E.2d at 540. Alternatively, defendant argued that if appellate review of the sufficiency of the evidence had been waived, and the trial court's denial of defendant's motion to dismiss did not constitute plain error, the court should consider whether defendant's trial counsel rendered ineffective assistance by failing to file a motion to dismiss at the close of all the evidence. *Id.*

The Court of Appeals found no error in the trial court's admission of the hearsay testimony. Specifically, the Court of Appeals held that the challenged statements fell within firmly rooted exceptions to the hearsay rule and, accordingly, satisfied the Confrontation Clause. *Id.* at 595, 508 S.E.2d at 540. The Court of Appeals also concluded that defendant had waived appellate review of his sufficiency of the evidence claim and that defendant failed to demonstrate that trial counsel was ineffective. *Id.* at 596, 508 S.E.2d at 540-41.

In his dissent, Judge Hunter recognized that, pursuant to Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure, defendant failed to properly preserve for review the issue of the sufficiency of the evidence. *Id.* at 598, 508 S.E.2d at 541. Nonetheless, Judge Hunter opined that the court should invoke Rule 2 of the North Carolina Rules of Appellate Procedure and review the merits of defendant's claim. *Id.* Based on his review of the record, Judge Hunter concluded that the evidence was insufficient to support defendant's first-degree rape conviction. *Id.* at 601, 508 S.E.2d at 543.

Defendant contends before this Court that the Court of Appeals erred in determining that the trial court properly admitted the hearsay testimony of Rockwell-Flick under the medical diagnosis or treatment exception to the hearsay rule. We agree.

[1] " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1999). Hearsay is not admissible except as provided by statute or the Rules of Evidence. N.C.G.S. § 8C-1, Rule 802 (1999). Rockwell-Flick's testimony was hearsay because it recounted J.'s out-of-court statements to her and was offered in evidence to prove the truth of the matter asserted—that defendant committed various sexual offenses against the alleged victim, J. The trial court admitted Rockwell-Flick's testimony under the medical diagnosis or treatment exception

to the hearsay rule. *See* N.C.G.S. § 8C-1, Rule 803(4) (1999). Rule 803(4) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (4) Statements for Purposes of Medical Diagnosis or Treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C.G.S. § 8C-1, Rule 803(4). Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment. *See State v. Aguallo*, 318 N.C. 590, 595-97, 350 S.E.2d 76, 80-81 (1986); *accord United States v. Iron Shell*, 633 F.2d 77, 83 (8th Cir. 1980) (federal rule), *cert. denied*, 450 U.S. 1001, 68 L. Ed. 2d 203 (1981).

Defendant contends the Court of Appeals erred in concluding that the trial court properly admitted Rockwell-Flick's hearsay testimony under Rule 803(4) without first considering J.'s purpose in making statements to Rockwell-Flick. At trial, upon defendant's objection, the trial court questioned Rockwell-Flick about her purpose for interviewing J. The trial court, however, apparently did not consider J.'s purpose in talking to Rockwell-Flick. Based on Rockwell-Flick's claim that she interviewed J. to obtain information for the examining physician, Dr. Everett, the trial court overruled defendant's objection.

This Court has not squarely addressed the question of whether the purpose inquiry under Rule 803(4) is limited to consideration of the declarant's intent. We have recognized, however, that Rule 803(4) is based on the rationale that statements made for purposes of medical diagnosis or treatment are inherently trustworthy and reliable because of the patient's strong motivation to be truthful. *See State v. Jones*, 339 N.C. 114, 145, 451 S.E.2d 826, 842 (1994) (quoting N.C.G.S. § 8C-1, Rule 803(4) official commentary (1992)), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995); *Aguallo*, 318 N.C. at 595, 350

S.E.2d at 79; *State v. Stafford*, 317 N.C. 568, 573, 346 S.E.2d 463, 467 (1986); *State v. Smith*, 315 N.C. 76, 84, 337 S.E.2d 833, 839 (1985). The " '[declarant's] health—even life—may depend on the accuracy of information supplied [to] the doctor.' " Robert R. Rugani, Jr., Comment, *The Gradual Decline of a Hearsay Exception: The Misapplication of Federal Rule of Evidence 803(4), The Medical Diagnosis Hearsay Exception*, 39 SANTA CLARA L. REV. 867, 878 (1999) (quoting 1 John E.B. Myers, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 415 (3d ed. 1992)) [hereinafter Rugani, *The Gradual Decline*]; *see* MCCORMICK ON EVIDENCE § 277, at 488 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK ON EVIDENCE]; Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 260 (1989) [hereinafter Mosteller, *Child Sexual Abuse*].

The rationale we have articulated has been recognized by many jurisdictions. *See, e.g., Iron Shell*, 633 F.2d at 83-84 (patient's motive guarantees trustworthiness of statements); *R.S. v. Knighton*, 125 N.J. 79, 85, 592 A.2d 1157, 1160 (1991) ("[T]he declarant knows that he or she is injured and therefore is motivated to describe accurately his or her symptoms and their source."); *State v. Boston*, 46 Ohio St. 3d 108, 121, 545 N.E.2d 1220, 1234 (1989) ("[T]he child's statement must have been motivated by her desire for medical diagnosis or treatment."); *State v. Barone*, 852 S.W.2d 216, 220 (Tenn. 1993) ("[M]otive of obtaining improved health increases statement's reliability and trustworthiness.").

Based on the rationale underlying Rule 803(4), we have held inadmissible statements to a doctor made solely for purposes of trial preparation rather than diagnosis or treatment. *See Jones*, 339 N.C. at 145-46, 451 S.E.2d at 842; *Stafford*, 317 N.C. at 574, 346 S.E.2d at 467; *State v. Bock*, 288 N.C. 145, 163, 217 S.E.2d 513, 524 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976). In so holding, we recognized that the information the patient gave "lacked the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment." *Stafford*, 317 N.C. at 574, 346 S.E.2d at 467. When the declarant's statements have been motivated by the express purpose of receiving medical treatment, however, we have consistently upheld their admission under Rule 803(4). *See, e.g., State v. Bullock*, 320 N.C. 780, 782, 360 S.E.2d 689, 690 (1987); *State v. Jackson*, 320 N.C. 452, 462, 358 S.E.2d 679, 684 (1987); *Aguallo*, 318 N.C. at 597, 350 S.E.2d at 81; *Smith*, 315 N.C. at 84, 337 S.E.2d at 839.

Some courts, by not requiring a treatment motive on the part of declarant, have expanded the scope of the medical diagnosis or treatment exception beyond the common law moorings of Rule 803(4). *See, e.g., United States v. Joe*, 8 F.3d 1488, 1494 & n.5 (10th Cir. 1993) (explaining that Rule 803(4) requires only reasonable reliance by a physician for admission), *cert. denied*, 510 U.S. 1184, 127 L. Ed. 2d 579 (1994); *Gong v. Hirsch*, 913 F.2d 1269, 1274 n.4 (7th Cir. 1990) ("[A] fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription."); *O'Gee v. Dobbs Houses, Inc.*, 570 F.2d 1084, 1089 (2d Cir. 1978); *State v. Robinson*, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987). *See generally* L. Timothy Perrin, *Expert Witnesses Under Rules 703 and 803(4) of the Federal Rules of Evidence: Separating the Wheat from the Chaff*, 72 IND. L.J. 939 (1997). As a result, the "firmly rooted" status of Rule 803(4) has been questioned. *See* 4 Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE § 442, at 464 (2d ed. 1994) ("Admitting [hearsay] statements because doctors rely on them . . . is highly questionable."); Mosteller, *Child Sexual Abuse* at 290 ("[W]hen a [hearsay] statement is offered . . . exclusively on the basis that a medical expert has relied upon it to form her opinion, the statement is not within a firmly rooted hearsay exception."); Rugani, *The Gradual Decline* at 868 ("the current trend of expanding the . . . medical diagnosis exception is effectively making Rule 803(4) a less 'firmly rooted' and well-established hearsay exception").

The medical diagnosis or treatment exception to the hearsay rule is considered inherently reliable because of the declarant's motivation to tell the truth in order to receive proper treatment. N.C.G.S. § 8C-1, Rule 803(4) official commentary; *Jones*, 339 N.C. at 145, 451 S.E.2d at 842. If a treatment motive on the part of the declarant is not required, however, the jurisprudential basis upon which we conclude that statements of the declarant are inherently reliable is undeniably diminished. It has been observed that evidence admitted under Rule 803(4) without considering the declarant's motive

> has less inherent reliability than evidence admitted under the traditional common-law standard underlying the physician treatment rule. . . . [T]he veracity of the declarant's statements to the physician is less certain where the statements need not have been made for purposes of promoting treatment or facilitating diagnosis in preparation for treatment.

Morgan v. Foretich, 846 F.2d 941, 952 (4th Cir. 1988) (Powell, J., concurring in part and dissenting in part).

[2] To ensure the inherent reliability of evidence admitted under Rule 803(4), we reaffirm our adherence to the common law rationale underlying the rule—that a patient has a strong motivation to be truthful in order to obtain appropriate medical treatment. *See* N.C.G.S. § 8C-1, Rule 803(4) official commentary; *Jones*, 339 N.C. at 145, 451 S.E.2d at 842; *Stafford*, 317 N.C. at 573, 346 S.E.2d at 467. Accordingly, the proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment. Our holding applies only to trials commencing on or after the certification date of this opinion or to cases on direct appeal. To the extent that cases such as *State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988), are inconsistent with our holding, they are overruled.

Having so concluded, we recognize the difficulty of determining whether a declarant understood the purpose of his or her statements. Because of this evidentiary challenge, some courts have refused to apply Rule 803(4) in cases involving young children. *See, e.g.*, *Webb v. Lewis*, 44 F.3d 1387, 1390-91 (9th Cir. 1994), *cert. denied*, 514 U.S. 1128, 131 L. Ed. 2d 1003 (1995); *United States v. White*, 11 F.3d 1446, 1450 (8th Cir. 1993) (insufficient evidence to establish that child-victim understood social worker was conducting an interview in order for her or another to provide medical diagnosis or treatment); *Ring v. Erickson*, 983 F.2d 818, 820 (8th Cir. 1992) (no evidence that child knew she was talking to doctor); *State v. Wade*, 136 N.H. 750, 756, 622 A.2d 832, 836 (1993). *See generally* Krista M. Jee, Note, *Hearsay Exceptions in Child Abuse Cases: Have the Courts and Legislatures Really Considered the Child?*, 19 WHITTIER L. REV. 559, 569 (1998) ("The rationale of the medical treatment exception fails when applied to a child declarant . . . .").

Other courts, while adhering to the common law rationale underlying Rule 803(4), have looked to objective record evidence to determine whether the declarant had the proper treatment motive. *See, e.g.*, *United States v. Barrett*, 8 F.3d 1296, 1300 (8th Cir. 1993); *United States v. Renville*, 779 F.2d 430, 438-39 (8th Cir. 1985); *Boston*, 46 Ohio St. 3d at 121, 545 N.E.2d at 1234. For example, some courts have found the intent requirement satisfied where some adult explained to the child the need for treatment and the importance of truthfulness. *See, e.g.*, *Renville*, 779 F.2d at 438-39 (physician explained purpose of examination to eleven-year-old victim). Others have considered the presence of corroborating physical evidence. *See, e.g.*, *United States*

v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979). The latter example, however, is no longer a viable consideration. The United States Supreme Court has squarely rejected the use of corroborating physical evidence to support the trustworthiness of hearsay testimony. *See Idaho v. Wright*, 497 U.S. 805, 822, 111 L. Ed. 2d 638, 656-57 (1990). "Hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.*

Courts have also considered with whom, and under what circumstances, the declarant was speaking. This Court has stated that Rule 803(4) " 'might' " include " [s]tatements to hospital attendants, ambulance drivers, or even members of the family.' " *Smith*, 315 N.C. at 84, 337 S.E.2d at 839 (quoting N.C.G.S. § 8C-1, Rule 803(4) official commentary); *see* MCCORMICK ON EVIDENCE, at 489. Other courts have recognized that a young child is more likely to possess the requisite treatment motive when speaking to medical personnel. *See, e.g., State v. Harris*, 247 Mont. 405, 411-12, 808 P.2d 453, 456-57 (1991); *State v. Dever*, 64 Ohio St. 3d 401, 410, 596 N.E.2d 436, 444 (1992) ("Once the child is at the doctor's office, the probability of understanding the significance of the visit is heightened and the motivation for diagnosis and treatment will normally be present."), *cert. denied*, 507 U.S. 919, 122 L. Ed. 2d 672 (1993); *State v. Eastham*, 39 Ohio St. 3d 307, 311, 530 N.E.2d 409, 413 (1988) (Brown, J., concurring). In addition, courts have analyzed the surrounding circumstances, including the setting of the interview and the nature of the questioning. *White*, 11 F.3d at 1450; *Barrett*, 8 F.3d at 1300. These objective circumstances provide evidence "that the child understood the [witness'] role in order to trigger the motivation to provide truthful information." *Barrett*, 8 F.3d at 1300.

[3] In our view, the trial court should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4).

The second inquiry under Rule 803(4) is whether the statements of the declarant are reasonably pertinent to diagnosis or treatment. *See* N.C.G.S. § 8C-1, Rule 803(4); *Aguallo*, 318 N.C. at 595-97, 350 S.E.2d at 80-81. Defendant contends that J.'s statements to Rockwell-Flick, a clinical psychologist, made two weeks after J.'s initial medical examination, were not reasonably pertinent to medical diagnosis or treatment.

The common law rationale we have recognized is equally relevant during the second inquiry under Rule 803(4). If the declarant's statements are not pertinent to medical diagnosis, the declarant has no treatment-based motivation to be truthful. We have held, for example, that a victim's statements to rape task force volunteers, when the victim had already received initial diagnosis and treatment, were not reasonably pertinent to medical diagnosis or treatment. *Smith*, 315 N.C. at 86, 337 S.E.2d at 840. The logical inference arising from *Smith* is that Rule 803(4) does not include statements to nonphysicians made after the declarant has already received initial medical treatment and diagnosis. This inference comports with the common law rationale underlying the rule. If the declarant is no longer in need of immediate medical attention, the motivation to speak truthfully is no longer present.

We have also refused to apply Rule 803(4) where the victim was interviewed solely for purposes of trial preparation. *See Stafford*, 317 N.C. at 574, 346 S.E.2d at 467; *Bock*, 288 N.C. at 163, 217 S.E.2d at 524. In such cases, the declarant's statements "lack[] the indicia of reliability based on the self-interest inherent in obtaining appropriate medical relief." *Stafford*, 317 N.C. at 574, 346 S.E.2d at 467.

[4] We hold that hearsay evidence is admissible under Rule 803(4) only when two inquiries are satisfied. First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent. Second, the trial court must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.

[5] In the present case, after thoroughly reviewing the record and transcript, we cannot conclude that J. understood Rockwell-Flick was conducting the interview in order to provide medical diagnosis or treatment. Rockwell-Flick testified that she interviewed J. in order to relay information to Dr. Everett, the examining physician, about what had or had not happened to J. While this testimony provides Rockwell-Flick's motive for obtaining the statements at issue, it sheds no light on the motive of the four-year-old declarant who provided them.

There is no evidence that J. had a treatment motive when speaking to Rockwell-Flick. The record does not disclose that Rockwell-Flick or anyone else explained to J. the medical purpose of

the interview or the importance of truthful answers. *See Renville*, 779 F.2d at 438-39. In addition, the interview was not conducted in a medical environment. Instead, it was held in what Rockwell-Flick described at trial as a "child-friendly" room, one in which all of the furniture was child-sized. In our view, such a setting did not reinforce to J. her need to provide truthful information. *See Barrett*, 8 F.3d at 1300. Therefore, there is no affirmative record evidence indicating that J.'s statements were medically motivated and, therefore, inherently reliable. *See* N.C.G.S. § 8C-1, Rule 803(4) official commentary; *Stafford*, 317 N.C. at 574, 346 S.E.2d at 467; *Bock*, 288 N.C. at 162-63, 217 S.E.2d at 524.

The lack of inherent reliability in J.'s statements is further demonstrated by the manner in which the interview was conducted. The entire interview consisted of a series of leading questions, whereby Rockwell-Flick systematically pointed to the anatomically correct dolls and asked whether anyone had or had not performed various acts with J. "Inherent in this type of suggestive questioning is the danger of planting the idea of sexual abuse in the mind of the child." *Harris*, 247 Mont. at 415, 808 P.2d at 459; *see* Robert G. Marks, Note, *Should We Believe the People Who Believe the Children?: The Need For a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 222 (1995) (discussing dangers of suggestive interview practices).

Because the record fails to demonstrate that J. possessed the requisite intent when speaking with Rockwell-Flick, J.'s statements were not made for purposes of medical diagnosis or treatment.

[6] Likewise, J.'s statements to Rockwell-Flick were not reasonably pertinent to medical diagnosis or treatment. Rockwell-Flick did not meet with J. until approximately two weeks after J. had received her initial medical examination. The initial examination was conducted on the night in question and consisted of an external genital exam. That examination did not reveal any signs of trauma. Rule 803(4) was not "created to except from the operation of the hearsay rule" statements made to a nontreating clinical psychologist two weeks after the alleged victim received initial medical diagnosis. *See Smith*, 315 N.C. at 86, 337 S.E.2d at 840. Therefore, J.'s statements to Rockwell-Flick were not reasonably pertinent to medical diagnosis or treatment.

Because J.'s statements to Rockwell-Flick were not made for purposes of, or reasonably pertinent to, medical diagnosis or treat-

ment, the Court of Appeals erred in determining that Rockwell-Flick's testimony was properly admitted under Rule 803(4).

We note that Rockwell-Flick's testimony may be admissible under the residual exceptions to the hearsay rule. *See* N.C.G.S. § 8C-1, Rules 803(24), 804(b)(5) (1999); *see also Wright*, 497 U.S. 805, 111 L. Ed. 2d 638 (analyzing hearsay statements of child declarant under Idaho's Rule 803(24)); Mosteller, *Child Sexual Abuse*, at 294 (suggesting Rule 803(24) as a more appropriate exception to the hearsay rule in child sexual abuse cases). These exceptions allow the admission of hearsay not falling within a firmly rooted exception but "having equivalent circumstantial guarantees of trustworthiness." N.C.G.S. § 8C-1, Rules 803(24), 804(b)(5). Hearsay may not be admitted under a residual exception, however, unless the trial court makes certain required findings of fact and conclusions of law. *See State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 254-55 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989); *State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 740-41 (1986); *Smith*, 315 N.C. at 92, 337 S.E.2d at 844.

In the instant case, the state does not contend that Rockwell-Flick's testimony was admissible under the residual exceptions. Therefore, we do not address this question.

[7] The erroneous admission of hearsay "is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986). Rather, defendant must show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at . . . trial . . . ." N.C.G.S. § 15A-1443(a) (1999). Concerning defendant's convictions for first-degree sexual offense and taking indecent liberties with a minor, defendant has not met his burden. Based on our review of the evidence of record, there is no reasonable possibility that, absent the trial court's error, a different result would have been reached at trial. Therefore, we affirm the Court of Appeals as to those convictions.

As to defendant's first-degree rape conviction, however, we cannot say that admitting the hearsay evidence was harmless. Rockwell-Flick's improperly admitted hearsay testimony was the only noncorroborative evidence of penetration presented at trial. Therefore, we reverse the decision of the Court of Appeals as to defendant's conviction for first-degree rape and remand this case to the Court of Appeals for further remand to the Superior Court, Wake County, for proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

Justice LAKE concurring.

I concur with the majority's holding that it is the declarant's motivation to receive medical treatment or diagnosis which supports the "inherent reliability" characteristic of the firmly rooted hearsay exception of Rule 803(4). Recognizing the significant interest of society in protecting our children from any type of abuse and the inherent difficulty in determining whether a child's statement was made for the purpose of medical diagnosis or treatment, I am compelled to emphasize that although the testimony as presented in the instant case is not admissible under Rule 803(4), such evidence, if properly obtained, might be admissible under the residual hearsay exceptions, Rule 803(24) (availability of declarant immaterial) and Rule 804(b)(5) (declarant unavailable), as suggested by the majority.

I am further compelled to emphasize the importance of the forethought and proper interview techniques required on the part of child advocates (medical, legal or otherwise) in obtaining statements from children to ensure, to the fullest extent possible, their trustworthiness and the need for trial courts to adequately present findings of fact and conclusions of law supporting that trustworthiness. The standard for admissibility is increased under the residual exceptions to the hearsay rule, as discussed by this Court in *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), and *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). Therefore, planning is necessary to ensure that the admissibility requirements of notice, materiality, trustworthiness, probative value and the interests of justice are met and properly presented.

GASTON COUNTY DYEING MACHINE COMPANY, TAX I.D. NO. 56-02-32800, PLAINTIFF v. NORTHFIELD INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, ROSENMUND, INC., ALLENDALE MUTUAL INSURANCE COMPANY, STERLING WINTHROP, INC., AND STERLING PHARMACEUTICALS, INC., AND INTERNATIONAL INSURANCE COMPANY, DEFENDANTS, AND UNITED CAPITOL INSURANCE COMPANY, INTERVENOR

No. 10PA99

(Filed 4 February 2000)

1. Insurance— comprehensive general liability—occurrence—coverage triggered

Where there was no dispute that contamination of a medical diagnostic dye commenced on 21 June 1992 when a pressure vessel ruptured and a chemical used in the production process leaked into the dye and that the leakage continued until discovery on 31 August 1992, the rupture of the pressure vessel caused all of the ensuing property damage and there was but one "occurrence" that took place when the leak commenced on 21 June for purposes of comprehensive general liability policies insuring the designer-seller and the fabricator of the pressure vessel. Therefore, only the 1 July 1991 to 1 July 1992 policy period was triggered even though the leakage contaminated multiple dye lots extending into the next policy period.

2. Insurance— comprehensive general liability—knowledge of injury-in-fact—coverage triggered

Where the date of the injury-in-fact is known with certainty, comprehensive general liability policies on the risk on that date are triggered. To the extent that *West Am. Ins. Co. v. Tufco Flooring East*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), purports to establish a bright-line rule that property damage occurs "for insurance purposes" at the time of manifestation or on the date of discovery, that decision is overruled.

3. Insurance— comprehensive general liability—damages from single event—single occurrence—coverage triggered

When an accident that causes an injury-in-fact occurs on a date certain and all subsequent damages flow from the single event, there is but a single occurrence, and only liability policies on the risk on the date of the injury-causing event are triggered.

4. Insurance— comprehensive general liability—claims-made policies—occurrence-based policies—excess coverage

A pressure vessel designer-seller's claims-made comprehensive general liability policy was excess over other insurance available to the designer-seller as an additional insured in occurrence-based comprehensive general liability policies issued to the pressure vessel fabricator that provided primary and umbrella excess coverage where coverage under the occurrence-based policies was triggered by damage resulting from a 21 June 1992 pressure vessel leak; the policy year for the occurrence-based policies was 1 July 1991 to 1 July 1992 and for the claims-made policies was 4 October 1991 to 4 October 1992; the "other insurance" clause of the claims-made policy provided that the coverage was excess to other insurance which was effective prior to the beginning of the policy period and which "continued after" the retroactive policy date of 4 December 1986; and the occurrence-based policies were maintained without interruption after 4 December 1986 even though they did not begin before that date.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 131 N.C. App. 438, 509 S.E.2d 778 (1998), affirming in part, reversing in part, and remanding an order signed 3 February 1997 by Jones (Julia V.), J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 17 September 1999.

Yates, McLamb & Weyher, L.L.P., by Barbara B. Weyher; and Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., by Tracy R. Gunn, pro hac vice, for defendant-appellant Northfield Insurance Company.

Dean & Gibson, L.L.P., by Rodney Dean and Barbara J. Dean, for defendant-appellee Liberty Mutual Insurance Company.

Lustig & Brown, L.L.P., by James J. Duggan, pro hac vice; and Henson & Henson, L.L.P., by Perry Henson, Jr., for defendant-appellee International Insurance Company.

Golding, Meekins, Holden, Cosper & Stiles, L.L.P., by Harvey L. Cosper, Jr.; and Sedgwick, Detert, Moran, & Arnold, by Sidney Rosen, pro hac vice, for intervenor-appellant United Capital Insurance Company.

Parker, Poe, Adams & Bernstein L.L.P., by Josephine H. Hicks, on behalf of Hoechst Celanese Corporation, amicus curiae.

Rivkin, Radler & Kremer, by Richard S. Feldman, pro hac vice; and Bennett & Guthrie, L.L.P., by Richard Bennett, on behalf of Commercial Union Insurance Company and Fireman's Fund Insurance Company, amici curiae.

FRYE, Chief Justice.

In this case, the trial court reformed primary and excess policies covering plaintiff so as to afford full coverage to defendant Rosenmund, Inc. (Rosenmund); applied the "injury-in-fact" date in determining when damage to property occurred; concluded that the applicable policy period was a one year period beginning 1 July 1991; and ruled that the policy issued by intervenor was excess to all other coverage available to Rosenmund. The Court of Appeals affirmed in part and reversed in part the trial court's order. We allowed discretionary review to determine the correctness of the Court of Appeals' decision.

This case arises out of a products liability action that was originally filed in the United States District Court for the District of Puerto Rico on 17 December 1992. Sterling Pharmaceuticals, Inc. (Sterling); Sterling Winthrop, Inc.; and Allendale Mutual Insurance Company filed the underlying action to recover damages in excess of $20 million from Gaston County Dyeing Machine Company (Gaston), Rosenmund, and their insurers. The original complaint alleged defects in the design and manufacture of pressure vessels fabricated by Gaston for Rosenmund and sold by Rosenmund to Sterling for use in production of contrast media dyes for diagnostic medical imaging. On 21 June 1992, Sterling modified the production process, increasing the operating pressure in one of the pressure vessels. On 31 August 1992, Sterling discovered that ethylene glycol, a chemical used in connection with the heating process, had leaked into the vessel and contaminated over sixty tons of the contrast media dye.

Liberty Mutual Insurance Company (Liberty Mutual), Northfield Insurance Company (Northfield), and International Insurance Company (International) had issued policies insuring Gaston effective for the policy periods 1 July 1991 to 1 July 1992 and 1 July 1992 to 1 July 1993. For each policy period, Liberty Mutual issued to Gaston a comprehensive general liability (CGL) policy providing $1 million in primary coverage per occurrence and a commercial

umbrella excess liability policy providing $1 million coverage per occurrence. Rosenmund purported to be an additional named insured on the Liberty Mutual policies. Northfield issued to Gaston commercial excess liability policies providing $5 million coverage for the 1991-92 policy period and $9 million for the 1992-93 policy period. International issued to Gaston commercial excess liability policies providing $9 million coverage for the 1991-92 policy period and $5 million for the 1992-93 policy period. The Liberty Mutual, Northfield, and International policies are all "occurrence-based" policies, and the Northfield and International excess policies "follow the form" of the Liberty Mutual umbrella policies. United Capital Insurance Company (United) issued to Rosenmund a separate CGL policy providing $2 million coverage on a "claims-made" basis for claims reported during the 4 October 1991 to 4 October 1992 policy period.

In February 1994, Gaston brought this action for declaratory judgment against all its insurers, the plaintiffs from the underlying action, and Rosenmund. As an additional insurer for Rosenmund, United was allowed to intervene. Northfield filed a parallel declaratory judgment action in Puerto Rico.

Liberty Mutual provided defense to Rosenmund in the underlying action from 8 July 1993 until 23 August 1993, when Liberty Mutual withdrew after determining that the "additional insured" endorsements of the Gaston policies did not cover Rosenmund for products liability. United assumed Rosenmund's defense in the underlying action under its 4 October 1991 to 4 October 1992 CGL policy until 26 January 1996, when Liberty Mutual resumed Rosenmund's defense pursuant to a partial settlement agreement between the two parties.

Later in 1995, the underlying action was resolved by settlement agreement, and Gaston and Rosenmund dismissed their claims against the insurers. The four insurance carriers contributed to a settlement fund of $11 million as follows: Liberty Mutual, $2 million; United, $2 million; Northfield, $5 million; and International, $2 million. Pursuant to a stipulation of the insurers, the following issues were reserved for judicial determination: choice of law and forum; trigger of coverage; priority of coverage; allocation of payments among insurers; and whether Rosenmund was afforded the same coverage as Gaston under the Liberty Mutual, International, and Northfield policies.

In 1996, following settlement of the underlying action, Liberty Mutual, International, and United filed motions for summary judg-

ment in the North Carolina declaratory judgment action. The summary judgment motions were heard at the 5 December 1996 Civil Session of Superior Court, Mecklenburg County, and an additional hearing was held on 17 January 1997.

After determining that there were no issues of material fact and that North Carolina law was applicable to all issues, the trial court found as follows:

> 4. . . . [O]n June 21, 1992 damage occurred to products being manufactured by Sterling Pharmaceuticals as the result of pressure vessel leakage, and that damage continued to result from the same or substantially the same leaking condition from June 21, 1992 until discovery of the damage on August 31, 1992.
>
> 5. . . . [T]here was one "occurrence" as that term is used in all applicable insurance policies.
>
> 6. . . . [T]he "occurrence" of damages in this case took place on June 21, 1992 when the leak damage commenced.
>
> 7. . . . [T]he damages in this case resulted from continuous or repeated exposure to substantially the same general harmful conditions, i[.]e., pressure vessel leakage resulting in the contamination of pharmaceutical dye with ethylene glycol during the manufacturing process at Sterling Pharmaceuticals.
>
> 8. . . . [T]he date upon which damage occurred can be established without question or uncertainty even though the existence of the damage was not immediately discovered. Under these circumstances, the Court finds that applicable North Carolina law is that the "injury-in-fact" that took place on June 21, 1992 triggers the coverages applicable on that date and that the liability of the respective insurance carriers is for the coverages applicable on June 21, 1992 . . . .
>
> 9. . . . [T]he Liberty Mutual policies, the Northfield policy, and the International policy for the period July 1, 1992 to July 1, 1993 are not applicable to the loss in question.
>
> . . . .
>
> 12. . . . Rosenmund is entitled to coverage for the claims of Sterling Pharmaceuticals as an additional insured under the Liberty Mutual primary and excess policies; as such, Rosenmund is also entitled to full coverage for the claims of Sterling

Pharmaceutical[s] under the Northfield and International . . . policies which the Court finds follow form to the Liberty Mutual excess policies.

13. . . . [T]he policies of insurance issued by Liberty Mutual, Northfield, and International are "occurrence" policies, while the policy of insurance issued by United Capitol is a "claims made" policy. The facts are undisputed that the claim made in this case was during the pendency of the United Capitol policy that provided coverage from a period of October 4, 1991 to October 4, 1992. It is undisputed that not only did all damages take place during that period of time, but claims were also duly made to United Capitol during that same policy period. However, the Court finds that the United Capitol policy is excess above the other coverage available to Rosenmund, therefore its coverage is not reached.

. . . .

15. . . . [T]he coverage obligations of the carriers for funding the $11 million settlement on behalf of Gaston and Rosenmund are as follows:

a. Liberty Mutual—primary coverage—$1 million

b. Liberty Mutual—excess coverage—$1 million

c. Northfield—$5 million

d. International n/k/a Westchester—$4 million

16. . . . United Capitol is entitled to reformation of the Liberty Mutual policies to provide Rosenmund with product liability coverage and to a declaration of coverage for Rosenmund for the claims of Sterling Pharmaceuticals as an additional insured under the Liberty Mutual primary and excess policies and under the Northfield and International n/k/a Westchester policies, which follow form to the Liberty Mutual excess policies; and that United Capitol's policy is excess over all other coverages available to Rosenmund. Accordingly, Liberty Mutual must pay all costs of defense for Rosenmund, United Capitol is entitled to reimbursement from Liberty Mutual for its costs of defending Rosenmund, and United Capitol is entitled to reimbursement from International n/k/a Westchester for its contribution toward the settlement of Sterling Pharmaceuticals' claims.

Based on its findings and conclusions, the trial court ordered that United recover $453,443 from Liberty Mutual in defense costs for Rosenmund and $2 million from International, plus interest on both amounts. From this order, International and Liberty Mutual appealed.

The Court of Appeals affirmed that part of the trial court's order reforming the primary and excess policies covering Gaston so as to afford Rosenmund full coverage. However, the Court of Appeals reversed those portions of the trial court's order (1) applying the "injury-in-fact" date in determining when the damage to Sterling's property occurred, (2) concluding that the applicable policy period was 1 July 1991 to 1 July 1992 rather than 1 July 1992 to 1 July 1993, and (3) ruling that the United policy was excess to all other coverage available to Rosenmund. This Court allowed petitions for discretionary review by Northfield and United on 8 April 1999.

We must decide the following issues raised by the two petitions for discretionary review: whether application of an "injury-in-fact" or a "date-of-discovery" trigger of coverage is appropriate where the date of property damage is known and undisputed; whether there was a single occurrence or multiple occurrences triggering the first policy year, the second policy year, or both; and whether Rosenmund's own policy issued by United should be considered excess to or contributing with the Liberty Mutual and International policies issued to Gaston and under which Rosenmund was an additional insured. For the reasons stated below, we reverse the Court of Appeals as to these issues.

We begin by noting the well-established principle that "an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). The rules of construction for insurance policies are likewise familiar:

> As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the

insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978); *see also C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990). We apply these principles to the insurance policies in this case.

The Liberty Mutual CGL policies issued to Gaston contain the following coverage provisions:

SECTION I—COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. . . .

   b. This insurance applies to "bodily injury" and "property damage" only if:

      (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

      (2) The "bodily injury" or "property damage" occurs during the policy period.

The Liberty Mutual CGL policies also contain the following definitions in Section V:

9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

. . . .

12. "Property damage" means:

   a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be

deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

The Liberty Mutual umbrella excess liability policies contain the following provisions:

SECTION I—COVERAGE—EXCESS LIABILITY

1. Insuring Agreement.

a. We will pay those sums in excess of the retained limit that the insured becomes legally obligated to pay as damages because of:

(1) bodily injury;

(2) property damage;

. . . .

to which this policy applies and caused by an occurrence.

. . . .

SECTION IV—DEFINITIONS

. . . .

5. Occurrence means:

a. With respect to bodily injury or property damage[]: an accident, including continuous or repeated exposure to substantially the same harmful conditions . . . .

. . . .

9. Property damage means:

a. Physical injury to tangible property, including all resulting loss of use of that property . . . .

The International and Northfield excess liability policies provided coverage for amounts in excess of coverage in the underlying Liberty Mutual policies and "follow the form" of the Liberty Mutual umbrella excess liability policy.

[1] We begin by examining the two related issues regarding trigger of coverage. There is no dispute[1] that the contamination of Sterling's contrast media dye commenced on 21 June 1992, as a result of the rupture of the pressure vessel and subsequent leakage, and continued until discovery on 31 August 1992. Applying the principles of insurance contract interpretation set forth above, we conclude that the trial court correctly determined that there was one "occurrence" that took place on 21 June 1992 when the leak commenced.

Under the insurance policies at issue in this case, coverage is triggered by "property damage" when the property damage is caused by an "occurrence" and when the property damage occurs during the policy period. The property damage alleged in this case was the contamination of sixty tons of Iohexol, a contrast media dye used for diagnostic medical imaging, valued in excess of $20 million. The applicable Liberty Mutual primary policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Because the term "occurrence" is defined in the policy, we use the specific definition.

However, nontechnical words are to be given their ordinary meaning. An accident is generally considered to be an unplanned and unforeseen happening or event, usually with unfortunate consequences. *See, e.g.*, *Merriam-Webster's Collegiate Dictionary* 7 (10th ed. 1993); *Black's Law Dictionary* 15 (7th ed. 1999). The sudden, unexpected leakage from the pressure vessel, causing release of a contaminant into Sterling's dye product, certainly comes within the ordinary meaning of the term "accident." Further, there is no dispute that all the damage occurred as a result of exposure to the same harmful condition—continued leakage of the contaminant into the dye product. Thus, under the plain language of the insurance policies, the property damage was caused by an occurrence, and property damage occurred on 21 June 1992 when the pressure vessel ruptured. Stated differently, the "injury-in-fact" in this case can be determined with certainty because the cause of the property damage occurred and property damage resulted on 21 June 1992. Therefore, the 1 July 1991 to 1 July 1992 policy period is triggered, even though the contamination continued until discovery of the leak on 31 August 1992.

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1. Although there was some suggestion by one party that the date of the rupture could not be determined, the complaint alleges and the trial court found the date to be 21 June 1992, and no exception was taken to this finding of fact.

[2] Although our Court of Appeals has addressed the trigger of coverage issue, it is an issue of first impression for this Court. We conclude that where the date of the injury-in-fact can be known with certainty, the insurance policy or policies on the risk on that date are triggered. This interpretation is logical and true to the policy language. Further, although other jurisdictions have adopted varied approaches in determining the appropriate trigger of coverage, the injury-in-fact approach is widely accepted. *See, e.g., Dow Chem. Co. v. Associated Indem. Corp.*, 724 F. Supp. 474, *op. supplemented*, 727 F. Supp. 1524 (E.D. Mich. 1989).

We find unconvincing the approach adopted in *West Am. Ins. Co. v. Tufco Flooring East*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), *disc. rev. improvidently allowed*, 332 N.C. 479, 420 S.E.2d 826 (1992), and relied upon by the Court of Appeals in the instant case. In *Tufco*, the Court of Appeals analyzed a CGL policy containing a pollution-exclusion clause to determine whether coverage was available for damage to chicken stored in a cooler and contaminated with styrene released during floor resurfacing work. The Court of Appeals stated four different bases upon which to affirm the trial court's ruling that the pollution-exclusion clause did not exclude coverage. One of the reasons given by the Court of Appeals was its conclusion that "for insurance purposes property damage 'occurs' when it is first discovered or manifested." *Id.* at 318, 409 S.E.2d at 696. As discussed above, it is well-established North Carolina law that the language of the insurance policy controls, and in the instant case, we determine that property damage occurred for purposes of the applicable policies at the time of the injury-in-fact. To the extent that *Tufco* purports to establish a bright-line rule that property damage occurs "for insurance purposes" at the time of manifestation or on the date of discovery, that decision is overruled.

[3] International asserts that if the manifestation or date-of-discovery approach is not accepted, this Court should find that both policy periods are triggered under a "continuous" or "multiple trigger" theory. We decline to do so. In determining whether there was a single occurrence or multiple occurrences, we look to the cause of the property damage rather than to the effect. As noted previously, an "occurrence" is an accident, "including continuous or repeated exposure to substantially the same general harmful conditions." In this case, the rupture of the pressure vessel caused all of the ensuing property damage, even though the damage continued over time, contaminating multiple dye lots and extending over two policy periods. Therefore,

when, as in this case, the accident that causes an injury-in-fact occurs on a date certain and all subsequent damages flow from the single event, there is but a single occurrence; and only policies on the risk on the date of the injury-causing event are triggered. We believe this interpretation is the most faithful to the language and terms of the insurance policy.

For the foregoing reasons, we therefore reverse the Court of Appeals and affirm the decision of the trial court "that the 'injury-in-fact' that took place on June 21, 1992 triggers the coverages applicable on that date and that the liability of the respective insurance carriers is for the coverages applicable on June 21, 1992."

Next, we note again the trial court's ruling that Rosenmund was entitled to reformation of the Liberty Mutual primary and excess policies to provide it with products liability coverage and that Rosenmund was also an additional insured under the International and Northfield excess policies, which follow the form of the Liberty Mutual policies. In its new brief to this Court, Northfield asserts that this issue was decided in error. However, Northfield did not present this issue in its petition for discretionary review, nor has the issue been raised for review by any other party. Further, Northfield simply announces that it "reaffirms that it joins the positions of Liberty Mutual and International regarding this issue, as stated in the Court of Appeals briefs," and does not make an argument or cite authority in support of its position. As this issue is not properly before this Court for review, the decision of the Court of Appeals on the issue of reformation remains undisturbed.

[4] Finally, the trial court ruled that United's policy is excess over all other coverages available to Rosenmund and, therefore, ordered Liberty Mutual to reimburse United for the costs of defending Rosenmund and ordered International to reimburse United for its contribution to the settlement of the Sterling claims. Because the Court of Appeals concluded that the 1992-93 policy year was triggered, it held that the trial court erred in ruling that United's policy was excess. We now must interpret the applicable policies in view of our decision that coverage was triggered in the 1991-92 policy period by a single occurrence. For the reasons that follow, we reverse the Court of Appeals as to this final issue.

As discussed above, Liberty Mutual issued to Gaston "occurrence-based" policies for the policy year 1 July 1991 to 1 July 1992 that provided primary and umbrella excess insurance coverage to

Rosenmund as an additional insured. International also issued an occurrence-based policy for the 1 July 1991 to 1 July 1992 policy year that provided excess insurance to Rosenmund as an additional insured. These policies were triggered by the property damage that occurred as a result of the 21 June 1992 pressure vessel leak. Additionally, United issued to Rosenmund a "claims-made" policy that provided coverage for certain claims made during its 4 October 1991 to 4 October 1992 policy year. The claim in this case, based on the pressure vessel leak, was made during this policy period.

United contends that its claims-made policy is excess to all occurrence-based policies providing coverage for the 1991-92 policy year, while Liberty Mutual and International argue that United's policy provides primary coverage and that United is therefore not entitled to reimbursement. Again, we look to the language of the applicable insurance policies to decide the issue.

Where multiple policies appear to provide coverage to a common insured for the same risk, the insurers' respective obligations to pay are determined by examining each policy on its own terms. This Court stated the general principle in *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967).

> The terms of another contract between different parties cannot affect the proper construction of the provisions of an insurance policy. The existence of the second contract, whether an insurance policy or otherwise, may or may not be an event which sets in operation or shuts off the liability of the insurance company under its own policy. Whether it does or does not have such effect, first[,] requires the construction of the policy to determine what event will set in operation or shut off the company's liability and, second, requires a construction of the other contract, or policy, to determine whether it constitutes such an event.

Id. at 346, 152 S.E.2d at 440; *see also Reliance Ins. Co. v. Lexington Ins. Co.*, 87 N.C. App. 428, 436, 361 S.E.2d 403, 408 (1987) (noting North Carolina rule of construing insurance policies independent of one another).

We begin with the Liberty Mutual CGL policy, which provides, in part, as follows:

SECTION IV—COMMERCIAL GENERAL LIABILITY CONDITIONS

. . . .

4. Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover under Coverage A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. . . .

b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

(1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(2) That is Fire insurance for premises rented to you; or

(3) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I).

By its express terms, the Liberty Mutual CGL policy is primary unless there exists other insurance as identified in subsection (1) or (2), set out above, or if the loss is of a specific type identified in subsection (3). The United CGL policy issued to Rosenmund is not "other insurance" of the type specified in the Liberty Mutual policy, nor is the loss of a type that would cause the Liberty Mutual policy to be considered excess. Therefore, the Liberty Mutual CGL policy provides primary insurance for the covered property damage in this case.

Nonetheless, Liberty Mutual contends that United is a co-primary insurer because United issued a CGL policy to Rosenmund intended to provide primary liability coverage, including products liability coverage, and charged Rosenmund a premium consistent with that coverage. Therefore, contends Liberty Mutual, United must share the cost of defending Rosenmund. However, United's policy also contains an "other insurance" clause, which is identical to the one in the Liberty Mutual policy except for the following additional provisions under section 4.b.:

b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

(1) That is effective prior to the beginning of the policy period shown in the Declarations of this insurance and applies to "bodily injury" or "property damage" on other than a claims-made basis, if:

(a) No Retroactive Date is shown in the Declarations of this insurance; or

(b) The other insurance has a policy period which continues after the Retroactive Date shown in the Declarations of this insurance[.]

(Emphasis added.) Therefore, we examine United's "other insurance" clause to determine what event(s) bring it into operation. *See Allstate Ins. Co.*, 269 N.C. at 346-47, 152 S.E.2d at 440-41.

There is no dispute that the 1 July 1991 to 1 July 1992 policy issued by Liberty Mutual was "effective prior to" United's 4 October 1991 to 4 October 1992 policy. Likewise, it is clear that the occurrence-based policy issued by Liberty Mutual applies to property damage "on other than a claims-made basis." However, the parties contest the meaning of section 4.b.(1)(b) in United's policy. Liberty Mutual asserts that its policy does not have a policy period that "continues after" 4 December 1986, the retroactive date in the United policy, because the Liberty Mutual policy did not exist before that date. United, on the other hand, asserts that the Liberty Mutual policy does continue after 4 December 1986, because the words "continues after" do not necessarily imply "begins before."

Following the usual rules of construction, we use a term's ordinary meaning if no specific definition is contained within the policy. *See Woods*, 295 N.C. at 505-06, 246 S.E.2d at 777. The word "continue" is not defined in the policy, but continue is generally understood to mean to maintain without interruption. *See, e.g., Merriam-Webster's Collegiate Dictionary* 251. The Liberty Mutual policy was in effect from 1 July 1991 to 1 July 1992 and, therefore, was maintained without interruption *after* 4 December 1986, the retroactive date of United's policy. It is unnecessary to imply a requirement that the other insurance begin before the retroactive date in order to effec-

tively determine that other insurance "continues after" the retroactive date.

Further, we consider a policy provision in context so that various terms of a policy are harmoniously construed. *See Woods*, 295 N.C. at 506, 246 S.E.2d at 777. In section 4.b.(1), the United policy contains a requirement that the other insurance "is effective prior to the beginning of the policy period shown in the Declarations of this insurance," which is 4 October 1991. Thus, the United policy defines the time frame within which the existence of "other insurance" causes United's coverage to be excess. The other insurance must be effective prior to 4 October 1991, and it must continue after 4 December 1986. Therefore, the Liberty Mutual CGL policy effective 1 July 1991 to 1 July 1992 is "other insurance" under the United policy.

Because the existence of the Liberty Mutual primary policy causes United's "other insurance" clause to be effective, the United policy is not co-primary as contended by Liberty Mutual. The United policy, by operation of its other insurance provision, is excess to the Liberty Mutual policy. Therefore, even though the United policy contains a standard insuring agreement found in most primary CGL policies, which would require it to defend Rosenmund against any suit for damages, in this case the following provision in the United policy takes precedence:

> b. Excess Insurance
>
> . . . .
>
> When this insurance is excess, we will have no duty under Coverages A or B to defend any "claim" or "suit" that any other insurer has a duty to defend.

International also contends that United provided primary coverage to Rosenmund and asserts that because its policy is a "pure" excess policy, it can never be made primary to United's "primary" policy. International is correct that its 1 July 1991 to 1 July 1992 occurrence policy is an "excess" insurance policy. Its insuring agreement provides that International will "indemnify the insured for that amount of loss which exceeds the amount of loss payable by underlying policies described in the Declarations." Clearly, the International policy was intended to cover losses only in excess of those covered by underlying insurance. However, the United policy is not listed in the International policy's declarations as an "underlying policy," and therefore, International did not issue its excess policy

contingent upon the existence of the United policy. We disagree with International's assertion that its policy is in some way inherently excess to the United policy.

Further, for the same reasons articulated earlier, the International 1991-92 policy is "other insurance" by the terms of the United policy. The International policy is an occurrence-based policy, effective before 4 October 1991, and it continues after 4 December 1986. The United policy specifically provides that it is excess over any other insurance "whether primary, *excess*, contingent or on any other basis." (Emphasis added.)

The International policy also contains an "other insurance" clause, which provides as follows:

> K. Other Insurance. If other valid and collectible insurance is available to the insured which covers a loss also covered by this policy, other than insurance that is specifically purchased as being in excess of this policy, this policy shall operate in excess of, and not contribute with, such other insurance.

However, in this case, because the United policy is excess, it is not "available" within the meaning of the International policy's "other insurance" clause.

For the foregoing reasons, we reverse the Court of Appeals on the issue of whether the United policy was excess to other coverage available to Rosenmund.

In sum, the portion of the Court of Appeals' decision holding that reformation of the Liberty Mutual policies to provide Rosenmund with products liability coverage was appropriate remains undisturbed. We reverse the remainder of the Court of Appeals' decision and hold (1) that an "injury-in-fact" trigger of coverage is appropriate in this case, where the date of property damage is known and undisputed; (2) that there was a single occurrence triggering the 1 July 1991 to 1 July 1992 policy year; and (3) that the policy issued to Rosenmund by United is excess to the Liberty Mutual and International policies issued to Gaston and under which Rosenmund was an additional insured.

REVERSED.

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

UNION CARBIDE CORPORATION v. MURIEL K. OFFERMAN, SECRETARY OF REVENUE

No. 453A98-2

(Filed 4 February 2000)

Taxation— reverted pension funds—functional test—nonbusiness income

Reverted funds from a corporation's overfunded pension plan resulting from gains on investment do not constitute taxable business income under the "functional test" because the corporation did not acquire, manage, or dispose of any corporate property but held only a contingent property right in the excess funds in the event of a plan termination; the contingent property right was not integral or essential to the corporation's business of making and selling alloys and chemicals; and the assets of the pension fund were not used to generate income in the regular business operations. Rather, the reverted funds were investment income taxable by the corporation's domicile state. N.C.G.S. § 105-130.4(a)(1).

Justice LAKE dissenting in part.

Justice FREEMAN joins in this dissenting opinion.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals,132 N.C. App. 665, 513 S.E.2d 341 (1999), after reconsideration in light of *Polaroid Corp. v. Offerman*, 349 N.C. 290, 507 S.E.2d 284 (1998), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 671 (1999), affirming its prior, unpublished decision, 130 N.C. App. 761, 508 S.E.2d 847 (1998), which affirmed in part, reversed in part, and remanded summary judgment for plaintiff entered 5 May 1997 by Farmer, J., in Superior Court, Wake County. Heard in the Supreme Court 12 October 1999.

Alston & Bird LLP, by Jasper L. Cummings, Jr.; and Morrison & Foerster, by Paul H. Frankel, pro hac vice, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Kay Linn Miller Hobart, Assistant Attorney General, for defendant-appellant.

Multistate Tax Commission, by Paull Mines, General Counsel, and Roxanne Bland, Counsel, amicus curiae.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Samuel M. Taylor, on behalf of Committee on State Taxation, amicus curiae.

WAINWRIGHT, Justice.

Union Carbide Corporation ("Union Carbide") is chartered under the laws of the State of New York, having its principal place of business in Danbury, Connecticut. Union Carbide manufactures and sells alloys, chemicals, industrial gases, and plastics. A portion of this business is administered in North Carolina.

Since 1951, Union Carbide has maintained and is the sponsor of a pension plan for its employees. This plan is a qualified plan under the applicable Internal Revenue Code provisions. *See* 26 U.S.C. § 401(a) (1982 & Supp. 1985). The pension plan defined benefits to be received by Union Carbide employees upon retirement and employed a trust fund from which all the obligations would be paid. Union Carbide funded the pension plan through contributions from its general business earnings in amounts based on the expected needs of the plan to meet its obligations to its employees.

In 1984, there was a catastrophic gas leak at Union Carbide's facility in Bhopal, India. As a result, Union Carbide's stock prices plummeted. Union Carbide adopted a restructuring plan in order to prevent a hostile takeover, which could have resulted in significant layoffs. The restructuring plan consisted of "spinning off" excess funds from the pension plan not needed to cover benefits for current employees, purchasing annuities with the spun-off assets to pay benefits to retired employees, and distributing the remainder to shareholders to increase stock prices.

In 1985, actuarial consultants for the pension plan determined the plan was over funded because the trust's assets substantially exceeded the value of benefits earned by employees covered by the plan. The plan was over funded largely due to superior investment decisions. In situations where there is an over-funded plan, the Internal Revenue Code allows excess pension funds to be reverted to the plan sponsor, here Union Carbide. 26 C.F.R. § 1.401-2(b)(1) (1985). In December 1985, Union Carbide obtained the necessary authorization to cause a reversion of excess funds from the pension plan.

Union Carbide used a portion of the reverted funds to purchase annuities to pay benefits to retired employees. A balance of five hundred million dollars of the funds reverted to Union Carbide. Union Carbide, on its 1985 federal tax return, recognized the reverted funds as ordinary income for federal tax purposes. Union Carbide reported the reverted funds as nonbusiness, nontaxable income on its 1985 corporate tax return in North Carolina and allocated the reverted income entirely to Connecticut, its state of domicile.

The North Carolina Department of Revenue (DOR) audited Union Carbide's corporate tax return and reclassified the reverted funds as business income, apportionable to North Carolina pursuant to N.C.G.S. § 105-130.4(i). DOR's tax assessment included the tax owed plus interest and a penalty. On 17 November 1992, Union Carbide paid DOR $243,114.14, and on 8 April 1996, Union Carbide paid DOR $517,115.35, for a total payment of $760,229.49. Thereafter, on 17 July 1996, Union Carbide filed suit to obtain a refund of the taxes paid.

Both Union Carbide and DOR moved for summary judgment in Wake County Superior Court. The trial court held there were no genuine issues of material fact, granted Union Carbide's motion for summary judgment, and ordered DOR to pay plaintiff $760,229.49 with interest from the dates of payment.

DOR appealed to the Court of Appeals from the order granting Union Carbide's motion for summary judgment and denying DOR's motion for summary judgment. In an unpublished opinion, the Court of Appeals held, *inter alia*, the reverted funds were not business income to Union Carbide under the "transactional test" defined in *Polaroid Corp. v. Offerman*, 128 N.C. App. 422, 496 S.E.2d 399 (1998) (*Polaroid I*), because the reversion of excess pension plan funds was not a part of Union Carbide's regular trade or business. *Union Carbide Corp. v. Offerman*, 130 N.C. App. 761, 508 S.E.2d 847 (1998) (*Union Carbide I*).

This Court allowed review of *Union Carbide I* for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Polaroid Corp. v. Offerman*, 349 N.C. 290, 507 S.E.2d 284 (1998) (*Polaroid II*), *cert. denied*, — U.S. —, 143 L. Ed. 2d 671 (1999), which identified a "transactional test" and a "functional test" in the definition of "business income." *Union Carbide Corp. v. Offerman*, 349 N.C. 534, — S.E.2d — (1998) (*Union Carbide II*).

A brief review of the *Polaroid* case is instructive in the instant case. In *Polaroid I*, Polaroid Corporation (Polaroid) collected a judgment against Eastman Kodak Corporation (Kodak) for Kodak's infringement of Polaroid's patents. *Polaroid I*, 128 N.C. App. at 423, 496 S.E.2d at 400. Polaroid classified the judgment proceeds as "nonbusiness income" for income tax purposes. *Id.* DOR disagreed and reclassified the judgment proceeds as "business income" taxable in North Carolina. *Id.* Polaroid paid the assessment and filed suit to obtain a refund. *Id.* The trial court granted summary judgment for DOR. *Id.*

On appeal, the Court of Appeals reversed and ordered summary judgment in favor of Polaroid. The Court of Appeals based its decision on the definition of "business income," which provides:

> income arising from transactions and activity in the *regular course* of the corporation's *trade or business* and includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute *integral* parts of *the corporation's regular trade or business operations.*

N.C.G.S. § 105-130.4(a)(1) (1999) (emphasis added). The Court of Appeals held business income "aris[es] from transactions and activity in the regular course of the corporation's trade or business" (the "transactional test"), while the phrase beginning with "and includes" provides examples of what fits within the definition. *Polaroid I*, 128 N.C. App. at 424-25, 496 S.E.2d at 400-01. Utilizing this interpretation, the Court of Appeals ordered a refund for Polaroid. *Id.* at 427, 496 S.E.2d at 402.

On review of *Polaroid I*, this Court reversed the Court of Appeals, holding the portion of the definition after the words "and includes," was a "functional test," and was an additional, distinct test for determining business income, as opposed to examples of business income. *Polaroid II*, 349 N.C. at 297-301, 507 S.E.2d at 290-93. As a result, business income is now classified according to the "transactional test" and the "functional test."

On remand, in the instant case, the Court of Appeals addressed only the issue of whether the reverted funds are business income or nonbusiness income under the two-prong test of *Polaroid II*. *See Union Carbide Corp. v. Offerman*, 132 N.C. App. 665, 513 S.E.2d 341

(1999) (*Union Carbide III*). The Court of Appeals unanimously held the reverted funds were not business income under the "transactional test" because: (1) the reversion of excess funds, not the operation of the pension plan, created the income; (2) the removal of funds from the over-funded pension plan was a rare and extraordinary event; and (3) no such removal occurred before or since the reversion in 1985. *Id.* at 667-68, 513 S.E.2d at 343. A majority of the Court of Appeals also held any income derived from the reverted funds was nonbusiness income under the "functional test" defined in *Polaroid II* because: (1) Union Carbide did not own any interest in the pension plan trust; (2) the pension plan, while an aspect of a compensation package, was not essential to Union Carbide's chemical business; and (3) Union Carbide did not rely on the employee pension plan to create corporate income. *Id.* at 669, 513 S.E.2d at 344. The dissent stated the income from the reverted funds was business income under the functional test because: (1) the goal of attracting and retaining qualified employees is clearly integral to the successful operation of a business; (2) Union Carbide, in deducting its contributions as "necessary business expenses," cannot later contend the pension plan was not necessary to its business; (3) Union Carbide's rights to withdraw excess funds and to direct investments satisfy the "acquisition, management, and/or disposition" portion of the functional test; and (4) this result is not fundamentally unfair because Union Carbide deducted the contributions from business income but then recaptured a substantial portion of the funds and classified them as nonbusiness income, with North Carolina seeking to tax only the portion representing contacts within North Carolina. *Id.* at 671-72, 513 S.E.2d at 345-46 (Horton, J., dissenting).

In DOR's appeal as of right to this Court, our review is limited to the sole issue presented which is whether the entire reversion of pension plan contributions constitutes business income under the "functional test" as first described in *Polaroid II*.

Following our discussion in *Polaroid II*, the instant case is, in essence, a case of statutory construction. It is well settled 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 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 John M. Strong, North Carolina Index 2d *Statutes* § 5 (1968)).

An important function of statutory construction "is to ensure accomplishment of the legislative intent." *Polaroid II*, 349 N.C. at 297, 507 S.E.2d at 290. We first look to the words chosen by the legislature and "if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 896 (1998). In *Polaroid II*, this Court analyzed the plain language of N.C.G.S. § 105-130.4(a)(1) and concluded the decision of the General Assembly to utilize different language in the two clauses of the statute evidences its intention to define business income with two distinct tests. *Polaroid II*, 349 N.C. at 298, 507 S.E.2d at 291. Accordingly, this Court held the plain language of N.C.G.S. § 105-130.4(a)(1) provides for a "transactional test" and a "functional test" in determining whether certain funds are business income. *Id.* at 301, 507 S.E.2d at 293.

The 1985 version of N.C.G.S. § 105-130.4(a)(1) is identical to the 1989 statute analyzed in *Polaroid II*. Thus, as only the application of the "functional test" is here on review, we analyze the present fact situation under the "functional test" described in *Polaroid II*.

Under the "functional test," business income "includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute *integral parts of the corporation's regular trade or business operations*." N.C.G.S. § 105-130.4(a)(1) (emphasis added).

In analyzing the plain language of N.C.G.S. § 105-130.4(a)(1), this Court in *Polaroid II* first noted "the phrase 'acquisition, management, and/or disposition' contemplates the indicia of owning corporate property.' " *Polaroid II*, 349 N.C. at 301, 507 S.E.2d at 292. The pension plan in the instant case was not Union Carbide's property. Union Carbide was the plan's sponsor, not its owner. Therefore, Union Carbide did not acquire, manage, and/or dispose of any corporate property. Union Carbide held only a contingent property right in the excess funds in the event of a plan termination.

Additionally, in *Polaroid II*, we defined "integral" as " 'essential to completeness.' " *Id.* (quoting *Merriam-Webster's Collegiate Dictionary* 607 (10th ed. 1993)). In the instant case, the contingent property right was not integral or essential to Union Carbide's business of making and selling alloys and chemicals.

Moreover, the phrase "regular trade or business operations" refers to business operations done in a recurring manner, or at fixed

or uniform intervals. *See Merriam-Webster's Collegiate Dictionary* 985 (10th ed. 1999). In the instant case, the assets of the pension plan were not used to generate income in the regular business operations. The assets were not working capital. The assets were not used as collateral in borrowing. The assets were not actively traded. Finally, the assets were not relied upon to purchase equipment or support research and development. Thus, the reversion of excess funds by Union Carbide, a one-time occurrence, not a recurring event, was not part of Union Carbide's "regular trade or business operations."

In sum, the assets were not *essential* to Union Carbide's regular trade or business operations. The assets were merely surplus investment assets which were not needed to meet the obligations of the pension plan. Thus, Union Carbide's contingent property right in the excess pension plan funds does not meet the functional test of business income. The plan funds were not integral to Union Carbide's regular trade or business operations of making and selling alloys, chemicals, industrial gases, and plastics. The plan funds, which produced the income at issue, functioned as an investment for the benefit of Union Carbide employees.

As the reverted funds do not constitute business income under the transactional test or the functional test, Union Carbide properly classified the funds as nonbusiness income on its North Carolina tax return. The dissent below points out that Union Carbide deducted its contributions as "necessary business expenses," thereby reducing the amount of business income subject to state and federal taxation, and should not be able to regain a substantial portion of the funds and claim they were not integral to its business operations. However, Union Carbide reported the reverted excess funds as ordinary income on its federal tax return and as taxable income on its Connecticut tax return, the state of domicile. The reverted funds are not business income, but rather are investment income taxable by the domicile state. Moreover, whether or not the funds were classified as "necessary business expenses," they were not used "in the regular course of the corporation's trade or business" and were not "integral" to "the corporation's regular trade or business operations" in North Carolina. Therefore, Union Carbide did not have to pay income tax on the reverted funds in North Carolina.

If, assuming *arguendo*, the pension plan was Union Carbide's property, then the acquisition, management, and/or disposition of the pension plan did not constitute an integral part of Union Carbide's

regular trade or business operations. While the plan may have assisted Union Carbide in attracting more qualified employees, the pension plan itself is not essential to Union Carbide's regular trade or business operations of producing alloys and chemicals. Moreover, while there exists a possibility that some of the reverted funds consisted of principle which had been deducted as business expenses by Union Carbide, rather than merely gains on investment, we are limited to the matters of record and are unable to apportion any unknown amounts.

Accordingly, under the plain language of the functional test of N.C.G.S. § 105-130.4(a)(1), the reversion of excess pension plan funds was not business income to Union Carbide. For these reasons, the decision of the Court of Appeals is

AFFIRMED.

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

Justice LAKE dissenting in part.

Although I concur with the majority's opinion that reverted pension funds resulting from gains on investment are nonbusiness income, I do not agree that this conclusion should be broadly extended to all pension fund reversion dollars.

In applying the "transactional test" or the "functional test" in determining whether income is business or nonbusiness income, it is important to establish the origin of the income. In its opinion, the majority states that Union Carbide's plan was over funded "largely due to superior investment decisions." It is my opinion that to the extent the flow-back of the funds resulted from an occurrence other than gains on investment, such as corporate restructuring, pension plan restructuring or funding in excess of the plan's requirements, those dollars should be "flowed back" to the state from which they had previously been deducted as business expense, thereby decreasing taxable income in that state. A flow-back in this manner would not only allow for the consistent treatment of dollars as "business expense" when deducted and "business income" when flowed back, but would ensure that corporations cannot manipulate their earnings by redirecting reversion funds to a state with a lower state tax rate.

In the instant case, it does not appear that all of Union Carbide's reversion funds resulted from gains on investment. Therefore, it is my opinion that the case should be remanded for a determination, to the extent possible, of what portion of the reversion resulted from gains on investment and what portion resulted from a flow-back of previously deducted business expense. The portion previously deducted as business expense in North Carolina should be flowed back to this state as taxable income.

Justice FREEMAN joins in this dissenting opinion.

CHARLIE STEVE SPRUILL v. LAKE PHELPS VOLUNTEER FIRE DEPARTMENT, INC. AND CRESWELL VOLUNTEER FIRE DEPARTMENT, INC.

No. 87PA99

(Filed 4 February 2000)

Immunity— rural fire department—negligence—statutory immunity

The statute affording limited liability to firemen, N.C.G.S. § 58-82-5(b), exempts a rural fire department from liability for ordinary negligence when the fire department performs acts which relate to the suppression of a reported fire, even though such acts do not occur at the scene of the fire. Therefore, two volunteer rural fire departments were immune from liability under the statute for alleged negligence in failing to warn plaintiff motorist of a traffic hazard created when water spilled on the roadway by the fire departments while filling the tanks of their fire trucks at a hydrant one-half mile from the fire to which they were responding froze on the roadway, and this ice caused the vehicle driven by plaintiff to skid off the roadway into a ditch bank.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 132 N.C. App. 104, 510 S.E.2d 405 (1999), reversing an amended order of summary judgment entered 10 December 1997 by Griffin, J., in Superior Court,

Washington County, and remanding for trial on the remaining issues. Heard in the Supreme Court 15 September 1999.

Hardee & Hardee, by G. Wayne Hardee and Charles R. Hardee, for plaintiff-appellee.

Baker, Jenkins, Jones & Daly, P.A., by Kevin N. Lewis and Ronald G. Baker, for defendant-appellant Lake Phelps Volunteer Fire Department, Inc.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for defendant-appellant Creswell Volunteer Fire Department, Inc.

LAKE, Justice.

The question presented for review is whether the statute affording limited liability to firemen, N.C.G.S. § 58-82-5, exempts a rural fire department from liability for ordinary negligence when a fire department performs acts which relate to the suppression of a reported fire, even though such acts do not occur at the scene of the fire. We conclude that it does. Accordingly, we reverse the decision of the Court of Appeals.

Plaintiff made the following basic allegations in the complaint initiating this action. Defendants are Lake Phelps Volunteer Fire Department, Inc. (Lake Phelps) and Creswell Volunteer Fire Department, Inc. (Creswell). On 10 March 1996, defendants responded to a fire in the vicinity of rural paved road 1149 in Washington County. While responding to this fire, defendants filled the tanks of their fire trucks from a hydrant approximately one-half mile from the fire, and in so doing, defendants spilled water on rural paved road 1149 from their vehicles or hoses. This spilled water then froze on the pavement of this road. At approximately 3:00 a.m. on 10 March 1996, plaintiff was operating a 1995 Chevrolet Corvette in this vicinity on rural paved road 1149. Plaintiff's car hit this ice, skidded and ran off the roadway, and collided with a ditch bank on the side of the road. Plaintiff sustained personal injuries and property damage as a result of this accident.

On 19 February 1997, plaintiff instituted this action against defendants Lake Phelps and Creswell to recover damages for his resulting personal injuries and property damage. On or about 25 March 1997, defendant Creswell filed a Rule 12(b)(6) motion to dismiss, asserting immunity. On 1 April 1997, defendant Lake Phelps filed its answer in which it denied all pertinent allegations. On 8 April

1997, defendant Lake Phelps filed an amendment to its answer in which it added the defenses of immunity and failure to state a claim upon which relief can be granted. On 8 April 1997, defendant Lake Phelps also filed a Rule 12(b)(6) motion to dismiss. On or about 16 April 1997, defendant Creswell filed an amended motion to dismiss. On 16 April 1997, plaintiff filed a motion for leave to amend his complaint.

Plaintiff's motion to amend and defendants' motions to dismiss were heard on 10 July 1997 in Superior Court, Washington County. The trial court allowed plaintiff's motion to amend his complaint, and the amendment was filed 11 July 1997. On 23 July 1997, the trial court entered an order dismissing plaintiff's action against defendant Lake Phelps, and on 4 August 1997, the trial court entered an order dismissing plaintiff's action against defendant Creswell. The trial court then entered an amended order on 10 December 1997 which superseded its two prior orders of dismissal and granted summary judgment in favor of both defendants. Plaintiff appealed to the Court of Appeals.

The Court of Appeals reversed the trial court's order granting summary judgment. *Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 132 N.C. App. 104, 510 S.E.2d 405 (1999). Defendant Lake Phelps and defendant Creswell each petitioned this Court for discretionary review. On 8 April 1999, this Court entered orders allowing discretionary review as to both defendants. Defendants contend that the Court of Appeals erred in reversing the trial court's order of summary judgment for defendants which was entered on the ground that N.C.G.S. § 58-82-5(b) provides immunity to rural fire departments. We agree.

The issue presented is thus one of statutory construction. When confronting an issue involving statutory interpretation, this Court's "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). The limited liability section of the Authority and Liability of Firemen Act provides:

> A rural fire department or a fireman who belongs to the department shall not be liable for damages to persons or property alleged to have been sustained and alleged to have occurred by reason of an act or omission, either of the rural fire department or of the fireman at the scene of a reported fire, when that act or

> omission relates to the suppression of the reported fire or to the direction of traffic or enforcement of traffic laws or ordinances at the scene of or in connection with a fire, accident, or other hazard by the department or the fireman unless it is established that the damage occurred because of gross negligence, wanton conduct or intentional wrongdoing of the rural fire department or the fireman.

N.C.G.S. § 58-82-5(b) (1999). It is apparent that in enacting this statute, the overall purpose of the General Assembly was to protect rural volunteer fire departments from liability for ordinary negligence when responding to a fire.

In the decision below, the Court of Appeals observed with respect to the wording of this section that the General Assembly failed to define "what constitutes 'the scene' of a reported fire." *Spruill*, 132 N.C. App. at 106, 510 S.E.2d at 407. The Court of Appeals then reasoned that "[t]he words 'at the scene' provide immunity for defendants for acts and omissions only in a specific place" (i.e., at the precise location of the fire), and that a "broader reading of the statute would be inconsistent with the plain meaning of the words." *Id.* at 108, 510 S.E.2d at 408. Accordingly, the Court of Appeals concluded that "[t]he fact that plaintiff's wreck occurred where defendants had filled their fire trucks with water from a fire hydrant, one-half mile away from the reported fire, is insufficient for defendants to claim immunity." *Id.* Under the Court of Appeals' interpretation, the words "at the scene of a reported fire" apply not just to individual firemen but to fire departments as well. The Court of Appeals thus determined that defendant fire departments were not immune from liability in this case by virtue of this statute. For the reasons stated below, we disagree with this interpretation.

Although the Court of Appeals focused on the phrase within this statutory section which specifies "the scene" of the fire, it is clear that the underlying premise of N.C.G.S. § 58-82-5(b) is that "[a] rural fire department . . . shall not be liable . . . by reason of an act or omission . . . when that act or omission relates to the suppression of the reported fire . . . ." This is the overall thrust of this statute, as it relates to rural fire departments, and this should be the focus. In this case, plaintiff sued only the fire departments.

Considering this statute as a whole, it establishes immunity for the ordinary negligence of *either* a rural fire department *or* a fireman of the department "at the scene." In order for immunity to attach to

either of these entities, the act or omission must be related to "suppression of the reported fire or to the direction of traffic." The alternative conduct involving direction of traffic may occur *either* "at the scene" of *or* "in connection with" a fire. When viewed in this context, it clearly appears that immunity would attach to a rural fire department if its acts or omissions complained of were *either* (1) related to the suppression of a reported fire, or (2) related to direction of traffic in connection with a fire. This Court must always " 'accord words undefined in [a] statute their plain and definite meaning' " when the statutory language at issue is " 'clear and unambiguous.' " *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996) (quoting *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995)). In the case *sub judice*, plaintiff alleges in his complaint that the acts or omissions occurred while defendants were responding to a fire *and* arose from defendants' alleged failure to warn plaintiff of a traffic hazard. It would thus appear that both alternatives for immunity as set forth in N.C.G.S. § 58-82-5(b) are met and apply in this case.

Further, we do not find persuasive the contention that the fire departments' acts or omissions must take place at "the scene" simply by virtue of the phrase "either of the rural fire department or of the fireman at the scene of a reported fire." Considering the language and grammar of this statutory phrase, the word "or" separates the terms "rural fire department" and "fireman at the scene of a reported fire." The phrase "at the scene of a reported fire" modifies the word "fireman," thus providing the single descriptive phrase, "fireman at the scene of a reported fire." If the General Assembly in enacting this statute had intended for rural fire departments to be protected from liability only for negligent acts occurring *at the scene* of a reported fire, it logically and more appropriately would have applied this modifying phrase directly to the fire department just as it did to the firemen actually working "at the scene." Because "or" separates the terms "rural fire department" from the phrase "fireman at the scene of a reported fire," it follows in the normal grammatical sense that only individual firemen have the limited immunity which is restricted to negligent acts or omissions occurring "at the scene" of a fire.

In further reflection of its intent, the legislature amended the original immunity statute in 1987 in order to expand the immunities allowed for rural fire departments and their members. Pursuant to this amendment, the General Assembly inserted the following underlined language into the statute's text:

> A rural fire department or a fireman who belongs to the department shall not be liable . . . . by reason of an act or omission . . . . when that act or omission relates to the suppression of the reported fire or to the direction of traffic or enforcement of traffic laws or ordinances at the scene of or in connection with a fire, accident, or other hazard by the department or the fireman unless it is established that the damage occurred because of gross negligence, wanton conduct or intentional wrongdoing of the rural fire department or the fireman.

N.C.G.S. § 58-82-5(b); *see also* Act of May 7, 1987, ch. 146, sec. 2, 1987 N.C. Sess. Laws 147, 147. This underlined language, as we have noted above, provides immunity for negligent acts or omissions that relate to the suppression of a fire or to the direction of traffic either "at the scene of or in connection with a fire." N.C.G.S. § 58-82-5(b). The addition of the phrase "at the scene of or in connection with a fire" suggests that the General Assembly intended to provide statutory immunity for the ordinary negligence of a rural fire department's acts or omissions which relate to the suppression of a fire, and not merely for those acts occurring at the scene of the fire.

The 1987 statutory amendment also creates another set of circumstances in which immunity would apply; thus, the General Assembly expanded the scope of the statute. "In construing a statute with reference to an amendment, it is presumed that the Legislature intended either (1) to change the substance of the original act or (2) to clarify the meaning of it." *Colonial Pipeline Co. v. Neill*, 296 N.C. 503, 509, 251 S.E.2d 457, 461 (1979). Here, the amendment adds an "or" and then describes the additional situations in which a rural fire department would receive immunity. " 'Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. "or"), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them.' " *Davis v. N.C. Granite Corp.*, 259 N.C. 672, 675, 131 S.E.2d 335, 337 (1963) (quoting 4 Strong's North Carolina Index *Statutes* § 5 (1st ed. 1961)). Additionally, the Act which amended N.C.G.S. § 58-82-5(b) in 1987 was merely part of "An Act to Expand the Traffic Control Authority of Firemen and Rescue Squad Members in Emergency Situations." This Court has previously ruled that the title of a statute may be used as an aid in determining legislative intent. *Equipment Fin. Corp. v. Scheidt*, 249 N.C. 334, 340, 106 S.E.2d 555, 560 (1959). Accordingly, we conclude that the General Assembly intended to expand the scope of the statute, including the

immunity options within it, when it passed the 1987 amendment. However, the Court of Appeals' interpretation of N.C.G.S. § 58-82-5(b) contravenes this indicated intent because it limits, rather than expands, the scope of the statute. The Court of Appeals' construction results in a much narrower interpretation of the statute which would restrict immunity and thus frustrate the indicated intent to expand the statute's scope.

Finally, in the decision below, the Court of Appeals relied on *Geiger v. Guilford College Community Vol. Firemen's Ass'n*, 668 F. Supp. 492 (M.D.N.C. 1987), in concluding that defendants are not protected from liability under N.C.G.S. § 58-82-5(b). The Court of Appeals' reliance on *Geiger* is misplaced because the facts in *Geiger* involve the rescue of two men trapped in a gasoline tanker. *See id.* at 493. The court in *Geiger* concluded that the fire department was not responding to a fire, and thus no immunity applied under the statute. *Id.* at 494. However, defendant fire departments in the case *sub judice* were performing acts that were "in connection with a reported fire" as required under N.C.G.S. § 58-82-5(b).

Based on the foregoing, we conclude that in order for immunity to apply to a rural fire department, the statute requires merely that the fire department's negligent act or omission must relate to the "suppression of the reported fire." N.C.G.S. § 58-82-5(b). Therefore, so long as the fire department's actions are related to the suppression of a fire, it is irrelevant whether the fire department's negligent act or omission occurs precisely "at the scene" of the fire. Because defendants' alleged negligence occurred while defendant fire departments were filling their tanks with water in response to a fire, defendants' alleged negligence constituted an "act or omission [that] relat[ed] to the suppression of [a] reported fire." *Id.* Since the legislature intended to provide immunity to rural fire departments for ordinary negligence when responding to a fire, we conclude that the trial court correctly granted summary judgment in favor of both defendants. Therefore, the decision of the Court of Appeals is reversed.

REVERSED.

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

STATE OF NORTH CAROLINA v. SCOTT LYN ROBERTS

No. 331PA99

(Filed 4 February 2000)

1. **Sentencing— structured sentencing—improper sentence—resentencing to longer term**

The trial court had the authority to set aside defendant's original sentence and to resentence defendant to a longer term within the correct sentencing range of the Structured Sentencing Act where the original sentence did not fall within the sentencing range for the offense and thus violated the Act.

2. **Appeal and Error— sentencing—Court of Appeals order—Supreme Court review—motion for appropriate relief not reviewed**

The Supreme Court could properly review a Court of Appeals order without violating N.C.G.S. § 15A-1422(f) where the order simply reversed a judgment and commitment entered by a superior court judge and did not constitute a decision by the Court of Appeals on defendant's motion for appropriate relief because it did not review the decision by the superior court judge to grant defendant's motion for appropriate relief.

3. **Appeal and Error— order granting appropriate relief—Supreme Court review by writ of certiorari**

The Supreme Court was not prohibited by Rule of Appellate Procedure 21(e) from reviewing by writ of certiorari a superior court order granting defendant's motion for appropriate relief and setting aside an amended sentence since Rule 21(e) pertains only to petitions for writ of certiorari to review motions for appropriate relief that have been denied.

On writ of certiorari, granted by the Supreme Court pursuant to N.C.G.S. § 7A-32(b), of an order of the Court of Appeals vacating the judgment and commitment entered 22 April 1999 by Cornelius, J., in Superior Court, Randolph County, and reinstating the judgment and commitment entered 22 July 1998 by Martin (Lester P., Jr.), J. in Superior Court, Randolph County. Heard in the Supreme Court 16 November 1999.

Michael F. Easley, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State-appellant.

The Exum Law Office, by Mary March Exum, for defendant-appellee.

WAINWRIGHT, Justice.

On 22 July 1998, Superior Court Judge Lester P. Martin, Jr., sentenced defendant to a minimum of eight months' and a maximum of ten months' imprisonment for a class E, level II felony. In a letter dated 18 February 1999, the North Carolina Department of Correction notified the Clerk of Superior Court for Randolph County that the sentence imposed on 22 July 1998 did not fall within the sentencing range for a class E offense as provided for in the Structured Sentencing Act of 1994. *See* N.C.G.S. § 15A-1340.17 (1999). On 4 March 1999, Judge Martin, outside the presence of defendant and his attorney, entered an amended judgment sentencing defendant to a term of imprisonment within the correct sentencing range for a class E, level II felony: a minimum of twenty-nine months and a maximum of forty-four months. *See id.*

On 13 April 1999, defendant filed a motion for appropriate relief claiming that when the term of imprisonment was changed, he was not given notice or an opportunity to be heard. Defendant requested a hearing and prayed that the amended judgment incarcerating defendant for more than his original sentence be stricken and for any other relief deemed appropriate.

A hearing on defendant's motion was held on 22 April 1999, before Judge C. Preston Cornelius in Randolph County Superior Court. Both defendant and his attorney were present. Judge Cornelius ruled the amended judgment had not been properly entered because neither defendant nor his attorney had been present. Accordingly, he granted the requested relief contained in defendant's motion for appropriate relief and set aside the amended judgment. As the original sentence imposed was invalid, Judge Cornelius then resentenced defendant to a minimum of twenty-nine months' and a maximum of forty-four months' imprisonment, which is within the correct sentencing range.

On 9 June 1999, defendant filed a writ of mandamus with the Court of Appeals, which the Court of Appeals treated as a writ of certiorari. The Court of Appeals allowed the petition for writ of certio-

rari for the limited purpose of vacating the judgment and commitment entered by Judge Cornelius on 22 April 1999 and reinstating the judgment and commitment entered by Judge Martin on 22 July 1998. The State petitioned this Court for writ of certiorari to review the order of the Court of Appeals, which was allowed on 19 August 1999.

[1] Defendant contends the resentencing by Judge Cornelius was improper. We disagree. Trial courts are required to enter criminal judgments consistent with the provisions of the Structured Sentencing Act. *See* N.C.G.S. § 15A-1331 (1999). The General Statutes clearly provide that a sentence of unauthorized duration can be modified. *See* N.C.G.S. § 15A-1445(a)(3)(c) (1999) (providing that the State may appeal when it alleges the sentence imposed "[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 . . . for the defendant's class of offense and prior record or conviction level"). "If resentencing is required, the trial division may enter an appropriate sentence." N.C.G.S. § 15A-1417(c); *see also State v. Morgan*, 108 N.C. App. 673, 425 S.E.2d 1 (1993) (holding that the trial court had the authority to set aside a sentence and to resentence a defendant if such resentencing is required), *disc. rev. improvidently allowed*, 335 N.C. 551, 439 S.E.2d 127 (1994). Moreover, pursuant to N.C.G.S. § 15A-1417(a)(4), when a court grants a motion for appropriate relief, the court can grant "[a]ny other appropriate relief" in addition to the relief specifically enumerated in the statute. N.C.G.S. § 15A-1417(a)(4) (1999). The original sentence, which was imposed by Judge Martin and reinstated by the Court of Appeals, violated the Structured Sentencing Act. Therefore, the resentencing by Judge Cornelius was proper in the instant case.

[2] Defendant also contends this Court should dismiss the State's petition for writ of certiorari pursuant to N.C.G.S. § 15A-1422(f), which provides:

> Decisions of the Court of Appeals on motions for appropriate relief that embrace matter set forth in G.S. 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion, or otherwise.

N.C.G.S. § 15A-1422(f) (1999). We disagree. On 25 June 1999, the Court of Appeals entered the following order:

> The petition filed in this cause by defendant on 9 June 1999 and designated "Petition for Writ of Mandamus to the Superior

> Court of Randolph County" is treated as a petition for a writ of certiorari and *is allowed for the purpose of entering the following order.* The judgment and commitment entered in this cause on 22 April 1999 by Judge C. Preston Cornelius is hereby ordered VACATED and the judgment and commitment entered in this cause on 22 July 1998 by Judge Lester P. Martin, Jr. is hereby ordered REINSTATED.

(Emphasis added.)

The Court of Appeals' order simply reversed the judgment and commitment entered by Judge Cornelius. The order did not constitute a decision by the Court of Appeals on defendant's motion for appropriate relief because it did not review the decision by Judge Cornelius to grant the motion for appropriate relief to defendant.

[3] Defendant further contends that this Court does not have jurisdiction pursuant to Rule 21(e) of the North Carolina Rules of Appellate Procedure, which provides:

> Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have 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 cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases.

N.C. R. App. P. 21(e).

We disagree. The above rule contemplates review of petitions for writ of certiorari to review motions for appropriate relief that have been denied. As previously stated, defendant's motion for appropriate relief was allowed. In defendant's motion for appropriate relief, he prayed the Court as follows: (1) that a hearing be held at a term of Superior Court, Randolph County, North Carolina, on his motion for appropriate relief; (2) that the amendment of the judgment incarcerating defendant for more than his original sentence be stricken; and (3) for such other and further relief as to which the court may deem the defendant entitled. Each of these requests for appropriate relief was granted by Judge Cornelius.

For these reasons, the Court of Appeals erred in vacating the sentence imposed by Judge Cornelius and in reinstating the original

sentence imposed by Judge Martin. Therefore, we reverse the order of the Court of Appeals and remand to the Court of Appeals for further remand to the Randolph County Superior Court for reinstatement of the sentence imposed upon defendant by Judge Cornelius on 22 April 1999.

REVERSED AND REMANDED.

LARRY M. DAVIS AND WIFE, SUE DAVIS; RANDY MANN, INDIVIDUALLY AND D/B/A RANDY'S AUTO SALVAGE; JOSEPH WRENN AND WIFE, ANNETTE WRENN; INTERSTATE NARROW FABRICS; LOGAN CRUTCHFIELD, INDIVIDUALLY AND D/B/A CRUTCHFIELD'S MOBILE CRUSHER v. THE CITY OF MEBANE, NORTH CAROLINA; THE CITY OF GRAHAM, NORTH CAROLINA; AND W.M. PIATT & COMPANY

No. 162PA99

(Filed 4 February 2000)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 132 N.C. App. 500, 512 S.E.2d 450(1999), affirming two orders entered by Allen (J.B.), J., on 23 February 1998 in Superior Court, Alamance County. Heard in the Supreme Court 13 December 1999.

Womble Carlyle Sandridge & Rice, PLLC, by Allan R. Gitter and Jack M. Strauch, for plaintiff-appellants.

Poyner & Spruill, L.L.P., by Keith H. Johnson, for defendant-appellees City of Mebane and City of Graham.

Ragsdale & Liggett PLLC, by David K. Liggett and Sarah E. Winslow, for defendant-appellee W.M. Piatt & Company.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

FREDERICKA HOLSHOUSER v. SHANER HOTEL GROUP PROPERTIES ONE LIMITED PARTNERSHIP, SHANER OPERATING CORPORATION, BEN ROBINSON, AND LOSS PREVENTION SERVICES, INC.

No. 386A99

(Filed 4 February 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 134 N.C. App. 391, 518 S.E.2d 17 (1999), affirming in part, reversing in part and remanding judgments entered by Rousseau, J., on 31 March 1998 and 14 April 1998 in Superior Court, Forsyth County. Heard in the Supreme Court 14 December 1999.

McCall Doughton & Blancato PLLC, by Thomas J. Doughton, for plaintiff-appellee.

Young Moore and Henderson P.A., by John A. Michaels and Reed N. Fountain, for defendant-appellant Shaner Operating Corporation.

PER CURIAM.

AFFIRMED.

ENERGY INVESTORS FUND, L.P. v. METRIC CONSTRUCTORS, INC., KVAERNER ASA, KVAERNER ENVIRONMENTAL TECHNOLOGIES, INC., METRIC/KVAERNER FAYETTEVILLE, J.V., J.A. JONES, INC., AND LOCKWOOD GREENE ENGINEERS, INC.

No. 333A99

(Filed 3 March 2000)

1. Partnerships— limited partner—status similar to shareholder

The Court of Appeals properly equated the status of limited partners in a partnership to the relationship that exists between corporate shareholders and the corporation.

2. Partnerships— limited partner—standing to bring suit

Plaintiff limited partner in a partnership organized to develop a "waste-to-energy" project did not have standing to maintain individual suits against defendant engineering and construction companies for negligence, negligent misrepresentations and breach of warranty where (1) the complaint does not allege an injury separate and distinct to plaintiff but shows that plaintiff's injury is the loss of its investment, which is identical to the injury suffered by the other limited partners and by the partnership as a whole; and (2) the complaint does not allege facts showing that a relationship existed outside of the partnership sufficient to create a special duty between defendants and plaintiff.

3. Civil Procedure— lack of standing—motion to dismiss—failure to state claim

A lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted.

4. Negligence— contract with partnership—suit by limited partner—failure to state claim

Plaintiff limited partner's complaint was insufficient to state a claim against defendant engineering and construction companies for negligence in the design and construction of a "waste-to-energy" project where the alleged injuries arose out of work done pursuant to a contract between defendants and the limited partnership, and no facts were alleged that would support a finding of a duty running from defendants to plaintiff rather than to the partnership.

5. Fraud— negligent misrepresentation—claim by limited partner—standing—special relationship

Plaintiff limited partner's claim against defendant engineering and construction companies for negligent misrepresentations pertaining to the design and construction of a "waste-to-energy" project for the partnership must fail because plaintiff has not alleged or established a special relationship with defendants which supports standing to bring a direct claim.

6. Warranties— breach—claim by limited partner—absence of privity

Plaintiff limited partner's claim for breach of warranty in the design and construction of a "waste-to-energy" project for the partnership must fail where plaintiff did not allege contractual privity between plaintiff and defendants or any warranty addressed to plaintiff as ultimate consumer or user.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. 522, 516 S.E.2d 399 (1999), affirming an order entered 10 February 1998 by Jenkins, J., in Superior Court, Cumberland County. Heard in the Supreme Court 17 November 1999.

Adams Kleemeier Hagan Hannah & Fouts, by W. Winburne King, III, and R. Harper Heckman; and Gadsby & Hannah LLP, by Richard K. Allen and Michael B. Donahue, for plaintiff-appellant.

Moore & Van Allen, PLLC, by Gregory J. Murphy and Alan W. Pope; and Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by H. Gerald Beaver, for defendant-appellees Metric Constructors, Inc.; Kvaerner ASA; Kvaerner Environmental Technologies, Inc.; Metric/Kvaerner Fayetteville, J.V.; and J.A. Jones, Inc.

Murray, Craven, Inman & McCauley, L.L.P., by Richard T. Craven, for defendant-appellee Lockwood Greene Engineers, Inc.

FREEMAN, Justice.

Plaintiff Energy Investors Fund, L.P. (EIF), is a limited partner in BCH Energy Limited Partnership (BCH), a limited partnership organized under the laws of the State of Delaware. BCH is the

owner/developer of a waste-to-energy project in North Carolina. EIF's complaint alleges that during 1992 and 1993, BCH solicited bids from various sources to plan, construct and operate a facility (Project) in Cumberland and Bladen counties that would receive waste, incinerate it, and thereby generate steam and electricity. EIF alleges that defendants made oral and written representations to BCH that they had the staff, resources, experience and expertise to design and manage the Project in accordance with BCH's specifications. These alleged representations were made after the formation of BCH, but before EIF had invested funds in the Project. EIF claims that it reasonably and justifiably relied on these representations in investing $16,076,655 in the development of the Project, and that defendants knew or should have known of such reliance. EIF further contends that defendants' representations were false and inaccurate, resulting in the Project's failure and loss of EIF's investment, because: (1) defendants did not, in fact, possess the abilities, capabilities and experience they professed to have, and (2) they designed and constructed the facility in a negligent fashion. As a result of the Project's failure, EIF has asserted claims against defendants for negligence, negligent misrepresentation, and breach of warranty.

The trial court dismissed all claims pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) (failure to state a claim upon which relief can be granted), Rule 12(b)(7) (failure to join a necessary party), Rule 17 (failure to join a real party in interest), and Rule 19 (failure to join those united in interest as plaintiffs or defendants). In doing so, the trial court concluded that plaintiff "lack[ed] standing to assert claims against Defendants for negligence, negligent misrepresentation and breach of warranty," and that "[p]laintiff has failed to state a claim upon which relief may be granted." EIF appealed, and the Court of Appeals affirmed.

EIF, as a limited partner of BCH, seeks to bring individual causes of action against the defendants to recover for the loss of its equity investment. We note this issue is one of first impression in North Carolina. Other jurisdictions which have considered this question have looked to the law of corporations for guidance and have analogized the role of a limited partner to that of a shareholder of a corporation. In 1953, the New York Court of Appeals held that "[l]imited partnerships were unknown to the common law and, like corporations, are 'creature[s] of statute,' *Lanier v. Bowdoin*, 282 N.Y. 32, 38, 24 N.E.2d 732, 735 [(1939)]. Statutes permitting limited partnerships are intended to encourage investment in business enterprise by

affording to a limited partner a position analogous to that of a corporate shareholder." *Ruzicka v. Rager*, 305 N.Y. 191, 197-98, 111 N.E.2d 878, 881 (1953).

In *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 297 (2d Cir. 1965), the Second Circuit of the United States Court of Appeals declared:

> [I]n the main, a limited partner is more like a shareholder, often expecting a share of the profits, subordinated to general creditors, having some control over direction of the enterprise by his veto on the admission of new partners, and able to examine books and "have on demand true and full information of all things affecting the partnership . . . ." *See* N.Y. Partnership Law §§ 98, 99, 112. That the limited partner is immune to personal liability for partnership debts save for his original investment, is not thought to be an "owner" of partnership property, and does not manage the business may distinguish him from general partners but strengthens his resemblance to the stockholder; and even as to his preference in dissolution, he resembles the preferred stockholder.

To like effect, the Chancery Court of Delaware, generally recognized as an authority in the interpretation of business law, has affirmed the proposition that shareholders and limited partners hold similar positions within their respective entities. *Litman v. Prudential-Bache Properties, Inc.*, 611 A.2d 12, 15 (Del. Ch. 1992). The Chancellor in *Litman* relied on the holding of *Strain v. Seven Hills Assocs.*, 75 A.D.2d 360, 370, 429 N.Y.S.2d 424, 431 (1980), which equated the status of corporate shareholders and corporate directors to that existing between limited partners and general partners.

Scholars have also analogized the role of a limited partner to that of a shareholder because

> [l]imited partnerships resemble corporations in various ways. Formalities of creation are much alike. Both forms of organization can attract investment capital by offering limited liability with roughly similar effects in limited partnerships and corporations. Limited liability necessitates some rules to protect corporate creditors. It facilitates passive ownership—a separation of ownership from control—that permits some efficiencies as well as poses some risks from delegated management. Thus, limited partners are somewhat analogous to shareholders . . . .

> Information rights and fiduciary duties owed to limited partners are similar to those owed to shareholders. Limited partners, like shareholders, may bring derivative suits on behalf of the business entity against errant management. Limited partner interests are generally treated like corporate shares in the securities laws.

III Alan R. Bromberg & Larry E. Libstein, *Bromberg and Libstein on Partnership* § 11.01(c) (Supp. 1999-2); *see also Moore v. Simon Enters.*, 919 F. Supp. 1007, 1012 (N.D. Tex. 1995).

[1] While it is true that a partner and shareholder are treated differently for tax purposes, *see Donroy, Ltd. v. United States*, 196 F. Supp. 54, 59 (N.D. Cal. 1961), *aff'd*, 301 F.2d 200 (9th Cir. 1962), their duties are still analogous. As such, we conclude that the Court of Appeals properly equated the status of limited partners in a partnership to the relationship that exists between corporate shareholders and the corporation. Having so concluded, we now turn to the North Carolina law of corporate shareholders for the legal principles applicable to this case.

In *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997), this Court held that the plaintiff shareholders could not assert claims against a third party for the loss of their equity investment in the corporation. *Id.* at 660, 488 S.E.2d at 220. In doing so, this Court endorsed the "well-established general rule . . . that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Id.* at 650, 488 S.E.2d at 219. The only two exceptions to this rule are: (1) a plaintiff alleges an injury "separate and distinct" to himself, or (2) the injuries arise out of a "special duty" running from the alleged wrongdoer to the plaintiff. *Id.* Therefore, unless EIF fits into one of these two exceptions, it has no standing to bring this action.

[2] Accordingly, an evaluation of EIF's standing in this matter requires an analysis of: (1) EIF's alleged injury, and (2) the relationship between EIF and defendants with respect to each claim. In so doing, it appears that EIF's injury is not distinct from the injuries suffered by BCH and other limited partners. This Court has stated that "[a]n injury is peculiar or personal to the shareholder if 'a legal basis exists to support plaintiffs' allegations of an individual loss, separate and distinct from any damage suffered by the corporation.' " *Id.* at 659, 488 S.E.2d at 220 (quoting *Howell v. Fisher*, 49 N.C. App. 488, 492, 272 S.E.2d 19, 23 (1980), *disc. rev. denied*, 302 N.C. 218, 277

S.E.2d 69 (1981)). In applying this rule of shareholder law to that of limited partnerships, we find that the complaint shows EIF's injury is the loss of its investment, which is identical to the injury suffered by the other limited partners and by the partnership as a whole. EIF did not invest its funds directly and independently in the Project. Rather, EIF invested in the BCH partnership. Obviously EIF would not have invested in BCH if it believed the Project would be unprofitable, but hopes for profits are hardly unique. That EIF invested an amount different from other limited partners hardly makes for an "individual injury." The complaint does not allege a basis demonstrating that the investment, and thus the injury, is peculiar or personal to the limited partner, EIF.

Further, EIF has alleged no relationship creating a special duty owed to it by defendants. This Court has previously held that the existence of a special duty could be established by facts showing that defendants owed a duty to plaintiff that was personal to plaintiffs as shareholders and was separate and distinct from the duty defendants owed the corporation. *Barger*, 346 N.C. at 659, 488 S.E.2d at 220. In the instant case, EIF was already a limited partner in BCH before its alleged communications with defendants, so defendants could not have induced EIF to become a limited partner. Nor has EIF alleged any individualized services performed for it by defendants. Defendants were communicating with EIF in its capacity as a limited partner, not as an entity separate and distinct from the BCH limited partnership. In fact, the complaint alleges defendants "communicated with, *among others*, representatives of EIF"; "intended EIF, *among others*, to rely on such representations"; and made "representations intended for the Projects' investors, *including but not limited to EIF*." (Emphasis added.) Nowhere in the complaint does EIF allege facts from which one might reasonably infer a relationship existed outside of the partnership sufficient to create a duty between defendants and EIF. EIF fails to set forth any allegations which, even taken as true, support a special duty between it and defendants or that support a peculiar or personal injury when compared to the injury suffered by other limited partners. Therefore, EIF lacks standing in its individual capacity to assert claims which belong to the limited partnership and which have been asserted and pursued by the limited partnership.

We disagree with EIF's contention that it has a right to bring a direct action against defendants. "It is settled law in this State that one partner may not sue in his own name, and for his benefit, upon a

cause of action in favor of a partnership." *Godwin v. Vinson*, 251 N.C. 326, 327, 111 S.E.2d 180, 181 (1959). EIF's premise lies in the fact that defendants' alleged statements were made for the purpose of inducing EIF to invest in the Project. Even if this were true, as the complaint shows, any representations were made not to EIF individually, but to the limited partnership as a whole. Therefore, any action brought against defendants must be brought by the partnership.

[3] A lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted. *See, e.g., Krauss v. Wayne County DSS*, 347 N.C. 371, 373, 493 S.E.2d 428, 430 (1997) (a Rule 12(b)(6) motion was made on the basis that the plaintiff did not have standing). Rule 12(b)(6) "generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970). In the instant case, EIF is not the real party in interest. " 'A real party in interest is a party who is benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject-matter of the litigation.' " *Parnell v. Nationwide Mut. Ins. Co.*, 263 N.C. 445, 448-49, 139 S.E.2d 723, 726 (1965) (quoting *Choate Rental Co. v. Justice*, 211 N.C. 54, 55, 188 S.E. 609, 610 (1936)). Thus, the real party in interest is the party who by substantive law has the legal right to enforce the claim in question. BCH is the real party in interest to bring this action. Further, we note that during oral arguments, the parties conceded that BCH and defendants are presently in arbitration. Since EIF cannot maintain an action in its own capacity, it lacks standing and has failed to state a claim upon which relief may be granted.

[4] Although EIF contends in its negligence claim that defendants breached a duty of care to EIF in its design, fabrication, and construction of the material handling components of the Project, these alleged injuries arose out of work done pursuant to a contract between BCH and defendants. No facts are alleged that would support a finding of a duty which runs from defendants solely to EIF rather than to BCH. While a common law duty of care may arise out of contractual obligations assumed with another party, our case law clearly provides that those obligations must result from some actual working relationship between a plaintiff and defendant. *Davidson & Jones, Inc. v. New Hanover County*, 41 N.C. App. 661, 667, 255 S.E.2d 580, 584, *disc. rev. denied*, 298 N.C. 295, 259 S.E.2d 911 (1979). In the instant case, EIF was merely an individual, passive investor in BCH.

EIF fails to allege anywhere that it had an ongoing working relationship with any of the defendants which gives rise to any duty. Therefore, the trial court correctly held that the complaint did not state a claim for negligence.

[5] EIF's claim for negligent misrepresentation also fails in that EIF has not alleged or established a special relationship with defendants which supports standing to bring a direct claim. *Barger*, 346 N.C. at 659, 488 S.E.2d at 220. In the instant case, EIF's complaint does not explain how defendants had a special duty to EIF at the time of the representation when: (1) defendants did not yet have a contract with BCH, and (2) EIF was already a limited partner. Rather, EIF's complaint shows that it was already a limited partner in BCH at the time of the alleged misrepresentations, that BCH solicited the requested information, and that defendants' negotiations were not with EIF individually, but with BCH. Absent some indication whereby defendants directly solicited EIF with the intent to induce its participation in BCH, EIF has failed to allege the existence of a legally cognizable duty of care which runs from defendants to EIF.

[6] As for EIF's claim for breach of warranty, it too must fail in that the complaint has not alleged contractual privity between EIF and defendants, nor does it allege that any warranty was addressed to it as an "ultimate consumer or user." *See Kinlaw v. Long Mfg. N.C., Inc.*, 298 N.C. 494, 259 S.E.2d 552 (1979). Furthermore, when a claim is only for economic loss, as with EIF's claims, the general rule is that privity is required to assert a claim for breach of an implied warranty involving only economic loss. *2000 Watermark Ass'n v. Celotex Corp.*, 784 F.2d 1183, 1185 (4th Cir. 1986); *Gregory v. Atrium Door & Window Co.*, 106 N.C. App. 142, 144, 415 S.E.2d 574, 575 (1992). Therefore, EIF's claim for breach of warranty was properly dismissed.

For the foregoing reasons, the decision of the Court of Appeals is affirmed.

AFFIRMED.

JOHNSON v. FIRST UNION CORP.

[351 N.C. 339 (2000)]

DOROTHY JOHNSON AND PAULA SMITH v. FIRST UNION CORPORATION AND/OR FIRST UNION MORTGAGE CORPORATION; KAY L. BAILEY; CIGNA PROPERTY & CASUALTY INSURANCE COMPANY AND/OR ESIS, INC.; ROBIN DEFFENBAUGH; INTERNATIONAL REHABILITATION ASSOCIATES, INC. (INTRACORP); AND PAT EDWARDS, R.N.

No. 485PA98

(Filed 3 March 2000)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 131 N.C. App. 142, 504 S.E.2d 808 (1998), affirming an order granting defendants' motions to dismiss signed by Barnette, J., on 18 September 1996 in Superior Court, Wake County. On 30 December 1998, the Supreme Court allowed conditional discretionary review of an additional issue. Heard in the Supreme Court 14 April 1999.

Charles R. Hassell, Jr., and Stephen Neal Camak for plaintiff-appellants and -appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson, for defendant-appellees First Union Corporation, First Union Mortgage Corporation, and Kay Bailey.

Maupin Taylor & Ellis, P.A., by Elizabeth D. Scott, M. Keith Kapp, and Joanne J. Lambert, for defendant-appellees International Rehabilitation Associates, Inc. (Intracorp) and Pat Edwards.

Cranfill, Sumner & Hartzog, L.L.P., by Beth R. Fleishman; and Yates, McLamb & Weyher, L.L.P., by Derek M. Crump, for defendant-appellants and -appellees CIGNA Property & Casualty Insurance Company, ESIS, and Robin Deffenbaugh.

Richard M. Lewis and John H. Ruocchio on behalf of Builders Mutual Insurance Company, amicus curiae.

Bailey & Dixon, L.L.P., by David M. Britt, Alan J. Miles, and Dayatra T. King, on behalf of American Insurance Association, amicus curiae.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Kenneth Lautenschlager, on behalf of The Travelers Insurance Company, amicus curiae.

Young Moore and Henderson P.A., by J.D. Prather and Joe E. Austin, Jr., on behalf of the North Carolina Association of Self-Insurers, amicus curiae.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Clayton M. Custer and Alison R. Bost, on behalf of Key Risk Management Services, Inc., amicus curiae.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr.; Caroline H. Lock; and Manning A. Connors, on behalf of North Carolina Association of Defense Attorneys, amicus curiae.

Donaldson & Black, by Jay A. Gervasi, Jr.; Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer; and Jernigan Law Firm, by N. Victor Farah, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justices MARTIN and FREEMAN did not participate in the consideration or decision of this case.

MICHAEL JENKINS, EMPLOYEE v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, EMPLOYER, SELF-INSURED CONSTITUTION STATE SERVICE COMPANY, SERVICING AGENT

No. 387A99

(Filed 3 March 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 134 N.C. App. 405, 518 S.E.2d 6 (1999), reversing and remanding an opinion and award entered by the North Carolina Industrial Commission on 1 June 1998. On 4 November 1999, the Supreme Court granted discretionary review of additional issues. Heard in the Supreme Court 15 February 2000.

Law Offices of Edward Jennings, by Griffis C. Shuler and Edward Jennings, for plaintiff-appellant and -appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo, Shelley W. Coleman, and Colleen M. Crowley, for defendant-appellants and -appellees.

Smith Helms Mulliss & Moore, L.L.P., by Jeri L. Whitfield, on behalf of the North Carolina Association of Self-Insurers, amicus curiae.

The Jernigan Law Firm, by N. Victor Farah, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

As to the issue on direct appeal, we reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion of Wynn, J. Further, we conclude the petition for discretionary review as to the additional issues was improvidently allowed.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

WALTER L. HOISINGTON, AS GUARDIAN AD LITEM FOR JILL LEE MARKER, AN INCOMPETENT, PLAINTIFF v. ZT-WINSTON-SALEM ASSOCIATES, ZAREMBA ASSOCIATES LIMITED PARTNERSHIP, ZAREMBA REALTY CORPORATION, TOYS "R" US, INC., TOYS "R" US-DELAWARE, INC., WINSTON-SALEM RETAIL ASSOCIATES LIMITED PARTNERSHIP, CENTERPOINT SOUTHERN, INC., AND THE WACKENHUT CORPORATION, DEFENDANTS AND ZT-WINSTON-SALEM ASSOCIATES, ZAREMBA ASSOCIATES LIMITED PARTNERSHIP, ZAREMBA REALTY CORPORATION, TOYS "R" US, INC., TOYS "R" US-DELAWARE, INC., WINSTON-SALEM RETAIL ASSOCIATES LIMITED PARTNERSHIP, AND CENTERPOINT SOUTHERN, INC., DEFENDANTS/THIRD-PARTY PLAINTIFFS v. THE TREE FACTORY, INC., D/B/A THE SILK PLANT FOREST, THIRD-PARTY DEFENDANT

No. 339PA99

(Filed 3 March 2000)

On discretionary review pursuant to N.C.G.S. § 7A-31 and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, 133 N.C. App. 485, 516 S.E.2d 176 (1999), affirming an order of summary judgment in favor of defendant Wackenhut Corporation entered by Wood, J., on 16 April 1998 in Superior Court, Forsyth County, and dismissing the appeal of third-party defendant The Tree Factory. Heard in the Supreme Court 17 February 2000.

Comerford & Britt, L.L.P., by W. Thompson Comerford, Jr., and Clifford Britt, for plaintiff-appellant Walter Hoisington.

Moss & Mason, by Joseph W. Moss and Matthew L. Mason, for defendant/third-party plaintiff-appellants ZT-Winston-Salem Associates; Zaremba Associates Limited Partnership; Zaremba Realty Corporation; Toys "R" US-Delaware, Inc.; and Winston-Salem Retail Associates Limited Partnership.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Allan R. Gitter, Richard T. Rice, and Jack M. Strauch, for defendant-appellee The Wackenhut Corporation.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul C. Lawrence, for third-party defendant-appellant The Tree Factory, Inc.

PER CURIAM.

GOGGINS v. BALATSIAS

[351 N.C. 343 (2000)]

DISCRETIONARY REVIEW AND WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

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

ALAN E. GOGGINS v. KLEOMENIS BALATSIAS, D/B/A COPAL GRILL, COPAL GRILL, INC., D/B/A COPAL RESTAURANT, AND JOE MOODY, D/B/A PIEDMONT FIRE PROTECTION COMPANY

No. 463PA99

(Filed 3 March 2000)

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished, unanimous decision of the Court of Appeals, 134 N.C. App. 732, — S.E.2d — (1999), affirming an order of summary judgment entered 9 June 1998 by Johnston, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 14 February 2000.

Price, Smith, Hargett, Petho & Anderson, by Wm. Benjamin Smith, for plaintiff-appellant.

Crews & Klein, P.C., by James N. Freeman, Jr., for defendant-appellees Kleomenis Balatsias and Copal Grill, Inc.

Patterson, Harkavy & Lawrence, L.L.P., by Burton Craige, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

McIVER v. SMITH

[351 N.C. 344 (2000)]

RODERICK TODD McIVER AND TERRIE GENTRY v. JAMES SUGGS SMITH AND FORSYTH COUNTY

No. 453PA99

(Filed 3 March 2000)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 134 N.C. App. 583, 518 S.E.2d 522 (1999), affirming an order for summary judgment entered by Martin (Lester P.), J., on 7 January 1998, in Superior Court, Forsyth County. Heard in the Supreme Court 14 February 2000.

Roderick Todd McIver for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Alison R. Bost, for defendant-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

HARTWELL v. MAHAN

[351 N.C. 345 (2000)]

JUDITH E. HARTWELL v. ROBERT G. MAHAN, M.D.

No. 439A99

(Filed 3 March 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 134 N.C. App. 731, —— S.E.2d —— (1999), affirming an order of dismissal entered 29 April 1998 by Helms (William H.), J., in Superior Court, Davidson County. Heard in the Supreme Court 17 February 2000.

Shelley Blum for plaintiff-appellant.

Kluttz, Reamer, Blankenship, Hayes & Randolph, L.L.P., by Richard R. Reamer and Roman C. Pibl, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion of Judge Walker, the decision of the Court of Appeals is reversed.

REVERSED.

DURHAM v. DESSENBERGER

[351 N.C. 346 (2000)]

THOMAS F. DURHAM, SR., INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR CANDACE DURHAM, A MINOR CHILD; DEBBIE SMITH, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JUANITA PRIDGEN, A MINOR CHILD, PETITIONER v. ROBERT CARROLL DESSENBERGER, RESPONDENT

No. 419A99

(Filed 3 March 2000)

Appeal by petitioner pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 134 N.C. App. 498, —— S.E.2d —— (1999), affirming an order of dismissal entered 18 February 1998 by Jones (Abraham Penn), J., in Superior Court, Durham County. Heard in the Supreme Court 16 February 2000.

Roberti, Wittenberg, Lauffer & Wicker, P.A., by R. David Wicker, Jr., for plaintiff-appellants.

Teague, Rotenstreich & Stanaland, L.L.P., by Steven B. Fox and Ian J. Drake, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. WILLIAM VAN TRUSELL

No. 324A99

(Filed 3 March 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 133 N.C. App. 446, 525 S.E.2d 243 (1999), finding no reversible error in judgments entered 1 May 1997 by Allen (J.B., Jr.), J., in Superior Court, Lee County. On 19 August 1999, the Supreme Court granted discretionary review of an additional issue. Heard in the Supreme Court 14 February 2000.

Michael F. Easley, Attorney General, by Marian Hill Bergdolt, Assistant Attorney General, and Lorinzo L. Joyner, Special Deputy Attorney General, for the State.

Paul Pooley for defendant-appellant.

PER CURIAM.

As to the issue on direct appeal based on the dissenting opinion of Judge Greene, we reverse the decision of the Court of Appeals for the reasons stated in that dissent and remand to that court for further remand to the Superior Court, Lee County, for proceedings consistent with the dissent below. We conclude the petition for discretionary review as to an additional issue was improvidently allowed.

REVERSED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

MARGARET K. JONES v. ASHEVILLE RADIOLOGICAL GROUP, P.A., NATHAN WILLIAMS, M.D., TIMOTHY GALLAGHER, M.D., MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA, AND LUCI A. LAYTON

No. 242A98-2

(Filed 3 March 2000)

On appeal pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 134 N.C. App. 520, 518 S.E.2d 528 (1999), on remand from this Court, 350 N.C. 654, 517 S.E.2d 380 (1999), affirming in part, reversing in part, and remanding summary judgments for defendants entered by Ferrell, J., 25 February 1997 and 4 March 1997 in Superior Court, Buncombe County. Heard in the Supreme Court 15 February 2000.

Hyler & Lopez, P.A., by George B. Hyler, Jr., and Robert J. Lopez, for plaintiff-appellee.

Dameron, Burgin & Parker, P.A., by Charles E. Burgin and Sharon L. Parker, for defendant-appellants Asheville Radiological Group, P.A., and Timothy Gallagher, M.D.

Kennedy Covington Lobdell & Hickman, L.L.P., by James P. Cooney III, for defendant-appellant Nathan Williams, M.D.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Elizabeth Horton, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

For the reasons stated in Judge Walker's dissenting opinion, the decision of the Court of Appeals is reversed in part.

REVERSED IN PART.

VERONICA D. ROMIG, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED v. JEFFERSON-PILOT LIFE INSURANCE COMPANY

No. 218A99

(Filed 3 March 2000)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 132 N.C. App. 682, 513 S.E.2d 598 (1999), dismissing as interlocutory defendant's appeal of an order entered by Morgan (Melzer A., Jr.), J., on 14 July 1997 in Superior Court, Guilford County. Heard in the Supreme Court 16 February 2000.

McDaniel & Anderson, by L. Bruce McDaniel; and Wolf Haldenstein Adler Freeman & Herz LLP, by David A.P. Brower, pro hac vice, for plaintiff-appellee.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr.; Larry B. Sitton; and Robert R. Marcus, for defendant-appellant.

PER CURIAM.

AFFIRMED.

ALLSTATE INS. CO. v. CHATTERTON

No. 496P99

Case below: 135 N.C.App. 92

Petition by defendants (Chatterton, Nichols and Cathey) for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

AMAKER v. DUFFY REALTY & BLDG. CO.

No. 527P99

Case below: 135 N.C.App. 230

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

ARQUILLA v. CITY OF SALISBURY

No. 45P00

Case below: 136 N.C.App. 24

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

BAILEY v. STATE

No. 56PA00

Case below: Wake County Superior Court

Joint petition for discretionary review pursuant to G.S. 7A-31 allowed 2 March 2000 for the purpose of this Court considering the following specific questions: 1. Whether the Superior Court erred in concluding that only "retirees" and not persons who received lump sum refunds of their contributions to their respective retirement systems are included in the class; 2. Whether the Superior Court erred in concluding that only monthly retirement allowances are qualifying benefits for participation in the Settlement despite the inclusion of lump sum refunds, or the "return of contributions," in the benefits addressed by the litigation, in both evidence and documents presented throughout this litigation; 3. Whether the Superior Court erred in excluding from the class, without notice, persons who received lump sum refunds, or returns of contribution, after class counsel had treated those persons as included class members and mailed claim

forms to them. Review shall be limited to the above three questions solely as presented to this Court in the joint petition. Joint motion for expedited briefing schedule and oral argument date is allowed and shall be determined by the Clerk of the Supreme Court.

BARRINGER-WILLIS v. HEALTHSOURCE N.C., INC.

No. 22P00

Case below: 136 N.C.App. 441

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 2000.

BRANNOCK v. BRANNOCK

No. 580P99

Case below: 135 N.C.App. 635

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 2 March 2000.

BUCHANAN v. HIGHT

No. 300P99

Case below: 133 N.C.App. 299

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 19 August 1999. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

CALDERWOOD v. CHARLOTTE-MECKLENBURG HOSP. AUTH.

No. 507P99

Case below: 135 N.C.App. 112

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

CANNON v. CANNON

No. 515P99

Case below: 135 N.C.App. 384

Notice of appeal by plaintiff pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 3 February 2000. Petition by plaintiff pro se for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000. Justice Martin and Justice Wainwright recused.

CARPENTER v. RYAN

No. 15P00

Case below: 136 N.C.App. 789

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 March 2000.

COINER v. CALES

No. 535P99

Case below: 135 N.C.App. 343

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

CORN v. CONVERSE, INC.

No. 504P99

Case below: 135 N.C.App. 230

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

COUNTRY CLUB OF JOHNSTON COUNTY, INC. v.
U. S. FIDELITY AND GUAR. CO.

No. 521P99

Case below: 135 N.C.App. 159

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000. Justice Martin recused.

DALTON v. CAMP

No. 495PA99

Case below: 135 N.C.App. 32

Petition by plaintiff for discretionary review pursuant to G.S 7A-31 allowed 2 December 1999 for the limited purpose of remanding to Court of Appeals for reconsideration in light of *Sara Lee Corp. v. Carter*, 351 NC 27 (1999). Conditional petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

DEERMAN v. BEVERLY CALIFORNIA CORP.

No. 501P99

Case below: 132 N.C.App. 234

Petition by defendant (Beverly California Corp.) for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

ESPINOSA v. MARTIN

No. 513P99

Case below: 135 N.C.App. 305

Petition by petitioner (Blue Ridge Savings Bank, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000. Petition by petitioner (Blue Ridge Savings Bank, Inc.) for writ of certiorari to review the order of the North Carolina Court of Appeals denied 2 March 2000.

FIRST UNION NAT'L BANK v. INGOLD

No. 33P00

Case below: 136 N.C.App. 262

Petition by defendants (Spratts and Warren) for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

FRAZIER v. MURRAY

No. 493A99

Case below: 135 N.C.App. 43

Motion by defendant to dismiss appeal allowed 3 February 2000.

FROST v. MAZDA MOTOR OF AMERICA

No. 582P99

Case below: COA99-1377 and Forsyth County Superior Court

Motion by defendant for temporary stay allowed 3 February 2000. Petition by defendant (Primus Automotive Financial Services, Inc.) for writ of certiorari to review the orders of the North Carolina Court of Appeals allowed 2 March 2000. Petition by defendant (Primus Automotive Financial Services, Inc.) for writ of certiorari to review the order of the Superior Court, Forsyth County allowed 2 March 2000. Petition by defendant (Primus) for writ of supersedeas of the judgment of the Court of Appeals allowed 2 March 2000.

GARBER v. GREAT-WEST LIFE & ANNUITY ASSURANCE CO.

No. 541A99

Case below: 135 N.C.App. 384

Joint motion by defendant and plaintiff to withdraw appeal allowed 21 January 2000.

GUILFORD COUNTY v. TURLINGTON

No. 472P99

Case below: 134 N.C.App. 732

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

HARKINS v. HARKINS

No. 577P99

Case below: 135 N.C.App. 631

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

HARTWELL v. MAHAN

No. 439A99

Case below: 134 N.C.App. 731

Motion by defendant (Mahan) to dismiss appeal denied 2 March 2000.

HATCHER v. SUPERIOR COURT OF ROBESON COUNTY

No. 39P00

Case below: Robeson County Superior Court

Petition by plaintiff pro se for writ of certiorari to review the order of Superior Court, Robeson County denied 2 March 2000. Motion by plaintiff pro se for temporary stay denied 2 March 2000.

HELMS v. BAUCOM

No. 459P99

Case below: 134 N.C.App. 732

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000. Motion by defendant to dismiss petition denied 2 March 2000.

HUSKINS v. HUSKINS

No. 479P99

Case below: 134 N.C.App. 101

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 February 2000.

HUTELMYER v. COX

No. 319A99

Case below: 133 N.C.App. 364

Motion by defendant to dismiss appeal allowed 3 February 2000.

IN RE ROGERS

No. 574P99

Case below: 135 N.C.App. 631

Petition by respondent (Daniel Lee Hodge) for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

IN RE WILL OF KRANTZ

No. 565P99

Case below: 135 N.C.App. 354

Petition by caveator (Robert Krantz) for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

JARVIS v. FOOD LION, INC.

No. 434P99

Case below: 134 N.C.App. 363

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999.

JONES v. PURINGTON

No. 547P99

Case below: 135 N.C.App. 384

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

JWL INVESTMENTS, INC. v. GUILFORD COUNTY BD. OF ADJUST.

No. 321P99

Case below: 133 N.C.App. 426

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1999.

LANE v. R. N. ROUSE & CO.

No. 555P99

Case below: 135 N.C.App. 494

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

LEFTWICH v. GAINES

No. 442P99

Case below: 134 N.C.App. 502

Petition by defendant (Mary Ann Wray) for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999. Petition by defendants (Luther Eugene Gaines and City of Mount Airy) for discretionary review pursuant to G.S. 7A-31 denied 2 December 1999.

LEWIS v. CRAVEN REG'L MED. CTR.

No. 462PA99

Case below: 134 N.C.App. 438

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 3 February 2000.

LYNN v. BURNETTE

No. 418PA99

Case below: 134 N.C.App. 731

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 February 2000 for limited purpose of remanding to Court of Appeals for reconsideration in light of *In re Moore*, 306 NC 394, 400 (1982).

MARKET AMERICA, INC. v. CHRISTMAN-ORTH

No. 523P99

Case below: 134 N.C.App. 234

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000. Justice Martin recused.

MARLEY v. GRAPER

No. 562P99

Case below: 135 N.C.App. 423

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 February 2000.

MILLIGAN v. STATE

No. 37P00

Case below: 136 N.C.App. 781

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 2 March 2000. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

MOORE v. CITY OF RALEIGH

No. 548P99

Case below: 135 N.C.App. 332

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

NAPIER v. NAPIER

No. 543P99

Case below: 135 N.C.App. 364

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

NOLAN v. PARAMOUNT HOMES, INC.

No. 526P99

Case below: 135 N.C.App. 73

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

OSBURN v. DANEK MEDICAL, INC.

No. 549A99

Case below: 135 N.C.App. 234

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rules 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 3 February 2000.

PARCHMENT v. GARNER

No. 540P99

Case below: 135 N.C.App. 312

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

PARK LAKE RECREATION ASS'N v. GRANT

No. 559P99

Case below: 135 N.C.App. 384

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 February 2000.

PULLIAM v. NOVA SOUTHEASTERN UNIV.

No. 247P99

Case below: 133 N.C.App. 347

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 19 August 1999.

RHONEY v. FELE

No. 441P99

Case below: 134 N.C.App. 614

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

RISSOLO v. SLOOP

No. 520P99

Case below: 135 N.C.App. 194

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

RUSH v. EMPLOYERS INS. OF WAUSAU

No. 540P98

Case below: 131 N.C.App. 554

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 March 2000.

SCHOOLER v. KENNEDY

No. 486P99

Case below: 135 N.C.App. 232

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. ATKINSON

No. 570P99

Case below: 135 N.C.App. 631

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. BARNES

No. 146A94-2

Case below: Rowan County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Rowan County, allowed 2 March 2000 for the limited purpose of remanding to trial court for hearing of defendant's motion and send copy of letter to trial court.

STATE v. BLACKWELL

No. 567A99

Case below: 136 N.C.App. 729

Motion by Attorney General for temporary stay allowed 21 December 1999. Petition by Attorney General for writ of supersedeas allowed 21 December 1999. Motion by defendant to dismiss appeal denied 3 February 2000. Motion by defendant to dismiss appeal based upon dissent denied 2 March 2000.

STATE v. BOYD

No. 3P00

Case below: 136 N.C.App. 790

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 March 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. BOYD

No. 533P99

Case below: 135 N.C.App. 232

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 February 2000.

STATE v. BRITT

No. 503P99

Case below: 135 N.C.App. 230

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. BROOME

No. 23P00

Case below: 136 N.C.App. 82

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 March 2000. Petition by defendant for discretionary pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. CAMPBELL

No. 299A93-2

Case below: Rowan County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Rowan County, denied 2 March 2000.

STATE v. CHAVIS

No. 447P99

Case below: 134 N.C.App. 546

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 February 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. COBLE

No. 446PA99

Case below: 134 N.C.App. 546

Motion by defendant for release pending discretionary review denied 3 February 2000.

STATE v. DAWKINS

No. 552P99

Case below: 131 N.C.App. 557

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 February 2000.

STATE v. DORSEY

No. 508P99

Case below: 135 N.C.App. 116

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 February 2000.

STATE v. ELLIOTT

No. 545P99

Case below: 135 N.C.App. 385

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. FONVILLE

No. 530P99

Case below: 135 N.C.App. 385

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. GAITHER

No. 571A99

Case below: 135 N.C.App. 632

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 February 2000.

STATE v. HALL

No. 424P99

Case below: 134 N.C.App. 417

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 February 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. HUDSON

No. 560P99

Case below: 135 N.C.App. 385

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 February 2000.

STATE v. HUNTER

No. 590A99

Case below: 135 N.C.App. 633

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 3 February 2000 in that notice was not timely filed. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 February 2000.

STATE v. JOHNSON

No. 589P99

Case below: 118 N.C.App. 339

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 February 2000.

STATE v. JONES

No. 524P99

Case below: 135 N.C.App. 230

Notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 3 February 2000. Second

notice of appeal by defendant pro se pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 3 February 2000. Petition by defendant pro se for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. JONES

No. 497A93-3

Case below: Duplin County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Duplin County denied 2 March 2000.

STATE v. LEGRANDE

No. 215A96-4

Case below: Stanly County Superior Court

351 N.C. 115

351 N.C. 189

Petition by defendant to rehear petitions pursuant to Rule 31 denied 3 February 2000.

STATE v. LEGGETT

No. 519P99

Case below: 135 N.C.App. 168

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 3 February 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. LUNDY

No. 498P99

Case below: 135 N.C.App. 13

Motion by the Attorney General to dismiss appeal by defendant (Lundy) for lack of substantial constitutional question allowed 3 February 2000. Petition by defendant (Lundy) for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000. Motion by the Attorney General to dismiss appeal by defendant (Evans) for lack of

substantial constitutional question allowed 3 February 2000. Petition by defendant (Evans) for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. LYNCH

No. 242A93-3

Case below: Gaston County Superior Court

Motion by defendant for temporary stay denied 6 January 2000.

STATE v. MELVIN

No. 32P00

Case below: 136 N.C.App. 233

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. PEREZ

No. 576P99

Case below: 135 N.C.App. 543

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 March 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. PERSON

No. 517P99

Case below: 135 N.C.App. 233

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. PILKINGTON

No. 528P99

Case below: 135 N.C.App. 233

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 February 2000.

STATE v. RHODES

No. 21P00

Case below: 136 N.C.App. 791

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 March 2000.

STATE v. ROBERTS

No. 12P00

Case below: 136 N.C.App. 690

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 March 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. SMITH

No. 9P00

Case below: 136 N.C.App. 649

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. SNIPES

No. 6P00

Case below: 136 N.C.App. 233

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 March 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. STALLINGS

No. 516P99

Case below: 135 N.C.App. 233

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE v. STEVENSON

No. 50P00

Case below: 136 N.C.App. 235

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. STEWART

No. 550PA99

Case below: 118 N.C.App. 339

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 2 March 2000. Justice Martin recused.

STATE v. TEAGUE

No. 474P99

Case below: 134 N.C.App. 702

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 February 2000. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 February 2000.

STATE v. UNDERWOOD

No. 579PA99

Case below: 134 N.C.App. 702

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 2 March 2000.

STATE v. WALKER

No. 13P00

Case below: 136 N.C.App. 791

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. WARREN

No. 116A96-2

Case below: Guilford County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Guilford County, denied 2 March 2000. Motion by defendant to seal attachment 3 of petitioner's interlocutory PWC-S denied 2 March 2000.

STATE v. WELCH

No. 534P99

Case below: 135 N.C.App. 499

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 March 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. WILLIAMS

No. 575A99

Case below: 135 N.C.App. 633

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 February 2000.

STATE v. WILLIAMS

No. 392P99

Case below: 134 N.C.App. 378

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000. Justice Wainwright recused.

STATE v. WOODS

No. 51P00

Case below: 136 N.C.App. 386

Motion by Attorney General for temporary stay denied 3 February 2000. Petition by Attorney General writ of supersedeas denied 2 March 2000. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. WRIGHT

No. 546P99

Case below: 135 N.C.App. 386

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

STATE EX REL. COMM'R OF INS. v. N.C RATE BUREAU

No. 42P99-2

Case below: 131 N.C.App. 874

350 N.C. 850

Petition by petitioner (N.C. Rate Bureau) for writ of certiorari to review the 17 August 1999 order of the North Carolina Court of Appeals reaffirming its decision in this case denied 2 March 2000.

STEM v. RICHARDSON

No. 367P99

Case below: 128 N.C.App. 754

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000. Motion by plaintiffs' attorney to participate as petitioner denied 3 February 2000. Notice of appeal by plaintiffs' attorney pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 3 February 2000. Petition by plaintiffs' attorney for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

SUDDRETH v. CITY OF CHARLOTTE

No. 497P99

Case below: 135 N.C.App. 231

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

TEW v. BROWN

No. 583PA99

Case below: 136 N.C.App. 763

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 February 2000.

TOLER v. BLACK AND DECKER

No. 473P99

Case below: 134 N.C.App. 695

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 21 February 2000.

VON PETTIS REALTY, INC. v. MCKOY

No. 518P99

Case below: 135 N.C.App. 206

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 2000.

WHALEY v. GEORGIA PACIFIC

No. 491P99

Case below: 134 N.C.App. 501

Motion by defendant to hold petition for discretionary review in abeyance allowed 2 December 1999. Motion by defendant to withdraw petition for discretionary review allowed 2 March 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 2 March 2000.

WOLFE v. WILMINGTON SHIPYARD, INC.

No. 14P00

Case below: 136 N.C.App. 661

Motion by defendant (Wilmington Shipyard, Inc.) to withdraw petition for discretionary review allowed 23 February 2000.

WRENN v. MARIA PARHAM HOSP., INC.

No. 16P00

Case below: 136 N.C.App. 672

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 March 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 March 2000.

STATE v. FRITSCH

[351 N.C. 373 (2000)]

STATE OF NORTH CAROLINA v. KIMBERLY BRAXTON FRITSCH
AKA KIMBERLY RAINS FRITSCH

No. 141PA99

(Filed 7 April 2000)

1. Homicide; Child Abuse and Neglect— child abuse—involuntary manslaughter—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss charges of involuntary manslaughter and felonious child abuse, and the evidence supported defendant's convictions of involuntary manslaughter and misdemeanor child abuse, where there was evidence tending to show that the seven-year-old victim had cerebral palsy and was profoundly mentally retarded; the victim was absent from a developmental center for extended periods of time while in defendant's care and custody; the victim's weight dropped after these absences from the center and rose again after regular attendance; each time the victim returned to the center after extended absences, she had sores on her back and was dirty and unkempt; the DSS had twice substantiated neglect of the victim by defendant based upon observations of the victim's physical condition and defendant's continued failure to take the victim to a doctor for a physical examination; the victim's death was caused by "starvation malnutrition"; and there was no evidence that the victim could not digest and ingest food. Substantial evidence existed from which the jury could infer that defendant willfully, or through her culpable negligence, deprived the victim of food and nourishment and that the victim's death was caused by defendant's actions or inactions.

2. Evidence— death of child—DSS substantiation of prior neglect—admissibility to show intent

In a prosecution of defendant for involuntary manslaughter and abuse of a child who suffered from cerebral palsy and mental retardation, evidence that DSS had substantiated two cases of neglect of the victim by defendant did not invade the province of the judge and jury but was properly admitted to show defendant's intent where the trial court instructed the jury that this evidence could be considered only for the limited purpose of showing defendant's knowledge of the level of care she was required to provide to the victim.

Justice MARTIN concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 132 N.C. App. 262, 511 S.E.2d 325 (1999), holding that the trial court erred in denying defendant's motions to dismiss and reversing a judgment entered by Cobb, J., on 26 March 1997 in Superior Court, Carteret County. Heard in the Supreme Court 17 November 1999.

Michael F. Easley, Attorney General, by Grady L. Balentine, Jr., Assistant Attorney General, for the State-appellant and -appellee.

Stephen M. Valentine for defendant-appellant and -appellee.

PARKER, Justice.

Defendant was indicted for felonious child abuse and involuntary manslaughter of her seven-year-old daughter (victim). The jury convicted defendant of nonfelonious child abuse and involuntary manslaughter. The convictions were consolidated for judgment, and the trial court sentenced defendant to a term of sixteen to twenty months imprisonment.

At trial the State's evidence tended to show that the victim suffered from cerebral palsy and severe mental retardation, functioning at the level of an infant. The victim died on 1 January 1996 at her home in Carteret County. The victim was a student at the Newport Developmental Center ("Center"), a therapeutic day program for children with special needs, from June 1989 until January 1992 and then again from April 1993 until 16 October 1995. While at the Center, the victim never exhibited any eating problems or inability to swallow. In February 1994 the victim weighed twenty-six and a half pounds. The victim was then absent from the Center from 8 June 1994 until 30 August 1994. When the victim returned on 30 August 1994, the Center observed that she was dirty and thinner and that she had sores on her back. The victim then weighed twenty-two pounds. The Center then contacted the Department of Social Services ("DSS") concerning the victim's physical condition. The DSS's investigation revealed that the victim had fresh and old bed sores on her spine, that the victim had a severe diaper rash, and that she appeared emaciated. The DSS then contacted Dr. William Stanley Rule for a child medical evaluation as to whether the victim's condition was due to neglect or her disability. The DSS's investigation also revealed that the victim had not been seen regularly by a physician. After the DSS substantiated a case for neglect of the victim, defendant entered into two intervention plans

with the DSS which included choosing a doctor to perform regular weight checks and medical examinations of the victim, having the victim followed by a home health agency or a similar organization, taking advantage of respite services for additional home support, obtaining counseling regarding defendant's care of the victim, having the victim attend the Center on a regular basis, and obtaining regular employment and independence. The DSS's service regarding this neglect complaint of the victim ended in May 1995.

Dr. Rule, an expert in the field of pediatrics, saw the victim from infancy in 1988 until 1992. According to Dr. Rule, the victim was a premature twin who had numerous medical problems, including severe kidney disease with a swollen left kidney, a collapsed lung, pulmonary disease, cerebral atrophy, and visual and hearing difficulties. Pursuant to the DSS's request to examine the victim, Dr. Rule concluded that

> [t]he pressure sore and evidence of prior similar lesions, along with chronic diaper rash and diminished subcutaneous tissue, a possible sign of inadequate caloric intake, along with the apparent lack of consistent medical, home and medical follow-up of problems, all raise valid concerns regarding the child's care, regarding child care issues. There is no suggestion of abuse. . . . Cerebral palsy could possibly explain the child's size and growth status, but I still believe the situation is suspect. . . . The skin lesions and her diaper rash, those areas I felt were indicative of suboptimal care or poor care. I thought that the weight of the child was something that should raise concern.

After regular attendance at the Center, the victim weighed twenty-seven pounds on 21 September 1994. The victim was again absent from the Center from 4 January 1995 until 4 April 1995. On 4 April 1995 the victim weighed twenty-four and a half pounds. After numerous absences from the Center in April and May 1995, the victim weighed twenty-two and a half pounds on 10 May 1995.

The victim was again absent from the Center from 2 September 1995 until 2 October 1995. On 2 October 1995 the victim returned to the Center unkempt and with sores. The victim weighed twenty-three pounds. The Center contacted the DSS again regarding the victim's physical condition. On 4 October 1995 the DSS observed that the victim appeared emaciated; that her arms and legs were in a fetal position; that she looked and smelled bad; that she had crusted dirt between her toes and various folds of her skin; that her left foot was

swollen; and that she had pressure sores on her right foot, right ear, back, and the back of her head at the hairline. When questioned about the victim's physical condition, defendant responded that the pressure sores were actually ant bites that had not healed. The DSS then told defendant to take the victim to the doctor for a medical evaluation. On or about 19 October 1995, the victim was treated for an ear and upper respiratory infection; and the physical examination was rescheduled. However, defendant missed two scheduled appointments to have the victim physically examined. Despite numerous calls and visits to defendant's home and a mailed certified letter requesting contact, the DSS was unable to contact defendant until 18 December 1995. On 19 December 1995 the DSS stressed to defendant that the victim needed a physical evaluation and that she needed to be back at the Center. On 20 December 1995 the DSS substantiated neglect for "lack of proper care and lack of proper medical care" of the victim by defendant based on observations made at the Center on 4 October 1995 and defendant's continued failure to take the victim to a doctor for a physical examination. The victim died on 1 January 1996 before case workers were scheduled to visit defendant's home.

On 2 January 1996 Dr. John Leonard Almeida, Jr., a pathologist, performed an autopsy of the victim's body. The autopsy revealed that the victim weighed eighteen pounds at her death and that the victim's stomach contained approximately a quart of food. Dr. Almeida opined that the underlying cause of the victim's death was "starvation malnutrition." He "found no evidence that [the victim] could not digest and ingest food." Dr. Almeida further opined that

> the malnutrition was of relatively long standing chronic condition, and that the child had very little strength or energies left. And although she had been fed and had ingested a significant amount of food, that she was unable to use that food for the final meal to any useful purpose.

According to defendant, the victim was able to eat only pureed food prepared in a blender. Dr. Richard Stevenson, defendant's expert in pediatrics and developmental disabilities in children, testified that it was common for children with cerebral palsy to be malnourished. Although Dr. Stevenson never physically examined the victim, he reviewed the victim's medical records and concluded that the victim "had been significantly malnourished for at least two years prior to her death." Dr. Stevenson explained that

> [the victim's] ability to eat was limited by the severity of her disability, so that she could only take in a certain number of calories. I think that she became malnourished and stay[ed] malnourished chronically. I think that malnutrition was then complicated by medical factors. Most importantly, I think her bed sores, and that the combination of [mal]nutrition and the bed sores, as well as intervening colds and other things like that, lead [sic] to a vicious circle of continued malnutrition, increased weakness and eventually, death.

In forming his opinions, Dr. Stevenson relied on a medical article that contained a study revealing that "43 percent of children with that severity of handicap [as the victim] were dead by age five and 70 percent were dead by age ten."

Defendant presented testimony of numerous family members and friends who testified that they witnessed defendant feeding the victim many times. They all attested to the fact that the feeding process was long and arduous since the victim had a difficult time swallowing food. They also testified that the victim had always been very thin for a child her age. Dr. Donald Jason, an expert in the field of forensic pathology, reviewed the victim's autopsy report and concluded that the victim died not from starvation malnutrition, but from severe dehydration since the stomach was not emptying properly. Defendant testified that the missed appointments for medical physicals were due to car problems. Defendant also testified that she kept the victim out of the Center during the winter months on account of the victim's respiratory problems.

Prior to trial on the charges of felonious child abuse and manslaughter, defendant filed five motions *in limine* to suppress the evidence of (i) the pathologist's conclusion that the victim died from the withholding of food; (ii) defendant's lifestyle; (iii) the injury to the victim's brother's eye; (iv) the victim's "diaper rash, bed sores, unclean or unsanitary appearance or evidence of marks, rashes, bites, [or] other conditions"; and (v) the four investigations by the DSS into allegations of neglect of the victim by defendant. The trial court granted defendant's first three motions, denied the fourth motion, and granted the fifth motion only with regard to the March 1994 and July 1994 DSS investigations into allegations of neglect of defendant's other children that were not substantiated.

At the close of the State's evidence and at the close of all the evidence, defendant moved to have the charges dismissed; the trial

court denied the motions. After the jury returned it verdicts, defendant renewed her motion to dismiss and moved to have the jury verdicts set aside; the trial court denied the motions.

Defendant appealed, arguing, *inter alia*, that the trial court erred by not granting her motions to dismiss the charges at the close of the State's evidence and at the close of all the evidence since there was insufficient evidence of the crimes charged. The Court of Appeals, agreeing with defendant, reversed the trial court, holding that "the State has failed to present substantial evidence of either felonious or misdemeanor child abuse, or of involuntary manslaughter," sufficient to survive defendant's motions to dismiss. *State v. Fritsch*, 132 N.C. App. 262, 271, 511 S.E.2d 325, 332 (1999). This Court allowed both the State's petition for discretionary review and defendant's conditional petition for discretionary review as to additional issues.

[1] The State contends that the Court of Appeals erred in holding that the trial court erred by denying defendant's motions to dismiss. The State argues that it presented substantial evidence of involuntary manslaughter and felonious or misdemeanor child abuse sufficient to survive defendant's motions to dismiss. We agree.

In *State v. Barnes*, 334 N.C. 67, 430 S.E.2d 913 (1993), this Court again reiterated the standard of review for motions to dismiss in criminal trials. The Court stated,

> This Court reviewed the law in *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980):
>
> > Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
> >
> > If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.
>
> *Id.* at 98, 261 S.E.2d at 117 (citations omitted). In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the bene-

> fit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *Id.* The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then " 'it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).

Barnes, 334 N.C. at 75-76, 430 S.E.2d at 918-19. "Both competent and incompetent evidence must be considered." *State v. Lyons*, 340 N.C. 646, 658, 459 S.E.2d 770, 776 (1995). In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). The defendant's evidence that does not conflict "may be used to explain or clarify the evidence offered by the State." *Id.* When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence. *See id.* at 67, 296 S.E.2d at 652.

Defendant was charged with felonious child abuse and involuntary manslaughter. The jury found defendant guilty of nonfelonious child abuse and involuntary manslaughter. To sustain a charge of felonious child abuse, the State must present substantial evidence that defendant is

> [a] parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child . . . .

N.C.G.S. § 14-318.4(a) (1999). To sustain a charge of misdemeanor child abuse, the State must present substantial evidence that defendant is

> [a] parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means . . . .

N.C.G.S. § 14-318.2(a) (1999).

To sustain a charge of involuntary manslaughter, the State must present substantial evidence that defendant committed

> the unlawful and unintentional killing of another human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty.

State v. Everhart, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977).

Under the applicable standard of review, substantial evidence existed from which the jury could infer that defendant willfully, or through her culpable negligence, deprived the victim of food and nourishment, or that the victim's death was proximately caused by defendant's actions or inactions. State's evidence tended to show that the seven-year-old victim, who had cerebral palsy and was profoundly mentally retarded, was absent from the Center for extended periods of time while in the care and custody of defendant. In February 1994 the victim weighed twenty-six and a half pounds. After being absent from the Center from 8 June 1994 until 30 August 1994, the victim returned thinner, dirty, and with sores on her back. The victim's weight had dropped to twenty-two pounds. After another extended absence from the Center from 2 September 1995 until 2 October 1995, the victim returned unkempt and with sores, weighing twenty-three pounds. Responding to the Center's allegations of neglect on 4 October 1995, the DSS observed that the victim appeared emaciated, that she looked and smelled bad, that there was crusted dirt between her toes and in the various folds of her skin, and that she had numerous pressure sores. Dr. Rule, who examined the victim at the DSS's request, concluded that the victim's skin lesions and diaper rash were "indicative of suboptimal care or poor care. I thought that

the weight of the child was something that should raise concern." The State's evidence further showed that the Center never observed the victim having problems eating or swallowing food. When the victim attended the Center regularly, she gained and maintained weight. At no time did the victim weigh more than twenty-seven pounds. Defendant's expert, Dr. Stevenson, acknowledged that the evidence that the victim's weight dropped after extended absences from the Center and rose again after regular attendance would support the assumption that the victim was not being fed as opposed to suffering from chronic malnutrition. The victim's autopsy on 2 January 1996 revealed that the victim weighed eighteen pounds at the time of her death, that her death was caused by "starvation malnutrition," and that there was no evidence that the victim "could not digest and ingest food."

Moreover, the State's evidence showed that the Center contacted the DSS twice concerning the victim's physical condition. The DSS's 1994 investigation revealed that the victim had not been seen regularly by a physician. After the DSS substantiated a case for neglect of the victim, defendant signed two intervention plans which detailed the level of care that she was expected to provide for the victim, including, *inter alia*, regular doctor visits and regular Center attendance. As part of the DSS's 1995 investigation, defendant was to take the victim for a medical evaluation scheduled for 18 October 1995. The medical evaluation was rescheduled; however, defendant missed two scheduled appointments. The DSS substantiated neglect on 20 December 1995 for "lack of proper care and lack of proper medical care" based on observations of the victim's physical condition and the continued failure to take the victim to a doctor for a physical examination.

The State contends that the Court of Appeals improperly weighed the evidence by considering defendant's exculpatory evidence that was in conflict with the State's evidence. We agree. Comparing this case with *State v. Mason*, 18 N.C. App. 433, 197 S.E.2d 79, *cert. denied*, 283 N.C. 669, 197 S.E.2d 878 (1973), which involved an involuntary manslaughter conviction for the starvation death of a child who was found in squalid living conditions, the Court of Appeals described the victim in this case as one who "lived in a properly heated, well stocked home with several healthy, well-fed children." *Fritsch*, 132 N.C. App. at 270-71, 511 S.E.2d at 331. This description identifies a contradiction or discrepancy with the State's evidence of the victim's condition, which is for the jury to resolve. *See Benson*,

331 N.C. at 544, 417 S.E.2d at 761. The Court of Appeals also noted that the victim suffered from "several significant medical conditions," that no "treating or examining physicians ever recommended hospitalization or feeding the victim through the insertion of a gastrostomy tube," and that friends and family members never expressed great concern with the victim's well-being. *Fritsch*, 132 N.C. App. at 271, 511 S.E.2d at 331. This evidence conflicts with the State's evidence and could not properly be considered on a motion to dismiss. *See Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 653.

We conclude that all the evidence, taken in the light most favorable to the State, was sufficient to support a finding that defendant was guilty of nonfelonious child abuse and involuntary manslaughter. The fact that some evidence in the record supports a contrary inference is not determinative on the motion to dismiss. Accordingly, the Court of Appeals erred in reversing the trial court's denial of defendant's motions to dismiss.

[2] Defendant contends that the trial court erred by denying defendant's motion *in limine* to suppress and by overruling defendant's objections during trial to evidence that DSS substantiated two cases of neglect of the victim by defendant. We disagree.

Defendant made a motion *in limine* to suppress evidence of four DSS investigations into allegations that defendant's children were neglected. The trial court granted the motion as to the DSS's March 1994 and July 1994 investigations that involved unsubstantiated allegations of neglect of defendant's other children. The trial court denied the motion as to the DSS's August 1994 and October 1995 investigations that involved substantiated allegations of neglect of the victim by defendant. The trial court permitted Pamela Stewart and Daniel Sullivan, employees of the DSS, to testify, over defendant's objection, that they investigated the Center's allegations of neglect by observing the victim's physical condition at the Center. Stewart testified that based on her observation in August 1994 of the "pressure sores, the weight loss, the diaper rash, and the fact that [the victim] had not been seen by a regular medical physician," the DSS substantiated a case of neglect of the victim by defendant. Based on his October 1995 observations of the victim, Sullivan testified that the DSS substantiated a case of neglect of the victim "for lack of proper care and lack of proper medical care" by defendant. The trial court instructed the jury that this evidence could be considered only for the limited purpose of "showing that the defendant had at least

some knowledge that the [DSS] had concerns regarding the level of care she was providing for her child," not as evidence of defendant's guilt.

The decision to either grant or deny a motion *in limine* is within the sound discretion of the trial court. *See State v. Hightower*, 340 N.C. 735, 746-47, 459 S.E.2d 739, 745 (1995). The trial court also has the sound discretion to exclude relevant but prejudicial evidence under Rule 403. *See State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). The trial court must exclude evidence of other crimes, wrongs, or acts if the purpose of the evidence is to show defendant's propensity to commit the crime. *See State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (1999). "Our courts have consistently held that past incidents of mistreatment are admissible to show intent in a child abuse case." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991).

Defendant contends that the testimony of the DSS employees that the DSS had substantiated a case of neglect of the victim by defendant was unduly prejudicial in that it invaded the province of both the judge and jury. In other words, the testimony was the equivalent of the involuntary manslaughter instruction given to the jury that "defendant's failure to act constituted a criminally negligent failure to perform a legal duty" and that "defendant's act proximately caused the victim's death." We disagree. The State contends that the evidence was not used to show defendant's propensity to commit the crime, but rather to show that defendant had knowledge of the level of care that she was expected to provide and maintain for the victim. The jury could infer from the evidence of the DSS's substantiation of neglect that defendant's failure to follow the two intervention plans provided by the DSS was not a mistake. We hold that defendant's past incidents of her failure to provide proper care for the victim are relevant and admissible to show intent. The trial court properly balanced the probative value of this relevant evidence for the State against any unduly prejudicial effect to defendant by giving a limiting instruction to the jury. Further, we note that the trial court granted defendant's motions *in limine* to suppress evidence of the pathologist's conclusion that the victim died from the withholding of food, of defendant's lifestyle, of the injury to the victim's brother's eye, and of two investigations by the DSS into unsubstantiated allegations of

neglect of other children. Therefore, we conclude that the trial court did not abuse its discretion in failing to grant defendant's motion *in limine* to suppress and in overruling defendant's objections during trial to evidence of the DSS's substantiation, based on its investigations, of allegations of neglect of the victim by defendant.

In conclusion, we affirm the decision of the Court of Appeals upholding the trial court's denial of defendant's motion *in limine* and overruling defendant's objections at trial to exclude evidence of the DSS's investigations. However, we reverse the Court of Appeals' decision reversing defendant's convictions.

REVERSED.

Justice MARTIN concurring in part and dissenting in part.

I concur in the majority's conclusion that the state presented sufficient evidence to survive defendant's motion to dismiss. I also agree that the underlying evidence of neglect, proffered by two lay witnesses for the limited purpose of showing defendant's knowledge of the level of care she was required to provide to the victim, was properly admitted. Nevertheless, I dissent from the majority's holding that the trial court did not commit prejudicial error when it allowed these same two lay witnesses to state repeatedly that they had "substantiated a case of neglect" against defendant.

Under N.C.G.S. § 8C-1, Rule 704, witnesses may offer an opinion that embraces an ultimate issue decided by the trier of fact. Neither a lay witness, nor *even* an expert witness, however, may suggest to the jury that a legal standard has been satisfied or otherwise testify to a legal conclusion. *See HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587, 403 S.E.2d 483, 489 (1991); *see also State v. Smith*, 310 N.C. 108, 114, 310 S.E.2d 320, 324 (1984). In *HAJMM* this Court stated:

> From the Rules of Evidence, the advisory committee's notes, case law, and commentaries, we discern two overriding reasons for excluding testimony which suggests whether legal conclusions should be drawn or whether legal standards are satisfied. The first is that such testimony invades not the province of the jury but "the province of the court to determine the applicable law and to instruct the jury as to that law." *F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir.), *cert. denied*, 464 U.S. 895, 78 L. Ed. 2d 232 (1983). It is for the court to explain to the jury the given legal

> standard or conclusion at issue and how it should be determined. To permit the expert to make this determination usurps the function of the judge. The second reason is that an expert is in no better position to conclude whether a legal standard has been satisfied or a legal conclusion should be drawn than is a jury which has been properly instructed on the standard or conclusion.

HAJMM, 328 N.C. at 587, 403 S.E.2d at 489; *see generally* 1 KENNETH S. BROUN, BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE §§ 182, 190 (5th ed. 1998).

In the present case, the two lay witnesses were permitted to testify repeatedly at trial that DSS had "substantiated a case of neglect" against defendant. As District Attorney McFadyen correctly explained to the trial court, "The central issue in both of these charges is **neglect** . . . between April 1994 and October 1995." (Emphasis added.) In essence, the issue before the jury was whether defendant's alleged neglect led to the victim's death.

It was the trial court's duty to explain to the jury the legal standard of criminal negligence and how it should be determined. *See HAJMM*, 328 N.C. at 587, 403 S.E.2d at 489. By permitting the two lay witnesses to testify repeatedly as to administrative determinations of negligence against defendant, the province of the trial court to determine the applicable law on criminal negligence, and to instruct the jury on that law, was impermissibly invaded. *See id.* Moreover, the lay witnesses were in no better position than the jury to determine whether defendant was negligent after presentation of the underlying facts relevant to defendant's conduct and the trial court's proper instruction on the law of criminal negligence. *See id.*

The error arising from the erroneous admission of this evidence during presentation of the state's case-in-chief was not cured by the limiting instruction given by the trial court during its charge to the jury. Whether the prejudicial effect of incompetent evidence should be deemed cured by the trial court's instruction to disregard or give limited consideration to such evidence "depends upon the nature of the evidence and the circumstances of the particular case." *State v. Aycoth*, 270 N.C. 270, 273, 154 S.E.2d 59, 61 (1967). This Court has recognized 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." *State v. Britt*, 288 N.C. 699, 713, 220 S.E.2d 283, 292 (1975). " '[I]f the evidence

admitted is obviously prejudicial, and especially if it is emphasized by repetition or by allowing it to remain before the jury for an undue length of time, it may be too late to cure the error by withdrawal' or cautionary instructions." *Duke Power Co. v. Winebarger*, 300 N.C. 57, 67, 265 S.E.2d 227, 233 (1980) (quoting 1 HENRY BRANDIS, JR., STANSBURY'S NORTH CAROLINA EVIDENCE § 28, at 75-76 (Brandis rev. 1973)). In such cases, this Court "will not indulge in the usual presumption that the jury followed the letter and intent of the judge's instructions." *Id.*; *see Whitley v. Redden*, 276 N.C. 263, 273, 171 S.E.2d 894, 901 (1970).

In the present case, the record indicates that no contemporaneous curative instructions were given when the statements at issue were admitted. The trial court did, however, inform the jury during the general jury charge that the statements had been admitted solely for the purpose of demonstrating defendant's knowledge of the level of care she was to provide to the victim. This instruction was not sufficient to disabuse the jury of the impression that an administrative agency charged, among other things, with the duty of protecting children, had twice essentially found defendant to be guilty of neglect. Moreover, this prejudicial evidence was emphasized by repetition, and it remained before the jury throughout the entire course of the proceeding, without limitation. Therefore, the trial court's limiting instruction came too late to cure the prejudicial error.

Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA v. MATTHEW THOMAS RICH

No. 161PA99

(Filed 7 April 2000)

1. Homicide— malice—instructions—second-degree murder—automobile accident—attitudinal circumstances

The trial court did not err in a prosecution for second-degree murder by instructing the jury that malice may be present if only one of the attitudinal circumstances constituting malice—wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, a mind regardless of social duty and deliberately bent on mischief—is found to exist. The attitudinal

circumstances listed by the trial court in the instruction serve only as descriptive words or phrases and do not constitute elements of malice so that the State need not prove each and every one of those attitudinal examples of malice in order for the jury to infer malice.

2. Homicide— instructions—malice—recklessness of consequences

The trial court's instruction allowing the jury in a second-degree murder case to find malice based on "recklessness of consequences" did not lower the culpability level required to convict a defendant of second-degree murder to a level of culpable negligence since the trial court's instructions as a whole reflected terms which described the degree of recklessness sufficient for the jury to find the state of mind which constitutes malice, and the jury could not have confused such a high degree of recklessness with mere culpable negligence.

3. Homicide— instructions—malice—deliberately bent on mischief

The trial court did not err in its definition of "deliberately bent on mischief" as used in its instruction on malice in a prosecution for second-degree murders arising from an automobile accident by failing to convey the appropriate concepts of deliberateness and intention since it was necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind; the State was not required to show that defendant had a conscious, direct purpose to do specific harm or damage, or had a specific intent to kill; and the State presented testimony that defendant drove his vehicle at a high rate of speed while impaired, on the wrong side of the road, in a no-passing zone and in violation of right-of-way rules. Therefore, the jury was properly focused on defendant's intention to perform an act which reflected the level of intent that is associated with a person being "deliberately bent on mischief."

4. Homicide— instructions—malice—deliberately bent on mischief

The trial court's instruction on the meaning of "deliberately bent on mischief" in a prosecution for second-degree murders arising from an automobile accident could not have caused the jury to confuse malice with culpable negligence where the trial

court never mentioned culpable negligence to the jury in connection with its charge on second-degree murder but focused on the term "malice"; and the instructions clearly required a finding of malice sufficient to support second-degree murder if the jury concluded that defendant's actions were such as to be inherently dangerous to human life and were done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

5. Evidence— lay opinion—investigating officer—driving while impaired

An investigating officer was properly permitted to state his opinion in a prosecution for two second-degree murders that defendant was driving while impaired when he collided with the victims' vehicle for the purpose of showing malice where the officer based his opinion not only on the odor of alcohol, but also on his investigation of the accident and upon his experience enforcing traffic laws and dealing with intoxicated drivers.

6. Evidence— other crimes—prior speeding convictions—malice

Evidence of defendant's prior convictions for speeding was admissible under Rule 404(b) to show malice in this prosecution for second-degree murders arising from an automobile accident in which the State's evidence tended to show that defendant drove his vehicle on the wrong side of the road at a high rate of speed while impaired. This evidence was not offered to show that defendant was speeding at the time of the collision but to show that defendant knew and acted with a total disregard of the consequences, which is relevant to show malice.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 132 N.C. App. 440, 512 S.E.2d 441 (1999), finding no error in two judgments for second-degree murder entered by Albright, J., on 25 September 1997 in Superior Court, Guilford County. Heard in the Supreme Court 16 November 1999.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

J. Donald Cowan and Shannon R. Joseph for defendant-appellant.

LAKE, Justice.

Defendant was indicted on 6 January 1997 for two counts of second-degree murder. He was tried at the 15 September 1997 Criminal Session of Superior Court, Guilford County. The jury found defendant guilty of both charges. On 25 September 1997, the trial court sentenced defendant to two consecutive terms of 132 to 168 months' imprisonment. Defendant gave notice of appeal to the North Carolina Court of Appeals on 29 September 1997.

On appeal, the Court of Appeals found no error. *State v. Rich*, 132 N.C. App. 440, 512 S.E.2d 441 (1999). For the reasons discussed herein, we conclude that the Court of Appeals correctly determined that defendant received a fair trial, free from prejudicial error. Accordingly, we affirm the decision of the Court of Appeals.

The State's evidence tended to show that on 29 November 1996, at approximately 10:15 p.m., while traveling on Horse Pen Creek Road in Greensboro, North Carolina, defendant's vehicle collided head-on with another vehicle. The passengers in the other vehicle were Todd Allan Bush and James Brady Littrell. The accident occurred at a sharp curve in the road where the posted speed limit was thirty-five miles per hour (mph). The road consisted of two lanes and was marked as a no-passing zone. The stretch of road leading up to the curve had a forty mph speed limit. Just prior to entering the curve in the road, defendant had passed another motorist in a no-passing zone. Defendant was driving at a speed in excess of seventy mph when he entered the curve, crossed into the left lane, and collided with Bush and Littrell. Both Bush and Littrell died as a result.

At approximately 10:30 p.m., Officer L.E. Farrington of the Greensboro Police Department arrived at the scene of the collision. While investigating the accident, Officer Farrington noticed a strong odor of alcohol on defendant. A member of the Emergency Medical Services (EMS) team who responded to the accident, Karrina Crews, testified that she also detected a strong odor of alcohol on defendant as she helped remove defendant from his vehicle. Other members of the EMS team testified that defendant was verbally abusive and combative toward assisting paramedics. Thereafter, EMS transported defendant to Moses Cone Hospital, where Dr. Kai-Uwe Mazur treated defendant. While treating defendant, Dr. Mazur asked him a series of questions, one of which was whether he drank alcohol. Defendant

responded that he frequently consumed alcohol, and on the night of the accident, he drank "several beers and several shots." Dr. Mazur recorded this statement in defendant's medical record.

Officer Gerald Austin of the Greensboro Police Department, who had also investigated the scene of the collision, interviewed defendant at the hospital at approximately 11:35 p.m. that night. During this interview, Officer Austin detected a strong odor of alcohol on defendant. Officer Austin also noted that defendant's eyes were bloodshot and watery, and that defendant had difficulty focusing on him during the interview. Officer Austin concluded that defendant was impaired at the time of the collision. However, there is nothing in the record which indicates that a blood alcohol test was ever administered to defendant.

The State also introduced evidence that defendant had a history of convictions for traffic violations: driving seventy mph in a thirty-five mph zone on 11 August 1995, driving seventy mph in a fifty-five mph zone on 11 May 1994, reckless driving and fleeing to elude arrest on 3 October 1991, driving seventy-six mph in a forty-five mph zone on 6 September 1990, and driving seventy-five mph in a forty-five mph zone on 3 October 1988.

[1] In his first assignment of error, defendant contends that the Court of Appeals erred in approving the trial court's instruction that the jury needed to find only one of the attitudinal components of malice to support a second-degree murder conviction. Defendant argues that the Court of Appeals' affirmance of the trial court's definition of malice conflicts with this Court's decision in *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). We disagree.

The trial court instructed the jury as to malice as follows:

> Now, members of the jury, our courts have defined malice, and our courts have declared that there are three kinds of malice in our law of homicide. One kind of malice connotes a possible concept of express hatred, ill will, or spite. This is sometimes called actual, express, or particular malice. Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. And there is, in addition, a third kind of malice which is defined as nothing more than that condition of

> mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification.
>
> . . . .
>
> Now, I further charge you, members of the jury, with respect to the second kind of malice that I have defined to you, that is, malice which arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief, I say I charge you that any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person, is sufficient to supply the malice necessary for second-degree murder.

After beginning its deliberations, the jury requested additional instructions from the trial court regarding "the nature of malice of the second kind." The trial court responded to the jury's question as follows:

> [Y]ou have asked me with regard to wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, a mind regardless of social duty and deliberately bent on mischief, as to whether all of these must be present. My answer to that is no. One of these, some of these, or all of these may be proved and may be sufficient to supply the malice necessary for second degree murder. That is a factual determination that you, the jury, must make . . . .

Defendant argues that the Court of Appeals erred in affirming the trial court's instruction to the jury that malice may be present if only one of the six attitudinal circumstances constituting malice is found to exist. Defendant contends that the Court of Appeals erred because the trial court's definition of malice conflicts with the language adopted by this Court in *Wilkerson*. The definition of malice set out in *Wilkerson* originated from a dissent to *State v. Wrenn*, 279 N.C. 676, 185 S.E.2d 129 (1971). *Wilkerson*, 295 N.C. at 578, 247 S.E.2d at 916. In her dissenting opinion to *Wrenn*, Justice (later Chief Justice) Sharp stated:

> [Malice] comprehends not only particular animosity "but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty

> and deliberately bent on mischief, though there may be no intention to injure a particular person." 21 A. & E. 133 (2nd Edition 1902).
>
> . . . "[It] does not necessarily mean an actual intent to take human life; it may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life." *State v. Trott*, 190 N.C. 674, 679, 130 S.E. 627, 629 [(1925)] . . . . In such a situation[,] "the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist." 1 Wharton, Criminal Law and Procedure § 245 (Anderson, 1957).

Wrenn, 279 N.C. at 686-87, 185 S.E.2d at 135 (Sharp, J., dissenting). This Court later approved that definition of malice in *Wilkerson*, 295 N.C. at 578, 247 S.E.2d at 916.

Defendant asserts that the trial court's formulation of malice conflicts with this Court's definition set forth in *Wilkerson* because the trial court did not require the jury to find all six attitudinal circumstances of malice to exist in order to find that defendant acted with malice. Rather, the trial court instructed the jury that only one of these circumstances may be sufficient for malice to exist. Defendant contends that because the trial court erroneously instructed the jury on malice, the trial court relieved the State of its burden to prove all the essential elements of second-degree murder. This argument is without merit.

In *State v. Leach*, 340 N.C. 236, 456 S.E.2d 785 (1995), this Court held that the elements listed by the trial court in a jury instruction on premeditation and deliberation were examples of circumstances that the jury could use to infer premeditation and deliberation, and that the law did not require that each circumstance be proven. The trial court in *Leach* instructed the jury on premeditation and deliberation for first-degree murder as follows:

> [Premeditation and deliberation] may be proved by proof of a circumstance from which they may be inferred such as a lack of provocation by the [v]ictim; conduct of the [d]efendant before, during and after the killing; threats and declarations of the defendant; use of grossly excessive force or vicious circumstances of the killing or the manner or means by which the killing was done.

Id. at 241, 456 S.E.2d at 788. In examining that jury instruction, this Court explained:

> The instruction in question informs a jury that the circumstances given are only illustrative; they are merely examples of some circumstances which, if shown to exist, permit premeditation and deliberation to be inferred. The instruction tells jurors that they "may" find premeditation and deliberation from certain circumstances, "such as" the circumstances listed.

Id. at 241, 456 S.E.2d at 789.

Just as the phrases contained in the instructions for premeditation and deliberation serve as examples from which a jury could infer premeditation and deliberation, the attitudinal circumstances given in the jury instruction for malice serve as descriptive phrases. These words or phrases are each descriptive of the type or types of thought, attitude or condition of mind sufficient to constitute malice. Like premeditation and deliberation, "depraved-heart" malice may be "infer[red] or implied." *Wilkerson*, 295 N.C. at 578, 247 S.E.2d at 916. The descriptive phrases listed in the instructions for malice serve to help define malice for the jury. They do not constitute "elements" of malice, which is itself an element of second-degree murder, and thus the State need not prove each and every one of those attitudinal examples of malice in order for the jury to infer the element of malice.

[2] Defendant also argues that if this Court allows the six traditional descriptive words and phrases defining malice to be read in the disjunctive, then it is possible for a jury to convict a defendant of second-degree murder based on a finding of "recklessness of consequences." Defendant asserts that this would effectively lower the culpability level required to convict a defendant of second-degree murder since "recklessness of consequences" is a level of culpability usually associated with negligence. We disagree.

The distinction between "recklessness" indicative of murder and "recklessness" associated with manslaughter "is one of degree rather than kind." *United States v. Fleming*, 739 F.2d 945, 948 (4th Cir. 1984) *cert. denied*, 469 U.S. 1193, 83 L. Ed. 2d 973 (1985). Additionally, this Court has stated:

> "The charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it . . . ." *State v. Wilson*, 176 N.C. 751,

> [754-55,] 97 S.E. 496[, 497] (1918). It will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. Lee, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970) (citations omitted). After reviewing the trial court's jury instructions as a whole, we conclude that the trial court's instructions reflected terms which described the degree of recklessness sufficient for the jury to find the state of mind which constitutes malice. Because the trial court's instructions, in their entirety, conveyed the level of recklessness required for second-degree murder, we cannot conclude that the jury could have confused such a high degree of recklessness with mere culpable negligence. This assignment of error is overruled.

[3] In his next assignment of error, defendant contends that the Court of Appeals erred in approving the trial court's instruction to the jury on the meaning of the phrase "deliberately bent on mischief." After receiving two identical charges on the definition of malice, the jury asked the trial court for a "legally-accepted paraphrase of 'deliberately bent on mischief.' " In response to the jury's question, the trial court stated:

> [The term deliberately bent on mischief] connotes conduct as exhibits conscious indifference to consequences wherein probability of harm to another within the circumference of such conduct is reasonably apparent, though no harm to such other is intended. [It] [c]onnotes an entire absence of care for the safety of others which exhibits indifference to consequences. It connotes conduct where the actor, having reason to believe his act may injure another, does it, being indifferent to whether it injures or not. It indicates a realization of the imminence of danger, and reckless disregard, complete indifference and unconcern for probable consequences. It connotes conduct where the actor is conscious of his conduct, and conscious of his knowledge of the existing conditions that injury would probably result, and that, with reckless indifference to consequences, the actor consciously and intentionally did some wrongful act to produce injurious result.

Defendant argues that this instruction erroneously states the meaning of "deliberately bent on mischief" because it fails to convey the

concepts of deliberateness and intention that are intrinsic to the phrase. In the decision below, the Court of Appeals noted that "in this jurisdiction, it is well-settled 'that a charge is to be construed as a whole and isolated portions of a charge will not be held prejudicial where the charge as a whole is correct and free from objection.' " *State v. Rich*, 132 N.C. App. at 447, 512 S.E.2d at 446 (quoting *State v. Poole*, 305 N.C. 308, 324, 289 S.E.2d 335, 345 (1982)). After reviewing the jury instruction in its entirety, the Court of Appeals found no error. *Id.* We agree.

"Second-degree murder is an unlawful killing with malice, but without premeditation and deliberation." *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991). "Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice." *Id.* at 522, 402 S.E.2d at 385. Accordingly, in the case *sub judice*, it was necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind. The State was not required to show that defendant had a conscious, direct purpose to do specific harm or damage, or had a specific intent to kill. However, the State did show a pattern of such behavior by eliciting testimony that defendant in this case drove his vehicle at a high rate of speed while impaired, on the wrong side of the road, in a no-passing zone and in violation of right-of-way rules. This is sufficient evidence to support a finding by the jury of malice necessary under second-degree murder. Therefore, after reviewing the trial court's instructions, we conclude that the jury was properly focused on defendant's intention to perform an act which reflected the level of intent that is associated with a person being "deliberately bent on mischief."

[4] Defendant also contends that the trial court's instruction on "deliberately bent on mischief" blurred the distinction between involuntary manslaughter and murder, and would thus allow a jury to return a verdict of second-degree murder when a defendant's conduct amounted to no more than culpable negligence. We disagree.

As stated above, the difference between the type of malice at issue in the case *sub judice* and culpable negligence is the degree of recklessness that would support a finding of each. *See Fleming*, 739 F.2d 945. "Standing alone, culpable negligence supports the submission of involuntary manslaughter." *Brewer*, 328 N.C. at 523, 402 S.E.2d at 386. But when that negligence is accompanied by "an act

which imports danger to another [and] is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life," then it is sufficient to support a second-degree murder charge. *State v. Trott*, 190 N.C. at 679, 130 S.E. at 629, *quoted in Brewer*, 328 N.C. at 523, 402 S.E.2d at 386.

After reviewing the trial court's instructions to the jury in their entirety, we cannot conclude that the trial court's definition of "deliberately bent on mischief" blurred the distinction between involuntary manslaughter and murder. The trial court never mentioned culpable negligence to the jury in connection with its charge of second-degree murder. Rather, the court focused on the term "malice." The jury's instructions clearly required a finding of malice sufficient to support second-degree murder if the jury concluded that defendant's actions were such as to be "inherently dangerous to human life [and were] done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." Because the trial court's instructions to the jury on the element of malice required for second-degree murder were clear and correct, we cannot conclude that the jury could have confused malice with culpable negligence. Therefore, the Court of Appeals correctly approved the trial court's jury instructions, and this assignment of error is overruled.

[5] In his next assignment of error, defendant contends that the Court of Appeals erred in approving the trial court's admission of the opinion of impairment by one of the investigating officers. Specifically, defendant argues that the opinion testimony lacked a sufficient foundation and was not rationally based on the observations of the witness. We do not agree.

At trial, Officer Gerald Austin testified that in his opinion, "defendant was under the influence of an impairing substance and unable and unfit to operate machinery or equipment of any type." During the cross-examination of Officer Austin, the following colloquy ensued:

> Q. And you are then basing your opinion on him lying on a gurney at Cone Hospital concerning him being unable to drive an automobile because he was intoxicated. Is that what you're telling his Honor and the members of this jury?
>
> A. No. What I'm telling his Honor and the members of this jury is based upon my experience of having to deal with people

that I've arrested and charged with D.W.I., whether they be of sound mind and body or whether they be injured. That was the opinion that I formed.

Q. Well, in other words, you formed an opinion, based on other arrests, that an hour and 45 minutes to two hours after Mr. Rich had an accident out there, that he was unable to drive an automobile?

A. Correct, sir.

Q. And that was based on your smelling a moderate odor of alcohol on his breath, is that right?

A. I believe my testimony was it was moderate to strong, and, yes, that's what it's based on.

Q. Beg your pardon?

A. My testimony was that it was moderate to strong, and that is what my opinion is based upon.

In addition to stating on cross-examination that his opinion that defendant was impaired was based only upon the odor of alcohol, Officer Austin also acknowledged that before he testified at trial, he never discussed with the State his opinion that defendant was impaired. Officer Austin also failed to put any notes in his report regarding his opinion that defendant was impaired. At trial, Officer Austin conceded that defendant's bloodshot and watery eyes could have resulted from defendant's head injuries. Finally, Officer Austin never saw defendant walk, and there was no evidence that defendant's speech was slurred.

In the decision below, the Court of Appeals determined that Officer Austin was competent to express an opinion that defendant was driving while impaired when he collided with the victims' vehicle. *State v. Rich*, 132 N.C. App. at 449, 512 S.E.2d at 448. The Court of Appeals reasoned:

> Officer Austin's opinion was based on his experience as a law enforcement officer in conjunction with his observations of the circumstances surrounding the collision. Officer Austin testified that as he proceeded to the scene, he noted the posted speed limits, and when he arrived at the place where the accident occurred, he observed the position and condition of the vehicles

> involved. He stated that he also witnessed defendant's behavior at the scene and described him as "giving E.M.S. quite a hard time." When Officer Austin later interviewed defendant at the hospital, he detected a "moderate to strong" odor of alcohol about defendant's person. He further noted that defendant's eyes were bloodshot and watery and that defendant had difficulty focusing on the officer during the interview. Armed with these facts, a police officer with more than three years' experience in the enforcement of motor vehicle laws and who has been personally involved in the investigations of nearly 200 driving while impaired cases is competent to express an opinion that defendant was under the influence of alcohol when he collided with the victims' vehicle.

Id. Based on the following reasons, we conclude that the Court of Appeals correctly ruled that the trial court properly admitted Officer Austin's testimony.

The rule concerning the admissibility of opinion testimony by lay witnesses provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (1999). Additionally, it is a well-settled rule that a lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal observation. *State v. Lindley*, 286 N.C. 255, 258, 210 S.E.2d 207, 209 (1974).

Defendant argues that this Court has held that "an odor [of alcohol], *standing alone*, is no evidence that [a driver] is under the influence of an intoxicant." *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 793 (1970). However, in that same case, this Court also stated, "the '[f]act that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [N.C.G.S. §] 20-138.' " *Id.* at 185, 176 S.E.2d at 794 (quoting *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965)). In the case *sub judice*, Officer Austin observed the collision scene and observed defendant at the hospital, and two witnesses tes-

tified that they saw defendant's car going seventy mph around a curve just before the collision. Additionally, other witnesses testified as to defendant's odor of alcohol.

We note that Officer Austin's testimony was offered as evidence which tended to show that defendant acted with malice, not that defendant was impaired. Based upon our review of the record in its entirety, we conclude that notwithstanding his cross-examination testimony, Officer Austin based his opinion not only on the odor of alcohol, but also on his investigation of the accident and upon his experience enforcing traffic laws and dealing with intoxicated drivers. Moreover, it is the jury that determines how much weight should be afforded such opinion evidence. *State v. Davis*, 321 N.C. 52, 57-58, 361 S.E.2d 724, 727 (1987). During cross-examination, defendant had the opportunity to discredit Officer Austin's testimony before the jury. Based on the foregoing, we conclude that the Court of Appeals correctly determined that Officer Austin's testimony was competent and admissible evidence which was rationally based on his perception of defendant and his observations at the scene of the accident. This assignment of error is overruled.

[6] In his last assignment of error, defendant contends that the Court of Appeals erred in approving the admission into evidence of defendant's prior traffic violations. Defendant asserts that prior driving-related convictions are irrelevant to the issue of malice at the time of the collision, and that the State introduced evidence of the prior convictions to show that defendant acted in conformity with prior conduct. We disagree.

Rule 404(b) of the Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1999). It is well settled that this "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. Hipps*, 348 N.C. 377, 404, 501 S.E.2d 625, 641 (1998) (quoting *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)), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999).

In affirming the trial court's admission of the prior speeding convictions to show malice, the Court of Appeals noted that it has previously and "repeatedly held that evidence of prior convictions is admissible under Rule 404(b) to show the malice necessary to support a second-degree murder conviction." *Rich*, 132 N.C. App. at 450, 512 S.E.2d at 448; *see also State v. Grice*, 131 N.C. App. 48, 505 S.E.2d 166 (1998), *disc. rev. denied*, 350 N.C. 102, —— S.E.2d —— (1999). The Court of Appeals then stated:

> [T]he State, in the present case, sought to establish the malice element of second-degree murder by showing that defendant committed an act evidencing a total disregard for human life—i.e., showing "wickedness of disposition," "recklessness of consequences" or "a mind regardless of social duty and deliberately bent on mischief." Evidence of defendant's prior traffic violations—driving 75 mph in a 45 mph zone, 76 mph in a 45 mph zone, 70 mph in a 35 mph zone, and 70 mph in a 55 mph zone—was relevant to establish defendant's "depraved heart" on the night he struck the victims' vehicle while rounding a sharp curve at a speed at least 40 mph over the posted limit.

Rich, 132 N.C. App. at 450-51, 512 S.E.2d at 449.

Defendant's argument that the State introduced the evidence of the prior speeding convictions to show that defendant acted in conformity with prior conduct must fail. The State was not seeking to prove that defendant was speeding at the time of the collision. Rather, by introducing defendant's prior speeding convictions, the State offered additional evidence which tended to show defendant's "totally depraved mind" and "recklessness of the consequences." Because the State offered the evidence to show that defendant knew and acted with a total disregard of the consequences, which is relevant to show malice, the provisions of Rule 404(b) were not violated. This assignment of error is overruled.

For the foregoing reasons, we conclude that the Court of Appeals correctly determined that defendant received a fair trial, free from prejudicial error. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE v. BUCKNER

[351 N.C. 401 (2000)]

STATE OF NORTH CAROLINA v. GEORGE CALE BUCKNER

No. 444A93-2

(Filed 7 April 2000)

1. Evidence— privileged communications—attorney-client—work product—waiver—allegations of ineffective assistance

N.C.G.S. § 15A-1415(e) did not supersede the decision of *State v. Taylor*, 327 N.C. 147, that a defendant, by alleging ineffective assistance of counsel, waives the benefits of both the attorney-client and work product privileges with respect to matters relevant to his allegations of ineffective assistance.

2. Discovery— ineffective assistance allegation—communications with counsel—statutory limitation—relevance

While the phrase in N.C.G.S. § 15A-1415(e) "to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness" is intended as some limitation on the information which the defendant is required to make available, the clear intent and purpose of the statute permit only a limitation of discovery to relevance.

3. Evidence— privileged communications—attorney-client—work product—waiver—allegations of ineffective assistance

Defendant's broad-based claims of ineffective assistance of counsel which encompass almost every aspect of his capital trial and sentencing proceeding involve each counsel's thoughts and, therefore, include defendant's and trial counsel's notes, documents, paperwork, work product, communications (both oral and written), frame of mind, trial decisions and strategy, along with defendant's and trial counsel's responses to one another; by attacking the competency of his trial counsel, defendant waived the attorney-client and work product privileges as to such communications and work product relevant to the allegations of ineffective assistance.

4. Discovery— ineffective assistance allegation—communications with counsel—work product—statutory language—inherent power of court

When enacting N.C.G.S. § 15A-1415(e), the legislature could not have intended for the phrase "to the extent the defendant's prior counsel reasonably believes such communications are nec-

essary to defend against the allegations of ineffectiveness" to mean that trial counsel should be the only one to control discovery by determining the extent of discovery or acting as the gatekeeper of discovery, since such an intent would be contrary to the purpose of the statute. Determining the extent of discovery is ultimately for the court to decide pursuant to its inherent power.

5. Discovery— post-trial motion—inherent power of court

The superior court has the inherent power to compel disclosure of relevant facts regarding a post-trial motion for appropriate relief.

6. Discovery— ineffective assistance allegation—communications with counsel—production of documents—inherent power of court

Because the State could have issued a subpeona to compel disclosure by defendant's trial counsel or the production of documentary evidence relevant to defendant's allegations of ineffective assistance of counsel, the superior court has the inherent power to order disclosure by defendant's trial counsel prior to a hearing on defendant's motion for appropriate relief. The court should determine if ordering disclosure on the merits of a defendant's motion for appropriate relief will significantly assist in the search for truth; if the court orders disclosure and there is disagreement about whether the order covers certain questionable documents or communications, the court must conduct an in camera review to determine the extent of the order as to those documents or communications.

7. Discovery— ineffective assistance allegation—State's motion—duties of court on remand

On remand of the State's motion for discovery in response to defendant's motion for appropriate relief alleging that trial counsel rendered ineffective assistance at both the guilt and sentencing phases of defendant's capital trial, the superior court should take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and client that are determined to be relevant to defendant's allegations of ineffective assistance.

8. Discovery— ex parte interview—inappropriate order

It was improper for the superior court to require defendant's trial counsel to submit to an ex parte interview by the prosecutor

in its order granting the State's motion for discovery in response to defendant's motion for appropriate relief alleging ineffective assistance of counsel. However, the superior court could order trial counsel to answer questions to reveal relevant information concerning defendant's motion for appropriate relief, order that a deposition of trial counsel be taken with both parties present, or order any other formal discovery appropriate to reveal relevant information.

Chief Justice FRYE concurs in the result.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order signed 3 November 1998 by Baker, J., in Superior Court, Gaston County, granting the State's motion for discovery under N.C.G.S. § 15A-1415(e). Heard in the Supreme Court 14 December 1999.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

E. Fitzgerald Parnell, III, and Joseph E. Zeszotarski, Jr., for defendant-appellant.

Center for Death Penalty Litigation, by Kenneth J. Rose, on behalf of the North Carolina Academy of Trial Lawyers and the National Association of Criminal Defense Lawyers, amici curiae.

WAINWRIGHT, Justice.

In September 1993, defendant George Cale Buckner was tried on charges of first-degree murder, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, felonious larceny, and felonious possession of stolen goods. On 20 September 1993, the jury returned verdicts of guilty as to all counts. The jury recommended the death penalty.

On 8 October 1993, the trial court sentenced defendant to death for first-degree murder and to consecutive terms of imprisonment of forty years for robbery with a dangerous weapon, ten years for conspiracy to commit robbery with a dangerous weapon, and ten years for felonious larceny. On 8 December 1995, this Court found no error as to the convictions of first-degree murder, conspiracy to commit robbery with a dangerous weapon, and robbery with a dangerous weapon, but arrested judgment on the conviction of felonious lar-

ceny. *See State v. Buckner*, 342 N.C. 198, 464 S.E.2d 414 (1995), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996).

On 5 August 1997, post-conviction counsel for defendant filed a motion for appropriate relief alleging that trial counsel rendered ineffective assistance of counsel at *both* the guilt *and* sentencing phases of defendant's capital trial. Defendant alleged he received ineffective assistance by trial counsel's:

1. "failure to *discover* and present evidence tending to *prove another* committed the murder";
2. "failure to *adequately warn* Defendant of the consequences of his taking the witness stand and . . . failure to object to the prosecutor's *alleged improper* closing argument and the trial court's *inadequate curative instruction*";
3. "failure to *adequately inform* Defendant about the prosecution's *subjecting him* to cross-examination about his prior criminal record";
4. "failure to *properly prepare* Defendant for cross-examination concerning the *type of speedometer* in the get-away vehicle";
5. "ineffective[ness] by virtue of his *failing to demand* Defendant be present at all stages of his trial";
6. "ineffective[ness] for *stipulating* to Defendant's prior common law robbery and for *failing to present* rebuttal evidence";
7. "ineffective[ness] in *developing* sufficient evidence *in support of* the mitigating circumstances presented to the jury";
8. "ineffective[ness] for failing to *sufficiently investigate* and present evidence of *other* mitigating circumstances";
9. "ineffective[ness] in failing to present evidence upon which a jury could find Defendant's criminal history was *not significant*"; and
10. "ineffective[ness] in *failing to request* peremptory instructions on non-statutory mitigating circumstances."

(Emphasis added.)

In response to defendant's motion for appropriate relief, the State requested, by way of a motion for discovery, "access to and copies of all notes, documents, communications or work product touching

directly or indirectly on the issues enumerated [in defendant's motion for appropriate relief] and the investigation, preparation for trial, tactical decisions, and strategy relevant to Defendant's allegations of ineffective assistance of counsel."

Post-conviction counsel provided the State with copies of written correspondence between trial counsel and defendant. Defendant's trial counsel, however, refused to speak to the State and filed an affidavit stating he was ineffective and was the attorney primarily responsible for investigation, preparation, and presentation of the mitigation evidence at sentencing. No summaries of any oral communications between trial counsel and defendant were provided to the State.

After considering the oral arguments of the parties, the evidence of record, and the parties' submitted written arguments, the superior court entered an order on 3 November 1998 granting the State's motion for discovery. The superior court made, *inter alia*, the following findings of fact:

5. Counsel for the State made several inquiries concerning discovery necessary to represent the interest of the State in defending against the allegations of ineffective assistance of counsel.

6. Post-conviction counsel for [defendant], provided copies of correspondence between the defense attorneys at trial and the defendant.

7. Access to any other material related to the issues of ineffective assistance of counsel has been denied the State's attorney.

8. The State, on September 28, 1998, formally filed its Discovery Motion and requested access to and copies of all notes, documents, communications, or work product touching directly or indirectly on the issues alleging ineffective assistance of counsel. The State also asks the right to interview trial counsel to glean the substance of any oral communications relevant to the allegations of ineffective assistance of counsel.

The superior court then concluded as a matter of law:

1. As to those issues alleging ineffective assistance of counsel, [defendant] has waived the attorney/client privilege and any privilege having to do with work product related to those issues.

2. The waiver of the attorney/client privilege was automatic upon the filing of the allegations of ineffective assistance of counsel, as it related to both oral and written communications between [defendant] and his trial counsel. N.C.G.S. § 15A-1415(e). *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990)[,] provides the [court] with the inherent power to determine that work product related to the issues alleging ineffective assistance of counsel be waived.

3. Nothing in the passage of N.C.G.S. § 15A-1415(e) limits the inherent authority of this court to determine a waiver of attorney/client privilege or that of work product privilege.

The superior court's order stated the State's attorney was to be provided access to and copies of all notes, documents, communications, or work product touching directly or indirectly on the allegations of ineffective assistance of counsel enumerated in defendant's motion for appropriate relief. Additionally, the superior court ordered that the State's attorney have the right to interview trial counsel to learn of any oral communications relevant to the trial investigation and preparation, tactical decisions, or strategy relevant to defendant's allegations of ineffective assistance of counsel.

On 22 July 1999, this Court allowed defendant's petition for writ of certiorari to review the superior court's order.

Defendant argues the superior court erred as a matter of law in failing to recognize the effect of the legislature's enactment of N.C.G.S. § 15A-1415(e) by not applying the statutory language, and in acting without authority in ordering trial counsel to submit to an interview.

First, we address defendant's argument that the superior court's order failed to recognize the effect of the legislature's enactment of N.C.G.S. § 15A-1415(e) by not applying the statutory language. In 1996, the legislature enacted "An Act to Expedite the Postconviction Process in North Carolina," ch. 719, 1995 N.C. Sess. Laws 389, which added discovery provisions, including subsection (e), to N.C.G.S. § 15A-1415. Subsection (e) provides:

> Where a defendant alleges ineffective assistance of prior trial or appellate counsel as a ground for the illegality of his conviction or sentence, he shall be deemed to *waive* the attorney-client privilege with respect to both *oral and written communications*

> between such counsel and the defendant to the extent the *defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness.* This waiver of the attorney-client privilege shall be *automatic* upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.

N.C.G.S. § 15A-1415(e) (1999) (emphasis added).

Specifically, defendant contends (1) N.C.G.S. § 15A-1415(e) supersedes and effectively overrules *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801, and sets out a specific, concrete set of discovery rules applicable to materials privileged between defendant and his trial counsel; (2) the statute invokes a stricter standard of permissible discovery than was previously imposed under the "relevance" standard of *Taylor* by limiting discovery to only "oral and written communications" between a defendant and trial counsel relevant to any ineffective assistance of counsel claims; (3) the superior court failed to follow N.C.G.S. § 15A-1415(e) when it ordered post-conviction discovery in the instant case; and (4) the required disclosure is further limited by the phrase "to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness." We disagree.

[1] At the time *Taylor* was decided, N.C.G.S. § 15A-1415 contained no discovery provisions. Defendant's contention that N.C.G.S. § 15A-1415(e) supersedes *Taylor* is misplaced. Except where inconsistent with this opinion, *Taylor* remains good law. In *Taylor*, the defendant's post-conviction counsel filed a motion for appropriate relief contending, *inter alia*, that trial counsel for the defendant rendered ineffective assistance in preparing and presenting both the defense at trial and the direct appeal. *Taylor*, 327 N.C. at 150, 393 S.E.2d at 804. The superior court ordered the defendant to give the State "access to . . . all files relating to these cases." *Id.* at 151, 393 S.E.2d at 804. This Court, however, held that a defendant waives the benefits of both the attorney-client and the work-product privileges by alleging ineffective assistance of counsel, "but *only* with respect to matters relevant to his allegations of ineffective assistance of counsel." *Id.* at 152, 393 S.E.2d at 805. The majority of this Court conceded that the defendant's waiver of privileges was broad, as pointed out in Justice Meyer's dissent, but nevertheless stated that "his waiver was not an unlimited waiver." *Id.* We concluded,

> [a]s the order of the Superior Court directed the defendant to provide the State access to "all files relating to these cases" without limiting the ordered disclosure to matters relevant to issues raised by the defendant's allegations of ineffective assistance of counsel, the order of the Superior Court was overbroad and exceeded its authority.

Id. As a result, the State was permitted discovery of all materials that were in any way relevant to the ineffectiveness claims. *Id.*

In reviewing N.C.G.S. § 15A-1415(e), we recognize that when interpreting a statute, courts must look to the intent of the legislature. *State v. Tew*, 326 N.C. 732, 738, 392 S.E.2d 603, 607 (1990). If possible, a statute must be interpreted so as to give meaning to all its provisions. *State v. Bates*, 348 N.C. 29, 35, 497 S.E.2d 276, 279 (1998). "Individual expressions must be construed as a part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *Tew*, 326 N.C. at 739, 392 S.E.2d at 607.

The legislature enacted "An Act to Expedite the Postconviction Process in North Carolina" "in response to legislative concerns that the post-conviction process in capital cases appeared endless." *State v. Green*, 350 N.C. 400, 406, 514 S.E.2d 724, 728, *cert. denied*, —— U.S. ——, 144 L. Ed. 2d 840 (1999) (citing *Bates*, 348 N.C. 29, 497 S.E.2d 276). The amendments to N.C.G.S. § 15A-1415 evidence "an intent on the part of the General Assembly to expedite the post-conviction process in capital cases *while ensuring thorough and complete review*." *Bates*, 348 N.C. at 37, 497 S.E.2d at 280-81 (emphasis added).

The superior court in the instant case followed N.C.G.S. § 15A-1415(e) when it ordered discovery. We find our previous decision in *Bates*, which examined subsection (f), instructive to our analysis here. *Id.* at 29, 497 S.E.2d at 276. Subsection (e) mandates, in explicit language, that the defendant is deemed to have waived the attorney-client privilege; therefore, the clear language of this statute demands disclosure in post-conviction proceedings. *See id.* at 36, 497 S.E.2d at 280; N.C.G.S. § 15A-1415(e). In criminal cases, both the accused and the State have an interest in obtaining a fair and accurate resolution of the question of guilt or innocence. *Id.* at 37, 497 S.E.2d at 280. This interest " 'demand[s] that adequate safeguards assure the thorough preparation and presentation of each side of the case.' " *Id.* (quoting *United States v. Nobles*, 422 U.S. 225, 238, 45 L. Ed. 2d 141, 153 (1975)). In *Bates*, we noted that the statute contains

no express provision for withholding work product. *Id.* at 35, 497 S.E.2d at 279. Similarly, nothing in existing law prohibits disclosure to the State of defendant's oral and written communications, including work-product materials, upon defendant alleging ineffectiveness of counsel. We also stated in *Bates* that the interest of the State in protecting its work product once the case has reached post-conviction review is diminished. *Id.* at 37, 497 S.E.2d at 280. Consistent with the legislature's intent in N.C.G.S. § 15A-1415(e), this principle applies equally to a defendant.

[2] Subsection (e), being expeditious in nature, makes clear that a defendant shall be deemed to waive the attorney-client privilege automatically without the need of the superior court entering such an order. Defendant argues that the phrase "to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness" must limit the required disclosure. We agree that this language is intended as some limitation on the information which the defendant is required to make available. However, the clear intent and purpose of the Act permit only a limitation of discovery to relevance, consistent with *Taylor*. *See id.*

The objective and subjective mental processes of trial counsel and defendant are relevant, as they form the basis of trial counsel's choices, strategies, and approaches concerning the case. If something is reasonably necessary in defending against an ineffectiveness allegation pursuant to N.C.G.S. § 15A-1415(e), it would also be relevant under *Taylor*. If evidence is relevant to ineffectiveness, it may be "necessary" to defend against an ineffectiveness allegation. *See* N.C.G.S. § 15A-1415(e). Thus, *Taylor* is not superseded, as defendant argues, and discovery is not *per se* limited to merely "oral and written communications."

In *Taylor*, post-conviction counsel described the extent of the defendant's waiver of the attorney-client and work-product privileges by making specific allegations of trial counsel's ineffectiveness. In particular, defendant alleged that his trial counsel (1) failed to investigate the other crimes, (2) failed to cross-examine witnesses to these crimes, and (3) offered no rebuttal evidence concerning these witnesses and crimes. *Taylor*, 327 N.C. at 158, 393 S.E.2d at 809. Defendant additionally set forth certain allegations of ineffective assistance with regard to his prior counsel's preparation of his appeal. *Id.* at 155, 393 S.E.2d at 807. The post-conviction counsel fur-

ther identified in detail specific parts of the files in which the defendant had not waived limited privileges of confidentiality. *Id.* Thus, this Court ordered disclosure to matters relevant to the defendant's allegations. *Id.* at 152, 393 S.E.2d at 805.

[3] In the instant case, however, defendant's claims are numerous, broad-based, and encompass almost every aspect of the trial and sentencing proceeding. Defendant's allegations involve each counsel's thoughts and, therefore, include defendant's and trial counsel's notes, documents, paperwork, work product, communications (both oral and written), frame of mind, trial decisions and strategy, along with defendant's and trial counsel's responses to one another. By attacking the competency of his trial counsel, defendant has waived the attorney-client and work-product privileges as to privileged communications and work product relevant to the allegations of ineffective assistance of counsel. *See id.* Defendant has raised these broad-based allegations and cannot be allowed to use them as a sword and simultaneously use the attorney-client and work-product privileges as a shield.

[4] Moreover, when enacting subsection (e), it is clear the legislature anticipated trial counsel would be cooperative and willing to defend their work and reputation against allegations of ineffectiveness. However, as in the instant case, it is reasonable to believe that, on occasion, trial counsel will continue to defend his/her client regardless of personal attacks. As previously noted, defendant argues the phrase "to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness" limits the required disclosure. The legislature could not have intended that trial counsel should be the only one to control discovery by determining the extent of discovery or acting as the gatekeeper of discovery. Such an intention would be contrary to the purpose of the statute. Determining the extent of discovery is ultimately for the court to decide pursuant to its inherent power.

[5] This Court in *Taylor* affirmed the "inherent power" of the superior court to order discovery in its discretion, to assure justice in criminal cases. *Taylor*, 327 N.C. at 153, 393 S.E.2d at 806 (citing *State v. Hardy*, 293 N.C. 105, 124, 235 S.E.2d 828, 840 (1977)). In *Taylor*, we stated:

> "At trial the major concern is the 'search for truth' as it is revealed through the presentation and development of all rele-

> vant facts. To ensure that truth is ascertained and justice served, the judiciary must have the power to compel the disclosure of relevant facts, not otherwise privileged, within the framework of the rules of evidence."

Id. at 154, 393 S.E.2d at 806 (quoting *Hardy*, 293 N.C. at 125, 235 S.E.2d at 840). This reasoning led us to conclude that "our judiciary also *must and does have the inherent power to compel disclosure of relevant facts regarding a post-trial motion* and may order such disclosure prior to a hearing on such motion." *Id.* (emphasis added).

Inherent power is that which a court necessarily possesses irrespective of constitutional provisions. *In re Alamance County Ct. Facils.*, 329 N.C. 84, 93, 405 S.E.2d 125, 129 (1991). Such power may not be abridged by the legislature and is essential to the court's existence and the orderly and efficient administration of justice. *Id.* Through its inherent powers, a court has the " 'authority to do all things that are reasonably necessary for the proper administration of justice.' " *Id.* at 94, 405 S.E.2d at 129 (quoting *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987)); *see also Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562-63 (3d. Cir. 1985) (holding that the United States Supreme Court viewed inherent power as fundamental to the administration of justice and the functioning of the judiciary); Felix F. Stumpf, *Inherent Powers of the Courts* 37-38 (1994) (inherent power covers powers thought essential to the existence, dignity, and functions of the court, or for an orderly, efficient and effective administration of justice). A court uses its inherent power when constitutional provisions, statutes, or court rules fail to supply answers to problems or when courts find themselves compelled to provide solutions that enable the litigative process to proceed smoothly. Stumpf, *Inherent Powers of the Courts* 37-38. Our courts have the "inherent power to order discovery in furtherance of criminal investigation." *In re Super. Ct. Order Dated April 8, 1983*, 315 N.C. 378, 379, 338 S.E.2d 307, 308 (1986).

[6] Because the State could have issued a subpoena to compel disclosure by defendant's trial counsel or the production of documentary evidence, the superior court has the inherent power to order disclosure by defendant's trial counsel prior to a hearing on defendant's motion for appropriate relief. *See Taylor*, 327 N.C. at 154, 393 S.E.2d at 806. Superior courts should determine if ordering disclosure on the merits of a defendant's motion for appropriate relief will significantly assist in the search for truth. If the superior court orders

disclosure, and there is disagreement about whether the order covers certain questionable documents or communications, the superior court must conduct an *in camera* review to determine the extent of the order as to those documents or communications. *See id.* at 155, 393 S.E.2d at 807.

[7] To defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. *See id.* at 159, 393 S.E.2d at 809 (Meyer, J., dissenting). "[O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance." *Id.* at 161, 393 S.E.2d at 810 (Meyer, J., dissenting) (citing *Harris v. Commonwealth*, 688 S.W.2d 338 (Ky. Ct. App. 1984), *cert. denied*, 474 U.S. 842, 88 L. Ed. 2d 104 (1985)). Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of the representation. *Id.* (noting that the performance of trial counsel must be analyzed according to the circumstances of each particular case); *see also Strickland v. Washington*, 466 U.S. 668, 693, 80 L. Ed. 2d 674, 697 (1984) (holding that "an act or omission that is unprofessional in one case may be sound or even brilliant [trial strategy] in another"). On remand of this case, the superior court should take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and client that are determined to be relevant to defendant's allegations of ineffective assistance of counsel.

[8] We now address defendant's argument that the trial court erred in ordering defendant's trial counsel to submit to an *ex parte* interview. Defendant contends the superior court was without authority to order such an interview. We agree. It was improper for the superior court to order an *ex parte* interview. However, the superior court may order trial counsel to answer questions to reveal relevant information concerning defendant's motion for appropriate relief, order that a deposition of trial counsel be taken with both parties present, or order any other formal discovery appropriate to reveal relevant information.

Based on the foregoing, we affirm the superior court's order as to its authority to determine the extent of discovery; to order relevant discovery based on the allegations; and to conduct *in camera* review, if necessary, to resolve any disagreements. However, that part of the superior court's order requiring that the State's attorney have the

right to interview defendant's trial counsel *ex parte* is vacated. On remand of the instant case, the superior court shall take evidence and (1) make appropriate findings of fact and conclusions of law concerning which materials are relevant; (2) order disclosure of all relevant materials; and (3) in addition, order any hearing, deposition, or other formal discovery necessary to reveal trial counsel's tactical decisions and strategy, including but not limited to their opinions, thoughts, and oral communications, which are relevant to the allegations of ineffectiveness.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Chief Justice FRYE concurs in the result.

STATE OF NORTH CAROLINA v. FLOYD CURTIS WADDELL

No. 418A98

(Filed 7 April 2000)

1. Evidence— hearsay—medical diagnosis or treatment exception—child sexual abuse victim—statements inadmissible—admission not plain error

Statements made by an alleged child victim of sexual offenses, indecent liberties, and felonious child abuse to a licensed psychological associate were not admissible under the medical diagnosis or treatment exception to the hearsay rule where the interview took place after the initial medical examination, in a child-friendly room, in a nonmedical environment, and with a series of leading questions; and the record lacks any evidence that there was a medical treatment motivation on the part of the child declarant or that the psychological associate or anyone else explained to the child the medical purpose of the interview or the importance of truthful answers. However, defendant failed to object to the admission of these statements at trial, and the admission of the statements did not constitute plain error where defendant's convictions of one count of first-degree sexual offense, taking indecent liberties with a minor, felony child abuse and lewd and lascivious acts were supported by (1) the testimony of the child's mother, a pediatrician, a social

services worker, a psychological associate, and a detective, and (2) defendant's pretrial admissions to the detective and his admissions at trial.

2. Witnesses— child sexual abuse victim—incompetency to testify—court's refusal to instruct

In a prosecution for first-degree statutory sex offense, taking indecent liberties, felony child abuse and lewd and lascivious acts wherein the child victim was ruled incompetent to testify after he had been called to the stand and a voir dire was conducted, the trial court did not abuse its discretion in refusing to instruct the jury that the child was no longer on the stand because he had been found incompetent to testify since (1) the trial court's finding that the child was incompetent to testify as a witness did not render unreliable the child's out-of-court statements to other witnesses, and (2) defendant could not have been prejudiced because the credibility of the child's version of the events was not in question and was, for the most part, consistent with defendant's own testimony.

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

On appeal of right to review a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) and pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 130 N.C. App. 488, 504 S.E.2d 84 (1998), finding no error in judgments entered by Everett, J., on 25 August 1995 in Superior Court, Wayne County. Heard in the Supreme Court 11 May 1999.

Michael F. Easley, Attorney General, by Anita LeVeaux-Quigless, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

LAKE, Justice.

On 6 February 1995, defendant was indicted for two counts of first-degree statutory sex offense, three counts of taking indecent liberties with a minor, three counts of lewd and lascivious acts, and two counts of felony child abuse. The cases were joined for trial and came to trial before a jury at the 21 August 1995 Criminal Session of

Superior Court, Wayne County. The jury found defendant not guilty of one count of first-degree sex offense and convicted him of all other offenses enumerated above. Defendant was sentenced to life imprisonment for the first-degree sex offense, three consecutive ten-year terms for taking indecent liberties with a minor and committing a lewd and lascivious act, and two consecutive ten-year terms for felony child abuse. From these judgments and convictions, defendant gave timely notice of appeal, and the Court of Appeals, with one judge dissenting, affirmed the trial court. Defendant appealed to this Court based on the dissent below and the assertion that another issue determined by the Court of Appeals raised a substantial constitutional question.

The State's evidence tended to show that subsequent to defendant's divorce from Connie Waddell, she was awarded custody of their son, with defendant accorded supervised visitation one day a weekend from 1:00 to 5:00 p.m., commencing in March 1993. On 27 August 1994, visitation was increased to supervised visitation one day a weekend from 9:00 a.m. to 9:00 p.m. Apparently, defendant did not understand that his visitation was to be supervised by the child's paternal grandmother, and the majority of defendant's visitation with his son was unsupervised.

According to Ms. Waddell, the child developed behavioral problems after beginning extended visitation with his father, including bed-wetting, masturbation and aggressive behavior when he became angry, such as hitting and name-calling. Ms. Waddell related that she had not seen the child masturbate previous to his visitation with his father and that the child told her "his daddy done [like] that."

After a 4 September 1994 visit with defendant, Ms. Waddell stated the child, then six years old, "started touching his privates, masturbating and saying my daddy, my daddy, my daddy," and that "his daddy let him touch his privates." After visitation on 10 September 1994, the child told Ms. Waddell he and his father had washed the car together in the nude and that "his father had him to masturbate him and he [the child] saw it shoot off." Thereafter, Ms. Waddell notified Kim Sekulich of the Johnston County Department of Social Services (DSS), who told Ms. Waddell to take the child to Wake Medical Center, where he received a physical exam and met with a psychiatrist.

On 15 September 1994, the child was interviewed by Sekulich at his school. According to Sekulich, the child told her about washing

the car in the nude with his father, described seeing his father masturbate and said his father "shot it off in the air." The child used the word "peanut" to describe his genitalia and reported he and his father touched each other's peanuts. Sekulich subsequently filed a petition alleging defendant's abuse and neglect of the child. Defendant was thereafter interviewed and arrested by police on 23 September 1994.

On 4 August 1995 and 17 August 1995, the State gave notice to defendant and the trial court that if the child victim was deemed unavailable, the statements and testimony of Ms. Lauren Rockwell-Flick, a licensed psychological associate at Wake Medical Center; Dr. Elizabeth Witman, who performed a physical examination of the child; Ms. Sekulich; Detective Mike Smith; and the child's mother would be introduced at trial. As expected, the child was found incompetent to testify at trial, and the aforementioned individuals testified regarding statements made to them by the child.

At trial, the State presented Rockwell-Flick as an expert in the field of child sexual abuse. She testified, *inter alia*, that she interviewed the child on 21 September 1994, using anatomically correct dolls. The child again described washing his father's automobile while wearing no clothes, identified his genitals as a "peanut," described seeing his father masturbate to the point of ejaculation, and said his father had touched the child's genitals. When asked by Rockwell-Flick to demonstrate what his father did, the child said, "he takes his pants off . . . and his shirt," and then the child "took the peanut off the adult male doll and put it in the mouth of the boy doll." When Rockwell-Flick asked, "does his peanut touch your mouth?" the child responded affirmatively. Rockwell-Flick inquired whether his father had ever done anything to the child's rectal area, and the child took both the boy and adult dolls and began touching the adult doll's penis to the rectum of the boy doll. During a second interview by Rockwell-Flick, on 27 September 1994, the child repeated demonstrations of oral and anal sex with the adult male and the boy anatomical dolls and indicated the child's penis had been in his father's mouth. Both interviews between Rockwell-Flick and the child were videotaped. However, only the tape from the 21 September 1994 interview was admitted into evidence, over defendant's objection, and shown to the jury.

[1] On appeal, defendant first argues the trial court erred by overruling defendant's objection to the admission of the hearsay testi-

mony of witness Rockwell-Flick, which the Court of Appeals held was admissible under the firmly rooted hearsay exception of "Statements for Purposes of Medical Diagnosis or Treatment," N.C.G.S. § 8C-1, Rule 803(4) (1999). After a thorough review of the record, we find that, contrary to defendant's contentions, defendant did not object to the admission of Rockwell-Flick's testimony at trial as required to preserve the question for appellate review. N.C. R. App. P. 10(b). At an early stage in Rockwell-Flick's testimony, defendant did object to testimony regarding the child's responses to questions about the body parts of the anatomically correct male dolls. Defendant also objected to the State's instruction to Rockwell-Flick to explain how she had conducted the interview with the child. However, after these preliminary objections, Rockwell-Flick entered into extended testimony, running over fourteen pages of the transcript, which was a continuous detailed narrative, without question from the State and without objection from defendant. It was after this testimony that defendant objected to the jury's being shown the video of Rockwell-Flick's interview of the child. In response to that objection, the trial court pointed out that defendant had not objected to testimony which had already been given regarding the content of the interview between Rockwell-Flick and the child. Defendant acknowledged through counsel that there had not been an objection, and defendant then specifically stated he thought Rockwell-Flick could testify as to her examination of the child.

Based on the above, defendant clearly not only did not object to the Rockwell-Flick testimony, but also did not think the testimony was objectionable at the time. Although defendant did object to the presentation of the videotape, Rockwell-Flick had already given detailed testimony regarding the content of the video before the objection was made. Notwithstanding defendant's lack of objection, and thus failure to preserve this issue for appellate review, we will review the Sixth Amendment confrontation question addressed by the opinion of the Court of Appeals for plain error.

This Court has recently examined the admissibility of testimony from the very same witness, Rockwell-Flick, under very similar circumstances in *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000). In *Hinnant*, this Court held that hearsay evidence is admissible under Rule 803(4) only when two inquires are satisfied. *Id.* at 289, 523 S.E.2d at 670. "First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. . . . Second, the trial court must determine

that the declarant's statements were reasonably pertinent to medical diagnosis or treatment." *Id.* at 289, 523 S.E.2d at 670-71. In *Hinnant*, the child victim was interviewed by Rockwell-Flick two weeks after the initial medical examination, in a "child-friendly" room, in a nonmedical environment, and with a series of leading questions, whereby Rockwell-Flick systematically pointed to the anatomically correct dolls and asked whether anyone had performed various acts with the child. The record did not disclose that Rockwell-Flick or anyone else explained to the child the medical purpose of the interview or the importance of truthful answers. This Court concluded that there was no evidence the child had a treatment motive when speaking to Rockwell-Flick and that the record did not disclose that Rockwell-Flick or anyone else explained to the child the medical purpose of the interview or the importance of truthful answers. *Id.* at 289-90, 523 S.E.2d at 671. Based on this lack of evidence, this Court held the two-prong test required for the admissibility of hearsay evidence under Rule 803(4) had not been satisfied, and the Rockwell-Flick testimony was therefore not admissible under that rule. *Id.*

The circumstances surrounding the interview of the child victim in the case *sub judice* are essentially identical to those in *Hinnant*. The interview took place after the initial medical examination, in a "child-friendly" room, in a nonmedical environment, and with a series of leading questions. The record also lacks any evidence that there was a medical treatment motivation on the part of the child declarant or that Rockwell-Flick or anyone else explained to the child the medical purpose of the interview or the importance of truthful answers. Therefore, for the reasons stated in *Hinnant*, we conclude the Court of Appeals erred in determining that Rockwell-Flick's testimony was properly admitted under Rule 803(4).

In *Hinnant*, this Court also noted that Rockwell-Flick's testimony might have been admissible under the residual exceptions to the hearsay rule provided there was proper notice, equivalent circumstantial guarantees of trustworthiness and findings of fact and conclusions of law made by the trial court. *Id.*; *see also* N.C.G.S. § 8C-1, Rules 803(24), 804(b)(5) (1999). In reviewing the record in the instant case, we note several references made by the State to the residual hearsay exceptions. In fact, the State pointed out to the trial court that the State recognized it had the burden to file notice of its intention to use residual hearsay and had ensured that timely notice was filed. However, the record also shows the State vacillated between relying on the residual and the medical exceptions to

hearsay, and at a pivotal point during *in limine* discussions regarding the admissibility of Rockwell-Flick's testimony, the State determined its position in tender of this evidence in stating, "[T]he testimony of [Rockwell-Flick] comes in under the medical diagnosis." This statement, along with the fact that the trial court then did not make any findings of fact and conclusions of law supporting admissibility as residual hearsay, also precludes a finding of admissibility under the residual exception to hearsay. *See State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 254-55 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989).

Notwithstanding the erroneous admission of the Rockwell-Flick testimony in the case *sub judice*, as in *Hinnant*, we note that an erroneous admission of hearsay " 'is not always so prejudicial as to require a new trial.' " *Hinnant*, 351 N.C. at 291, 523 S.E.2d at 672 (quoting *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986)). In reviewing the prejudicial impact of Rockwell-Flick's testimony in the present case, because defendant not only did not object to the admission of the testimony at trial, but also stated he thought the testimony as to the examination of the child was admissible, the issue is reviewed for "plain error." *See State v. Murillo*, 349 N.C. 573, 589, 509 S.E.2d 752, 762 (1998), *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 87 (1999); *State v. Bowman*, 349 N.C. 459, 477, 509 S.E.2d 428, 439 (1998), *cert. denied*, —— U.S. ——, 144 L. Ed. 2d 802 (1999). Before an error by the trial court amounts to "plain error," we must be convinced that absent the error the jury probably would have reached a different verdict. *See State v. Keel*, 337 N.C. 469, 485, 447 S.E.2d 748, 757 (1994), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995). Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed upon those defendants who have preserved their rights on appeal by timely objection. *Id.*

To determine whether the jury probably would have reached a different verdict had Rockwell-Flick's testimony not been considered, we review the other evidence before the jury. The record shows Ms. Waddell testified without objection that her son told her he washed the car naked with defendant and that defendant masturbated in front of the child to the point of ejaculation. On cross-examination, the mother also stated her son said defendant had the child put his mouth on defendant's "peanut."

Counsel stipulated Dr. Witman as an expert in the field of pediatrics and child sex abuse. She testified, without objection, that she

conducted a physical examination of the child on or about 21 September 1994 and that in her opinion the child "probably had been sexually abused."

Ms. Sekulich testified, without objection, that the child told her defendant masturbated in front of him and "shot it off"; that defendant had touched the child's peanut; that the child touched defendant's peanut; and that defendant made a voluntary statement at the juvenile hearing that he had been on the couch watching TV, had fallen asleep, and had awakened to find the child's mouth on his "stuff."

Detective Smith testified that defendant voluntarily came to the Wayne County Sheriff's Office, was given his *Miranda* rights and made an oral statement. Defendant's statement was reduced to writing; was reviewed sentence by sentence, word by word with defendant; and was signed by defendant. The trial court found the statement was freely, voluntarily and understandingly made after defendant was adequately advised of his constitutional rights, and the statement was read into evidence for the jury's consideration. In the statement, defendant admits to sexually molesting his son since 1992; to taking problems that he had with his ex-wife out on his son; to masturbating in front of his son; to having his son put lotion on defendant's penis and masturbate him; and that on two separate occasions, once while washing the car and once while in the bathroom together, the child had taken his father's penis in his hand and put it in the child's mouth. Defendant admitted in his statement that he knew the things he was doing to his son were wrong and that he was in need of help.

Detective Smith also testified at trial, without objection, that he had presented the child victim with anatomically correct dolls and asked if the child would like to name the dolls. The child named the boy doll after himself and the adult male doll "Daddy." Detective Smith asked the child what he did when he and his daddy were alone, and the child said that he would have to take the dolls' clothes off first to show him. The child removed the dolls' clothes and demonstrated the child doll putting his mouth on the adult doll's penis. He also demonstrated the adult doll putting his penis on the child doll's buttocks. The child told the detective he had put his mouth on his daddy's peanut, that he put lotion on his daddy's peanut and that his daddy put lotion on the child's peanut. The child also related that "after putting lotion on his daddy's peanut, stuff came out of the peanut into the air."

At trial, defendant testified on direct examination that he had his son put lotion on his penis and that his son had put defendant's penis in his mouth once when they were washing the car and once when defendant fell asleep watching TV. When asked about the automobile washing incident, defendant responded that he was wearing swim trunks and that his son ran up to him, grabbed defendant's penis and put it in his mouth. When asked about the incident on the couch, defendant stated he had fallen asleep on the couch and awoke to find his penis in the child's mouth. Defendant also testified on cross-examination that the child put his mouth on defendant's penis once while in defendant's bathroom. Defendant testified that he did not know why the child had done this and that the child had done it for only a few seconds before defendant told him to stop.

At trial, defendant also acknowledged three prior convictions for indecent exposure and one conviction for felony child abuse arising from the death of defendant's child from a previous marriage. On direct examination, defendant initially stated the child died from a head injury received in a car accident which occurred two weeks prior to the child's death. On cross-examination, defendant clarified that the child died from a head fracture that medical reports indicated happened on the day of the child's death.

The aforementioned testimony from Ms. Waddell, Dr. Witman, Ms. Sekulich, Detective Smith and the defendant himself has not been challenged on appeal to this Court. Therefore, applying the "plain error" standard and considering the abundance of evidence properly presented at trial, particularly defendant's own extensive and detailed admissions, we cannot conclude that because of the trial court's error in admitting Rockwell-Flick's testimony the scales were tilted to the extent that a different result was reached by the jury than would have been reached otherwise. To the contrary, we conclude a different result probably would not have been reached by the jury without the Rockwell-Flick testimony. We therefore hold that the erroneous admission of the Rockwell-Flick testimony did not constitute plain error, and defendant is not entitled to a new trial as a result of that error.

[2] Defendant next assigns error to the Court of Appeals' holding that the trial court did not err when it denied defendant's request to instruct the jury that the child had been found incompetent to testify. The parties do not dispute the fact that the child was incompetent to testify at trial and was therefore "unavailable." He suffered from a

speech impediment and learning disabilities, became distracted and confused during questioning and did not understand the need to tell the truth at trial.

The sequence of events which led to defendant's request for jury instruction began when the State called the child to testify before the jury. The State opened the examination by asking the child whether he understood the need to tell the truth. Although the child became confused several times during questioning, initially it appeared as though the child could sufficiently express himself and that he understood the need to tell the truth, as required by N.C.G.S. § 8C-1, Rule 601. Defendant then requested a *voir dire* of the witness, and the trial court sent the jury out while the child was still on the stand. During continuing questioning, the child was repeatedly asked if he would promise to tell the truth in court, to which the child began to consistently reply, "No." When the trial court asked, "Don't you know it is good to tell the truth?" the child responded, "No." The trial court eventually concluded the child was unable to "express to the Court his understanding of what it is to tell the truth and what it is to tell a lie," and the child was brought down from the witness stand and removed from the courtroom. Before the jury was brought back into the courtroom, the trial court denied defendant's request for instruction to the jury explaining why the child was no longer on the stand.

Defendant asserts that the boy's words were put before the jury in the hearsay testimony of Rockwell-Flick and other witnesses, and because the jury was never instructed the child was incompetent to testify, the jury was necessarily led to believe his words were worthy of belief. Precedent has established, however, that "the Confrontation Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial." *Idaho v. Wright*, 497 U.S. 805, 825, 111 L. Ed. 2d 638, 658 (1990). In the case *sub judice*, the admissibility of the child's prior statements to police, doctors and his mother is determined by their own indicia of reliability. The reliability requirement can be met in either of two ways: "where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.' " *Id.* at 816, 111 L. Ed. 2d at 653 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980)). "[T]he relevant circumstances [in determining trustworthiness] include only those that surround *the making of the statement* . . . ." *Id.* at 819, 111 L. Ed. 2d at 655 (emphasis added). The

determination of whether the child victim is competent to testify, which is determined at the time of trial, is a separate analysis from the determination of whether hearsay statements meet the required standard of reliability or trustworthiness as judged at the time the statement was made. Therefore, we reject defendant's intimation that the trial court's finding that the child was incompetent as a witness renders the child's out-of-court statements unreliable. *See State v. Rogers*, 109 N.C. App. 491, 498, 428 S.E.2d 220, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 54 (1994).

Additionally, the presiding judge is given large discretionary power as to the conduct of a trial. *State v. Young*, 312 N.C. 669, 678, 325 S.E.2d 181, 187 (1985); *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 635 (1976). Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within the trial court's discretion and are reviewed only for abuse of that discretion. *Young*, 312 N.C. at 678, 325 S.E.2d at 187.

In determining whether defendant could possibly have been prejudiced by this ruling of the trial court, we find it relevant and determinative that the credibility of the child's version of events does not appear to have been in question. The child's version is, for the most part, consistent with defendant's own testimony. The primary variance between defendant's own admissions and the accusations against him was how the child's mouth came to be on his father's penis and the extent of any rectal contact which occurred. Assuming *arguendo* the jury unanimously believed defendant's contention that there was no inappropriate rectal contact, there was abundant evidence of fellatio through defendant's own admissions to support his conviction of one count of first-degree sex offense. Based on the lack of conflicting testimony before the jury, we are unpersuaded by defendant's claim that he was prejudiced by the lack of instruction regarding the child's competency to testify at trial. Therefore, based on the discretionary nature of the trial court's ruling and the lack of possible prejudice resulting from that ruling, we conclude there was no abuse of discretion or resulting error.

In summary, based on our holding in *Hinnant*, we hold the Rockwell-Flick testimony was inadmissible under the medical exception to hearsay. However, based on "plain error" analysis of that

issue, we conclude defendant received a fair trial, free from prejudicial error, and we therefore modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

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

FORTUNE INSURANCE COMPANY v. GARY EDGAR OWENS, JOHNA R. HART, LOUIS L. GILMORE

No. 154PA99

(Filed 7 April 2000)

1. Insurance— automobile—Florida policy—accident in this state—no significant connection—Florida law

A significant connection did not exist between the insured interests and North Carolina to make a no-fault automobile liability policy issued in Florida subject to North Carolina law under N.C.G.S. § 58-3-1 for an accident that occurred in this state, although the insured had a temporary North Carolina address, where the insurance contract was entered into in Florida and the parties to the contract were Florida residents. The mere presence of the insured interests in this state at the time of the accident did not constitute a sufficient connection to warrant application of North Carolina law, and the policy must be construed in accordance with Florida law.

2. Insurance— automobile—Florida policy—accident in this state—conformity clause—Florida law

An automobile liability policy issued in Florida was not subject to the North Carolina Motor Vehicle Safety and Financial Responsibility Act pursuant to N.C.G.S. § 20-279.21(a) for an accident in this state because it contained a conformity clause amending the policy to conform to any law to which it was subject where the Florida insurer was not authorized to transact business and issue policies in North Carolina.

3. Insurance— automobile—Florida policy—accident in this state—no bodily injury coverage

A no-fault automobile policy issued to the tortfeasor in Florida did not provide bodily injury coverage to defendants for an accident in this state where defendants were not named insureds, relatives, occupants of the insured vehicle, or pedestrians.

4. Estoppel— automobile accident—tort action—insurer's withdrawal of counsel—victims not misled

A Florida insurer was not estopped to deny coverage for an accident in this state under a no-fault policy issued to the tortfeasor in Florida because the insurer had its counsel withdraw from defending an action against the tortfeasor two years after the action was instituted where the insurer filed a declaratory judgment action seeking a declaration that the policy did not provide coverage for bodily injury to the accident victims, the victims were thus fully aware of the insurer's position regarding coverage eighteen months before trial of the underlying tort action commenced, and the victims were not misled or prejudiced at trial by the insurer's withdrawal of counsel from the tortfeasor's defense.

Justice MARTIN concurring in the result.

Justices LAKE and FREEMAN join in this concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 132 N.C. App. 489, 512 S.E.2d 487 (1999), affirming a judgment entered 6 October 1997, as amended 13 October 1997, by Sitton, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 12 October 1999.

Kurdys & Lovejoy, P.A., by Jeffrey S. Bolster, for plaintiff-appellee.

Price, Smith, Hargett, Petho & Anderson, P.A., by Wm. Benjamin Smith, for defendant-appellants Johna Hart and Louis Gilmore.

PARKER, Justice.

This action arose out of a motor vehicle accident that occurred in Mecklenburg County, North Carolina, on 29 January 1990 when a

vehicle, owned and operated by Gary Edgar Owens (Owens) struck a motor vehicle driven by Louis L. Gilmore and occupied by Johna R. Hart (defendants). That vehicle was owned by a third party and was not insured. At the time of the accident, Owens was insured under a policy of insurance issued by Fortune Insurance Company (Fortune), a Florida corporation. The policy provided, in pertinent part:

> **CONFORMITY WITH LAW**
>
> If any provision of this policy is contrary to any law to which it is subject, such provision is hereby amended to conform thereto.
>
> **COVERAGE: PERSONAL INJURY PROTECTION**
>
> [Fortune] will pay, in accordance with the Florida Motor Vehicle No Fault Law, as amended, to or for the benefit of the insured person [enumerated damages] incurred as a result of bodily injury, caused by an accident arising out of the ownership, maintenance, or use of a motor vehicle and sustained by:
>
> 1. the named insured or any relative while occupying a motor vehicle or, while a pedestrian, through being struck by a motor vehicle; or
>
> 2. any other person while occupying the insured motor vehicle or, while a pedestrian, through being struck by the insured motor vehicle.

Both defendants instituted actions against Owens in January 1993, each claiming damages for personal injury. Fortune hired attorney Rex C. Morgan in Charlotte, North Carolina, to defend Owens in both actions. Mr. Morgan filed answers on Owens' behalf despite the fact that he was never able to locate Owens. On 17 July 1995 Mr. Morgan filed a motion to withdraw as counsel of record wherein he stated that Fortune "advised that it had sent a reservation of rights letter to Mr. Owens and advised that it took the position that it had no coverage" and that Fortune had instructed that he "close his files."

On 21 July 1995 Fortune instituted this declaratory judgment action requesting the court to declare that Fortune had no obligation to defend Owens or to pay any judgment entered against Owens in the actions by defendants. Fortune thereafter amended its petition for declaratory judgment asserting that Fortune is a corporation existing under the laws of the State of Florida. In their answer filed 20 September 1995, defendants asserted that Fortune should be

"estopped to deny coverage." On 31 July 1997 Fortune moved for summary judgment.

On 20 January 1997 defendants' actions against Owens were consolidated and tried at a nonjury Civil Session of Superior Court, Mecklenburg County. In its judgment the trial court concluded that Owens was liable to both defendants for personal injuries and ordered Owens to pay each defendant $18,500. Defendants subsequently filed a motion to amend their answer in this action to add a counterclaim incorporating the judgment in the underlying action and asking for costs, treble damages, and punitive damages. The trial court denied the motion to amend on 24 July 1997.

In October 1997 after a hearing on Fortune's petition for declaratory judgment, the trial court entered judgment finding that the Fortune policy was issued to Owens in Florida; that the address listed for Owens on 27 December 1989 was Destin, Okaloosa County, Florida; that the only vehicle described in the application was a 1966 Chevrolet pickup truck with a Florida identification number; that at the time of the accident, Owens had a Florida driver's license; and that Owens was operating the 1966 Chevrolet pickup truck with a Florida license plate and a Florida identification number. The trial court also found that no evidence was adduced to suggest that Fortune was authorized to transact business and issue policies in North Carolina. Based on these and other findings of fact, the trial court concluded that "Florida law does not require the extension of bodily injury liability coverage to defendants" and that the Fortune policy does not provide bodily injury coverage to defendants since "they are not protected persons under the Personal Injury Protection section of the policy." The trial court further concluded that the North Carolina Motor Vehicle Safety and Financial Responsibility Act does not apply to the Fortune policy "given the insignificant connection between the Fortune Insurance Policy and the State of North Carolina." Accordingly, the trial court determined that Fortune was not obligated to pay the judgments obtained by defendants against Owens arising out of the motor vehicle accident.

Defendants appealed to the Court of Appeals, arguing that the Fortune policy is subject to North Carolina law and, alternatively, that Fortune was estopped from denying coverage. On 2 March 1999 the Court of Appeals affirmed the trial court, holding that "the connection between North Carolina and the interests insured is too slight to allow us to interpret the Owens Policy in accordance with North

Carolina law." *Fortune Ins. Co. v. Owens*, 132 N.C. App. 489, 493, 512 S.E.2d 487, 189 (1999). Enforcing the terms of the Fortune policy, the Court of Appeals held that bodily injury liability coverage did not extend to defendants. *Id.* The Court of Appeals also held that Fortune was not estopped from denying coverage. *Id.* at 494, 512 S.E.2d at 494. On 24 June 1999 this Court allowed defendants' petition for discretionary review.

The two issues before this Court are whether the Court of Appeals correctly concluded (i) that the Fortune insurance policy was not subject to North Carolina law and did not provide coverage to defendants and (ii) that Fortune was not estopped from denying coverage. With respect to the coverage issue, defendants make three arguments.

[1] Defendants first argue that the Court of Appeals erred in holding that a significant connection did not exist between the insured interests and North Carolina to make the policy subject to North Carolina law. We disagree. As the Court of Appeals properly noted, the general rule is that an automobile insurance contract should be interpreted and the rights and liabilities of the parties thereto determined in accordance with the laws of the state where the contract was entered even if the liability of the insured arose out of an accident in North Carolina. *See Roomy v. Allstate Ins. Co.*, 256 N.C. 318, 322, 123 S.E.2d 817, 820 (1962). With insurance contracts the principle of *lex loci contractus* mandates that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract. *Id.* Construing N.C.G.S. § 58-3-1, this Court recognized an exception to this general rule where a close connection exists between this State and the interests insured by an insurance policy. *See Collins & Aikman Corp. v. Hartford Accident & Indem. Co.*, 335 N.C. 91, 95, 436 S.E.2d 243, 245-46 (1993). However, the mere presence of the insured interests in this State at the time of an accident does not constitute a sufficient connection to warrant application of North Carolina law.

When an action is tried before the trial court without a jury, the trial court is the fact finder; and on appeal, the appellate courts are bound by the trial court's findings if competent evidence in the record supports these findings. *See Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). In this case the trial court found, based on competent evidence, that the policy was issued by Fortune to Owens in Florida; that the insured vehicle which Owens was dri-

ving at the time of the accident had a Florida identification number and a Florida license plate; that from 5 March 1976 until the date of the accident, Owens had a Florida driver's license issued to him; that according to the record at the North Carolina Division of Motor Vehicles, Owens never had a North Carolina driver's license issued to him; and that the only contact between the Fortune policy and North Carolina is that "the automobile accident on January 29, 1990, occurred in North Carolina and following the accident Gary Edgar Owens provided the officer with a temporary North Carolina address." Based on these findings, we hold that the Court of Appeals did not err in upholding the trial court's conclusion that no significant connections existed between the Fortune policy and this State. All of the significant connections occurred in Florida. The insurance contract was entered into in Florida, and the parties to the contract were Florida residents. Thus, the Fortune policy must be construed in accordance with Florida law.

[2] Defendants next contend that the conformity clause triggers the application of the North Carolina Motor Vehicle Safety and Financial Responsibility Act. Again we disagree. The Act applies only to a "motor vehicle liability policy" that is "issued, except as otherwise provided in G.S. 20-279.20, by an insurance carrier duly authorized to transact business in this State." N.C.G.S. § 20-279.21(a) (1999). The trial court found, and we agree, that the evidence does not suggest that Fortune was ever authorized to transact business and issue insurance policies in North Carolina. The mere fact that the accident happened in North Carolina does not make the policy subject to North Carolina law. As the United States Supreme Court has noted,

> [a] legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.

Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143, 150, 78 L. Ed. 1178, 1181-82 (1934).

Defendants' reliance on *Cartner v. Nationwide Mut. Fire Ins. Co.*, 123 N.C. App. 251, 472 S.E.2d 389 (1996), is misplaced. In *Cartner* the Court of Appeals held that a Florida insurance policy

with a family-members exclusion and a conformity clause provided coverage to the estate of the plaintiff's decedent for an accident occurring in this state. *Cartner* is distinguishable in that the conformity clause in that case provided for the adjustment of coverage limits "to comply with the financial responsibility law of any state or province which requires higher limits." *Id.* at 252, 472 S.E.2d at 390. In contrast, the conformity clause in the policy at issue in the instant case provided that "[i]f any provision of this policy is contrary to any law to which it is subject, such provision is hereby amended to conform thereto." Moreover, the defendant insurance company in *Cartner* was authorized to and did transact business in North Carolina. Under the North Carolina Motor Vehicle Safety and Financial Responsibility Act, the provisions for uninsured/underinsured motorists coverage are designed to protect North Carolina drivers from the perils of a collision with an uninsured motor vehicle. We hold that the conformity provision does not alter our conclusion that the Fortune policy is not "subject to" North Carolina law.

[3] Defendants finally argue that the policy provides coverage to them and that plaintiff failed to establish a valid policy exclusion showing no coverage. This argument is not persuasive. A party seeking benefits under an insurance contract has the burden of showing coverage. *See Hedgecock v. Jefferson Standard Life Ins. Co.*, 212 N.C. 638, 639-40, 194 S.E. 86, 86-87 (1937). Until a *prima facie* case of coverage is shown, the insurer has no burden to prove a policy exclusion. *See id.*; *see also Nationwide Mut. Ins. Co. v. McAbee*, 268 N.C. 326, 328, 150 S.E.2d 496, 497-98 (1966); *U.S. Liab. Ins. Co. v. Bove*, 347 So. 2d 678, 680 (Fla. Dist. Ct. App. 1977). In this case the clear and unambiguous language of Fortune's insurance policy affords no bodily injury coverage to defendants. The Fortune policy provides bodily injury coverage only for the "named insured," "any relative while occupying a motor vehicle," "any other person while occupying the insured motor vehicle," or "a pedestrian . . . struck by the insured motor vehicle." This provision is consistent with Florida's statutory requirements for a no-fault insurance policy. *See* Fla. Stat. Ann. §§ 627.730-627.7405 (West 1996 & Supp. 1999). Defendants were not named insureds, were not relatives, were not occupying the insured vehicle, and were not pedestrians. Accordingly, defendants do not fit into any of the categories of protected individuals; therefore, they are not covered under the terms of the policy.

[4] Defendants also contend that Fortune was estopped to deny coverage since Fortune had its counsel withdraw from the case approxi-

mately two years after it instituted action against Owens. We disagree. Generally, an insurer is not barred from later denying coverage when it defends its insured with a reservation of its rights to deny coverage. *See Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 435, 146 S.E.2d 410, 414 (1966). We have applied the equitable estoppel doctrine to bar an insurer from later denying coverage where the insurer assumed the defense of the action without a reservation of rights to deny coverage and later disclaimed coverage after an adverse judgment was entered. *Early v. Farm Bureau Mut. Auto. Ins. Co.*, 224 N.C. 172, 174, 29 S.E.2d 558, 559-60 (1944).

On appeal to this Court, no reservation of rights letter is contained in the record. However, Mr. Morgan, in his motion to withdraw as attorney of record in the underlying actions on 17 July 1995, stated that Fortune "advised that it had sent a reservation of rights letter to Mr. Owens and advised that it took the position that it had no coverage." Consistent with this position, Fortune also filed a declaratory judgment action on 21 July 1995 seeking a declaration that the policy did not provide coverage to defendants. Therefore, defendants were fully aware of Fortune's position regarding coverage eighteen months before trial of the underlying tort action commenced on 20 January 1997. On these facts we conclude that defendants were not misled and were not prejudiced at trial by Fortune's withdrawal of counsel from Owens' defense.

For the foregoing reasons, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice MARTIN concurring in the result.

I concur in the result of the majority opinion but write separately to articulate my disagreement with part of the reasoning of the majority opinion and to express my concern about the result we are compelled to reach under the relevant language of the North Carolina Motor Vehicle Safety and Financial Responsibility Act (the Act).

I respectfully disagree with the majority's conclusion that the general rule of *lex loci contractus* controls in this case. Rather, North Carolina's contacts with the interests insured by the Fortune policy are sufficient to make the policy "subject to" North Carolina law under N.C.G.S. § 58-3-1. *See Collins & Aikman Corp. v. Hartford*

Accident & Indem. Co., 335 N.C. 91, 95, 436 S.E.2d 243, 246 (1993); *see also Martin v. Continental Ins. Co.*, 123 N.C. App. 650, 655-56, 474 S.E.2d 146, 148-49 (1996).

Nevertheless, as determined by the majority, the minimum limits of coverage set forth in the Act do not apply to the Fortune policy because of the language of this statute. In short, the Act applies only to a "motor vehicle liability policy" that is "issued . . . by an insurance carrier duly authorized to transact business in this State." N.C.G.S. § 20-279.21(a) (1999). Because the Fortune policy was not issued in North Carolina and Fortune is not authorized to transact business in this state, the Fortune policy may not be conformed to the minimum limits of the Act under the express language of the statute.

It is well settled, however, that legal protection of innocent victims who are injured by financially irresponsible motorists is the fundamental purpose of the Act. *See Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 90, 194 S.E.2d 834, 837 (1973); *Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 492, 473 S.E.2d 427, 429 (1996), *disc. rev. denied and cert. denied*, 345 N.C. 641, 483 S.E.2d 708 (1997).

In the instant case, a motor vehicle operator who was at least temporarily residing in North Carolina negligently inflicted injuries upon two North Carolina residents. Nevertheless, because the responsible driver's insurance policy was issued in a no-fault state and incorporated no-fault provisions which do not afford liability coverage under these circumstances, the injured parties, two North Carolina residents, are left without an adequate legal remedy.

This result is fundamentally at odds with the purpose of the North Carolina Motor Vehicle Safety and Financial Responsibility Act. Under the result permitted in this case, otherwise eligible drivers may obtain insurance in no-fault jurisdictions and inflict injuries with practical impunity. This result is inconsistent with the increasing interstate mobility of our society and renders meaningless the protections intended for innocent motorists under the Act.

Justices LAKE and FREEMAN join in this concurring opinion.

KARNER v. ROY WHITE FLOWERS, INC.

[351 N.C. 433 (2000)]

JANET L. KARNER AND LYMAN G. WELTON, PLAINTIFFS AND LORETTA LEE PENDERGRAST, APRILLE L. SHAFFER AND SHELLY JORDAN, INTERVENOR PLAINTIFFS V. ROY WHITE FLOWERS, INC., ROY J. WHITE, JR., MARGARET C. WHITE, AND EDWARD A. WHITE, DEFENDANTS

No. 475A99

(Filed 7 April 2000)

1. **Deeds— restrictive covenants—enforcement by other grantees**

Where the same restrictive covenant is placed in all deeds conveying lots out of a subdivision according to a common plan of development, any grantee may enforce the restriction against any other grantees governed by the common plan of development and any purchaser who takes land in the tract with notice of the restriction. If the restrictive covenant is removed from a lot within a subdivision, that action extinguishes the restrictive covenant on all properties within the subdivision.

2. **Parties— necessary—interests represented by current parties—irrelevancy**

Whether the interests of other property owners in a subdivision are represented by the current parties to an action to enforce subdivision restrictive covenants is not relevant to a determination of whether the other owners are necessary parties who are required to be joined under Rule 19.

3. **Deeds— restrictive covenants—residential use—change of circumstances—nonparty owners—necessary parties**

Nonparty property owners in a residential subdivision were necessary parties who were required to be joined in an action to enforce a residential-use restrictive covenant applicable to all property within the subdivision where defendants asserted a change-of-circumstances defense which could result in the invalidation of the restrictive covenant as to all lots within the subdivision and extinguish property rights of the nonparty owners.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 134 N.C. App. 645, 518 S.E.2d 563 (1999), affirming the trial court's denial of plaintiffs' and intervenor-plaintiffs' motion for joinder entered 9 May 1996 by Gray, J., in Superior Court, Mecklenburg County, and affirming in part and reversing and remanding in part an order for directed verdict entered

11 February 1997 by Gray, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 15 February 2000.

Kenneth T. Davies for plaintiff-appellants Karner and Welton and intervenor-plaintiff-appellants Pendergrast and Shaffer.

Groves, Dunklin & Boggs, P.C., by L. Holmes Eleazer, Jr., for defendant-appellees.

WAINWRIGHT, Justice.

Plaintiffs and defendants own lots in Elizabeth Heights, a subdivision in Charlotte, North Carolina. Elizabeth Heights was developed as a residential subdivision at the turn of the century. When the developer began conveying lots in 1907, each deed included a covenant restricting the use of each parcel to residential use only.

In September 1995, defendants applied for demolition permits for the residential structures on three of their lots. Subsequently, a local newspaper reported that Roy White Flowers had applied for demolition permits for structures on the three lots and that building plans called for a 5,300-square-foot structure, which was to house a video rental store.

On 5 October 1995, plaintiffs filed suit alleging they and the neighborhood would "be permanently and irreparably injured if the [d]efendants are allowed to demolish three (3) residential and historic structures adjacent to [p]laintiffs' properties and allowed to construct a commercial building thereon." Plaintiffs requested relief in the form of a temporary restraining order, a preliminary injunction, and a permanent injunction. On 13 November 1995, defendants answered plaintiffs' amended complaint and claimed affirmative defenses, including an assertion that a change of circumstances had occurred making use of the lots for residential purposes no longer feasible.

On 21 December 1995, intervenor-plaintiffs, all property owners within the Elizabeth Heights Subdivision, were allowed to intervene, pursuant to N.C.G.S. § 1A-1, Rule 24, because they "ha[d] an interest in the real property which [was] the subject of this action and they [were] so situated that the disposition of this action may, as a practical matter, impair or impede their ability to protect those interests." On 22 January 1996, defendants answered intervenor-plaintiffs' complaint and incorporated the same affirmative defenses contained in their answer to plaintiffs' amended complaint.

On 18 March 1996, pursuant to N.C.G.S. § 1A-1, Rule 19, plaintiffs and intervenor-plaintiffs (plaintiffs) moved the trial court to join all other parties who owned property in Elizabeth Heights Subdivision as shown on map number 3 recorded in the Office of the Register of Deeds for Mecklenburg County. Plaintiffs stated that by asserting the affirmative defense of changed circumstances, defendants sought to "impair or prejudice the property rights of all record owners of parcels of real property located in the Elizabeth Heights Subdivision, Map Number 3." Additionally, plaintiffs contended there were "third parties who own[ed] parcels of real property in Elizabeth Heights Subdivision, Map Number 3 . . . whose property rights [would] be directly affected by the determination of this litigation." Plaintiffs argued the third parties were necessary parties because defendants were seeking to set aside or void the residential restrictive covenants. In an order entered 9 May 1996, the trial court found, *inter alia*, that "[j]oinder of the non-party property owners in Elizabeth Heights would work a[] financial hardship on those who would be brought involuntarily into this litigation." In denying plaintiffs' motion for joinder, the trial court concluded "[t]he non-party property owners in Elizabeth Heights are not united in interest with the [p]laintiffs under the claim asserted herein. The [c]ourt may determine the pending claim for injunctive relief without prejudice to the rights of such others not before the [c]ourt."

On 29 May 1996, the Chief Justice of this Court designated this case "exceptional" and assigned it to the Honorable Marvin K. Gray pursuant to a joint motion by plaintiffs and defendants. The case came on for trial by jury at the 13 January 1997 session of Superior Court, Mecklenburg County. At the close of all the evidence, defendants moved for a directed verdict pursuant to N.C.G.S. § 1A-1, Rule 50. After considering all the evidence presented by both plaintiffs and defendants, the trial court found that defendants used their parcels of land and the structures thereon for nonresidential purposes in a continuous, open, and notorious manner for a period of time in excess of six years prior to plaintiffs filing their complaint. Accordingly, the trial court concluded plaintiffs' action was barred by the applicable statute of limitations. The trial court, on 11 February 1997, entered an order granting defendants' motion for a directed verdict.

Plaintiffs (except Shelly Jordan) appealed to the Court of Appeals from the 11 February 1997 order directing verdict in favor of defendants and the 9 May 1996 order denying plaintiffs' motion for joinder. The Court of Appeals affirmed in part and reversed in part

the trial court's directed verdict. *Karner v. Roy White Flowers, Inc.*, 134 N.C. App. 645, 656, 518 S.E.2d 563, 571 (1999).

In addition, the Court of Appeals affirmed the trial court's denial of plaintiffs' motion for joinder. *Id.* at 649, 518 S.E.2d at 566. The Court of Appeals interpreted this Court's decision in *Sheets v. Dillon*, 221 N.C. 426, 20 S.E.2d 344 (1942), "to stand for the proposition that if one party seeks to 'annul' or invalidate a restrictive covenant in equity, based on changed conditions, the interest of other property owners . . . must be represented in the suit." *Karner*, 134 N.C. App. at 648, 518 S.E.2d at 566. The court reasoned that the interests of the nonparty property owners within the subdivision were represented by the parties in the case and that the nonparty property owners were not necessary parties whose presence in the case was required by Rule 19. Judge Greene dissented on this issue, stating, "When there is a uniform plan of development for real property and a restrictive covenant placed on that property is in dispute, all the owners of lots in that development are 'necessarily interested parties in any action against or by [any] lot owner.' " *Id.* at 657, 518 S.E.2d at 571 (Greene, J., dissenting) (quoting *Hillcrest Bldg. Co. v. Peacock*, 7 N.C. App. 77, 82, 171 S.E.2d 193, 196 (1969)).

The sole issue before this Court is whether the nonparty property owners of the Elizabeth Heights Subdivision as shown in map number 3 (Elizabeth Heights) were required to be joined in this action pursuant to Rule 19 of the North Carolina Rules of Civil Procedure. Plaintiffs contend defendant's change-of-circumstances affirmative defense could result in the invalidation of the restrictive covenant requiring residential use of property in the subdivision. Consequently, the additional property owners should be joined as parties to the action. We agree.

A restrictive covenant creates "a species of incorporeal right." *Sheets*, 221 N.C. at 431, 20 S.E.2d at 347. Restrictive covenants are valid so long as they do not impair the enjoyment of the estate and are not contrary to the public interest. *Id.* "[T]he court will enforce its restrictions and prohibitions to the same extent that it would lend judicial sanction to any other valid contractual relationship." *Id.*

[1] The placement of the same restrictive covenant in all of the deeds conveying lots out of a subdivision according to a common plan of development presents a unique situation regarding the enforcement and continued vitality of the covenant. Under those circumstances, any grantee may enforce the restriction against any other grantee

governed by the common plan of development. *See Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 665, 268 S.E.2d 494, 497 (1980). Furthermore, any grantee may enforce the restriction against any purchaser who takes land in the tract with notice of the restriction. *Id.* If the restrictive covenant is removed from a lot within a subdivision, that action extinguishes the restrictive covenant on all properties within the subdivision. *See Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 41, 120 S.E.2d 817, 829-30 (1961).

In *Tull*, the parties were all property owners within a portion of the Myers Park development in Charlotte. The common plan of development for Myers Park called for the lots to be used for residential purposes only. Plaintiffs sought a declaratory judgment determining their rights to use their property for other purposes. Within the tract, several lots had been zoned for business purposes despite the restrictions governing the property. The trial court concluded the restrictive covenant should have been lifted from those particular lots but declined to do so itself, stating "the law requires either a complete abrogation of the restrictive covenants on all of the lots in the subdivision, or a complete enforcement of the restrictive covenants as to all of the lots in the subdivision." *Id.* at 35, 120 S.E.2d at 825. This Court agreed with the trial court and adopted its statement of the rule. *Id.* at 41, 120 S.E.2d at 830. The determination of whether a change of circumstances has taken place so as to void a restrictive covenant in equity depends on the specific facts of each individual case. *Id.* at 39, 120 S.E.2d at 827. However, in situations where there is a common plan of development, the Court emphasized the need for equal enforcement of restrictive covenants. The Court examined a situation where a covenant was removed from only a few lots in a subdivision:

> If equity should permit these border lots to deviate from the residential restriction, the problem arises anew with respect to the lots next inside those relieved from conforming. Thus, in time, the restrictions throughout the tract will become nugatory through a gradual infiltration of the spreading change.
>
> "Contractual relations do not disappear as circumstances change. So equity cannot balance the relative advantages and disadvantages of a covenant and grant relief against its restrictions merely because it has become burdensome."

Id. at 40, 120 S.E.2d at 829 (quoting *Vernon v. R.J. Reynolds Realty Co.*, 226 N.C. 58, 61, 36 S.E.2d 710, 712 (1946)). The Court explained

further that the right to enforce the restriction was a property right with value:

> To release all the lots . . . in direct violation of the valid residential restrictions here would undoubtedly substantially affect the value of every home in this subdivision. It is clear in our minds that residential restrictions generally constitute a property right of distinct worth, certainly to those who desire to keep their homes for residential use.

Id. at 41, 120 S.E.2d at 829. Although property owners may decide not to object to minor nonresidential uses by other property owners in some cases, this acquiescence " 'should not, in equity be held to have estopped them from asserting their right against the subsequent substantial violation by defendants.' " *Id.* at 39, 120 S.E.2d at 828 (quoting *Holling v. Margiotta*, 231 S.C. 676, 682, 100 S.E.2d 397, 400 (1957)). Thus, this Court concluded that a restrictive covenant common to all deeds from a subdivision must be either abrogated as to all lots or enforced as to all lots.

North Carolina Rule of Civil Procedure 19 governs the necessary joinder of parties and provides in part:

> (a) *Necessary joinder.*—Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.
>
> (b) *Joinder of parties not united in interest.*—The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C.G.S. § 1A-1, Rule 19 (1999). "Necessary parties must be joined in an action. Proper parties may be joined." *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365 (1978). A necessary party is one who "is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining

the controversy without his presence." *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968). A proper party is " 'a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties.' " *Id.* (quoting 67 C.J.S. *Parties* § 1 (1950)).

[2] In its opinion, the Court of Appeals relies on *Sheets* to support its reasoning that the other property owners in Elizabeth Heights were not necessary parties to the action because their interest was represented by the current parties. The court's reliance on *Sheets* for that holding is in error. This Court, in *Sheets*, specifically stated, "If plaintiff desires to have this covenant invalidated and stricken from the deed of the original grantee, he *must* bring in the interested parties and give them a day in court." *Sheets*, 221 N.C. at 432, 20 S.E.2d at 348 (emphasis added). In fact, this Court made no mention of "representation" in *Sheets*. Moreover, whether other property owners' interests are represented by current parties is not relevant to a determination of whether joinder is required under Rule 19. The text of Rule 19 refers only to whether a "complete determination" of a claim can be made without a party's presence. N.C.G.S. § 1A-1, Rule 19(b).

[3] Defendants claim the nonparty property owners are not required to be joined because they are "proper" rather than "necessary" parties. They cite *Hawthorne*, 300 N.C. 660, 268 S.E.2d 494, as approving that assertion. This reliance is misplaced. In *Hawthorne*, this Court addressed the issue of the continued validity of a residential-use restrictive covenant after the defendants alleged a change of circumstances. The trial court found that a change of circumstances had occurred and voided the restrictive covenant, but the Court of Appeals reversed that decision. *Id.* at 664, 268 S.E.2d at 497. This Court affirmed the decision of the Court of Appeals. *Id.* at 669, 268 S.E.2d at 500. All of the property owners subject to the residential restrictive covenant were not made parties in *Hawthorne*. However, that issue was neither addressed by this Court nor raised by the parties. As such, *Hawthorne* is not persuasive in our determination of whether the additional property owners are necessary parties.

In the instant case, each property owner within Elizabeth Heights has the right to enforce the residential restriction against any other property owner seeking to violate that covenant. This right has a "distinct worth." *Tull*, 255 N.C. at 41, 120 S.E.2d at 829. By operation of

law, if the residential restrictive covenant is abrogated as to the lots owned by defendants, each property owner within the subdivision would lose the right to enforce that same restriction. *Id.* at 41, 120 S.E.2d at 829-30. Unless those parties are joined, they will not have been afforded their "day in court." *Sheets*, 221 N.C. at 432, 20 S.E.2d at 348. An adjudication that extinguishes property rights without giving the property owner an opportunity to be heard cannot yield a "valid judgment." *See Strickland*, 273 N.C. at 485, 160 S.E.2d at 316; *see also* N.C.G.S. § 1A-1, Rule 19. For this reason, we conclude the nonparty property owners of Elizabeth Heights are necessary parties to this action because the voiding of the residential-use restrictive covenant would extinguish their property rights.

Based on the foregoing, the decision of the Court of Appeals affirming the trial court's denial of plaintiffs' motion to require joinder is reversed. This case is remanded to the Court of Appeals for further remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

WAKE COUNTY NO. 92CVS10221

JAMES H. POU BAILEY, A. PILSTON GODWIN, HARRY L. UNDERWOOD, HENRY L. BRIDGES, ROSALIE T. ADAMS, JESSE M. ALMON, HELEN L. ANDREWS, WORTH B. ASKEW, 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, TILLIE 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, 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 ELLIOTT HARTLE, MARTHA M. LAWING, DOUGLAS LAMAR MASON, DELMA DALTON REPASS, 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

WAKE COUNTY NO. 94CVS06904

JAMES H. POU BAILEY, DONALD L. SMITH, MILDRED GODWIN AS SURVIVING BENEFICIARY AND AS EXECUTRIX OF THE ESTATE OF A. PILSTON GODWIN, HARRY L. UNDERWOOD, HENRY L. BRIDGES, ROSALIE T. ADAMS, JESSE M. ALMON, HELEN L. ANDREWS, WORTH B. ASKEW, BILLY A. BAKER, PARKER N. BARE, ARTHUR C. BEAMAN AND GRACE G. BEAMAN, JOSEPH G. BRINKLEY, 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 A. 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, THOMAS S. WORSHAM, W.K. AUBRY, JR., JAMES BRYAN BARRETT, NORMAN W. CASH, ROBERTA M. COOK, JOHN ED DAVIS, DANIEL M. DYSON, EDWIN C. GUY, SAMUEL L. HARMAN, JOHN MARSHALL HARTLEY, DONALD ELLIOTT HARTLE, MARTHA M. LAWING, DOUGLAS LAMAR MASON, DELMA DALTON REPASS, 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, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, 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, AND OFFICER *EX OFFICIO* OF THE RETIREMENT SYSTEMS, THE TEACHERS AND STATE EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, AND THE LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, DEFENDANTS

WAKE COUNTY NO. 95CVS04346

CHARLES R. PATTON, EUGENE E. MOODY, MARY L. PRITCHARD, MERRILL R. CAMPBELL, THOMAS M. GROOME, JR., ROBERT J. DAVIS, MILTON H. QUINN, MAXINE S. WOOD, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROBERT V. WOOD, WINTON H. WILLIAMS, WILLIAM E. DENTON, BILLY CLARK, NORMAN W. SWANSON, WOODFORD T. MOSELEY, MARION B. ZOLLICOFFER, RAY HOMESLEY, DANIEL J. QUESENBERRY, RICHARD M. HERIOT, PAUL F. CHAVEZ, WILLIAM H. ADAMS, AND OTHERS SIMILARLY SITUATED, 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, DEFENDANTS

WAKE COUNTY NO. 95CVS06625

JAMES H. POU BAILEY, DONALD L. SMITH, MILDRED GODWIN AS SURVIVING BENEFICIARY AND AS EXECUTRIX OF THE ESTATE OF A. PILSTON GODWIN, HARRY L. UNDERWOOD, HENRY L. BRIDGES, ROSALIE T. ADAMS, JESSE M. ALMON, HELEN L. ANDREWS, WORTH B. ASKEW, BILLY A. BAKER, PARKER N. BARE, ARTHUR C. BEAMAN AND GRACE G. BEAMAN, JOSEPH G. BRINKLEY, 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 A. 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, THOMAS S. WORSHAM, W.K. AUBRY, JR., JAMES BRYAN BARRETT, NORMAN W. CASH, ROBERTA M. COOK, JOHN ED DAVIS, DANIEL M. DYSON, EDWIN C. GUY, SAMUEL L. HARMAN, JOHN MARSHALL HARTLEY, DONALD ELLIOTT HARTLE, MARTHA M. LAWING, DOUGLAS LAMAR MASON, DELMA DALTON REPASS, 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, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, 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, AND OFFICER *EX OFFICIO* OF THE RETIREMENT SYSTEMS, THE TEACHERS AND STATE EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, AND THE LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, DEFENDANTS

WAKE COUNTY NO. 95CVS08230

JAMES H. POU BAILEY, DONALD L. SMITH, MILDRED GODWIN AS SURVIVING BENEFICIARY AND AS EXECUTRIX OF THE ESTATE OF A. PILSTON GODWIN, HARRY L. UNDERWOOD, HENRY L. BRIDGES, ROSALIE T. ADAMS, JESSE M. ALMON, HELEN L. ANDREWS, WORTH B. ASKEW, BILLY A. BAKER, PARKER N. BARE, ARTHUR C. BEAMAN AND GRACE G. BEAMAN, JOSEPH G. BRINKLEY, 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 A. 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, THOMAS S. WORSHAM, W.K. AUBRY, JR., JAMES BRYAN BARRETT, NORMAN W. CASH, ROBERTA M. COOK, JOHN ED DAVIS, DANIEL M. DYSON, EDWIN C. GUY, SAMUEL L. HARMAN, JOHN MARSHALL HARTLEY, DONALD ELLIOTT HARTLE, MARTHA M. LAWING, DOUGLAS LAMAR MASON, DELMA DALTON REPASS, 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, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, 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

BAILEY v. STATE OF NORTH CAROLINA

[351 N.C. 440 (2000)]

STATE TREASURER, HARLAN E. BOYLES, IN HIS CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND OFFICER *EX OFFICIO* OF THE RETIREMENT SYSTEMS, THE TEACHERS AND STATE EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, AND THE LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEMS OF NORTH CAROLINA, CONSOLIDATED JUDICIAL RETIREMENT SYSTEM AND THE LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEM OF NORTH CAROLINA, DEFENDANTS

WAKE COUNTY NO. 98CVS00738

DAN R. EMORY, E. MICHAEL LATTA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. 53PA96-2

(Filed 7 April 2000)

Taxation— income tax—retirement benefits—government employees—refund—settlement fund—effective date—interest

The effective date of the first installment paid into a settlement fund created by the legislature to return improperly collected income taxes on state and local government retirement benefits from 1989 through 1991 was 1 July 1998, the retroactive date of the legislative act appropriating the funds and the retroactive date of the court order approving the settlement, and interest began accruing to the benefit of plaintiff retirees on that date.

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

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order entered by Thompson, J., on 23 April 1999 in Superior Court, Wake County. Heard in the Supreme Court 14 December 1999.

G. Eugene Boyce; and Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Keith W. Vaughan, W. David Edwards, and Alexander P. Sands, III, for plaintiff-appellees.

Michael F. Easley, Attorney General, by Norma S. Harrell and Thomas F. Moffitt, Special Deputy Attorneys General, for defendant-appellants.

FREEMAN, Justice.

In an opinion certified on 28 May 1998, this Court held that state and local government retirees challenging the collection of state income taxes on their retirement benefits from 1989 through 1991 were entitled to exemptions from state income taxes on those benefits if they were "vested" in their respective retirement systems as of 12 August 1989. *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998). On 11 June 1998, plaintiffs entered into a Consent Order with the General Assembly and the State of North Carolina, settling the consolidated cases for $799 million and requiring the parties to create a Settlement Fund to return the collected money to plaintiffs.

The General Assembly enacted legislation stating that it "established" the reserve fund for the Bailey/Emory/Patton refunds, and at the same time it "appropriated" and "transferred" funds from the General Fund to the reserve. Act of Sept. 30, 1998, ch. 164, sec. 2, 1998 N.C. Sess. Laws 534, 534. The General Assembly specified the Act's effective date as 1 July 1998. On 9 October 1998, the trial court approved the proposed settlement and concluded as a matter of law that "[t]his Order shall be effective as of the effective date prescribed in the Act of 1997 Session (1998 Special Session) of the General Assembly making the initial appropriation as agreed to by the parties and approved by the Court." No appeal was taken from this order. Thus, it became the law of the case and the effective date of the court approval of the settlement is 1 July 1998.

Pursuant to an inquiry from the Department of the State Treasurer, the Attorney General's Office informed the Treasurer's Office in a letter dated 6 November 1998 that the interest on the $400 million appropriated in Chapter 164 should commence "no sooner than October 9, 1998, the date Judge Thompson's order was entered approving the settlement of the *Bailey/Emory/Patton* litigation." On 8 January 1999, plaintiffs filed a motion for determination of the effective date of the transfer of the first payment.

On 23 April 1999, the trial court entered an order in which it decreed that the effective date of the first installment was 1 July 1998, with interest accruing to the benefit of plaintiffs from that date. The State appealed. On 6 October 1999, the parties filed a joint petition for discretionary review prior to determination by the North Carolina Court of Appeals, which was allowed by this Court on 4 November 1999.

The sole issue presented on appeal is the determination of the date interest began to accrue on the first payment of $400 million appropriated by the General Assembly. Plaintiffs assert that the plain language of the pertinent legislation provides that the money was transferred on 1 July 1998. In contrast, defendants assert that interest could not begin to accrue any sooner than 9 October 1998, the date defendants contend the money was actually transferred after the trial court approved the settlement, because the plain language of the Consent Order provides that "[a]ll interest and earnings on the principal after payment by the Treasurer to the Settlement Fund shall accrue to the Settlement Fund." Thus, defendants assert that interest did not begin on 1 July 1998 because the Treasurer had not made the payment to the Settlement Fund and the trial court had not approved the settlement on that date.

We hold that the Consent Order, the pertinent legislation, and the court order approving the settlement, when read together, reveal that the effective date of the first installment is 1 July 1998, with interest accruing to the benefit of plaintiffs from that date. The Consent Order provides that the settlement becomes effective upon: (a) the enactment of legislation appropriating the money necessary to make the payments called for herein, and (b) court approval following notice to class members.

The General Assembly enacted legislation stating that it "established" the reserve fund, and it also "appropriated" and "transferred" funds from the General Fund to the reserve. The General Assembly specifically provided that the Act's effective date was 1 July 1998, which was ninety-two days before the legislation's actual enactment on 30 September 1998. Ch. 164, sec. 2, 1998 N.C. Sess. Laws at 534. On 9 October 1998, the trial court concluded as a matter of law that the effective date of the approval of the settlement was 1 July 1998.

The Consent Order states that the first installment "shall be paid within thirty (30) days of the entry of an order approving the settlement after class notice or enactment of legislation appropriating the funds necessary to make the payments called for herein, whichever is later." The effective date for these two events is 1 July 1998. The only evidence of record as to when the State actually made the payment is the appropriation and transfer of the $400 million effective on that date.

The legislative act establishing the reserve fund provides that its effective date is 1 July 1998. The 9 October 1998 court order approving the settlement allocates distribution of the funds between principal and interest as of the effective date prescribed in the legislative act, 1 July 1998. Thus, the legislative act appropriating and transferring the funds for the settlement and the order approving the settlement became simultaneously effective on 1 July 1998.

Although legislation generally operates prospectively, remedial legislation is presumed to operate retroactively. *See Smith v. Mercer*, 276 N.C. 329, 338, 172 S.E.2d 489, 495 (1970). The purpose of the pertinent legislation is to remedy a tax that the legislature knew, from this Court's prior decision, had been unconstitutionally collected seven to nine years earlier. The selection of the 1 July 1998 date manifests the General Assembly's commendable intent to remediate and make as near whole as possible those whose money was so taken. Thus, the settlement was effective on 1 July 1998, the retroactive date of the legislative act appropriating the funds and the retroactive date of court approval.

Since the settlement was effective on 1 July 1998, defendants were obligated to pay the principal as of that date. Under the centuries-old rule that "interest shall follow the principal, as the shadow the body," the trial court properly provided that interest began accruing in the instant case on 1 July 1998. *See Beckford v. Tobin*, 27 Eng. Rep. 1049, 1051 (1749).

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

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

STATE OF NORTH CAROLINA v. JERRY ALFRED COBLE

No. 446PA99

(Filed 7 April 2000)

Homicide— attempted second-degree murder—not crime in this state

The crime of "attempted second-degree murder" does not exist under North Carolina law because the offense of attempted murder requires the element of specific intent to kill, and while specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first-degree murder, it is not an element of second-degree murder or manslaughter. Where the element of malice in second-degree murder is proved by intentional conduct, a defendant need only intend to commit the underlying act that results in death.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 134 N.C. App. 607, 518 S.E.2d 251 (1999), finding no error in a judgment entered by Allen (J.B., Jr.), J., on 26 March 1998 in Superior Court, Alamance County. Heard in the Supreme Court 17 February 2000.

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

Cheshire, Parker, Schneider, Wells & Bryan, by Joseph B. Cheshire, V, and John Keating Wiles, for defendant-appellant.

MARTIN, Justice.

On 12 May 1997 defendant was indicted for one count of attempted murder. Defendant was tried before a jury at the 23 March 1998 Criminal Session of Superior Court, Alamance County. At the conclusion of all the evidence, the trial court, over defendant's objection, instructed the jury on two degrees of attempted murder—"attempted first-degree murder" and "attempted second-degree murder." The jury found defendant guilty of a crime denominated as "attempted second degree murder."

On appeal, the Court of Appeals found no error. *State v. Coble*, 134 N.C. App. 607, 613, 518 S.E.2d 251, 255 (1999). On 4 November 1999 we allowed defendant's petition for discretionary review to

determine whether the crime of "attempted second-degree murder" exists under North Carolina law.

The elements of an attempt to commit a crime are: "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996); *see State v. Ball*, 344 N.C. 290, 305, 474 S.E.2d 345, 354 (1996), *cert. denied*, 520 U.S. 1180, 137 L. Ed. 2d 561 (1997). The crime of attempt requires an act done with the specific intent to commit the underlying offense. *See State v. Hageman*, 307 N.C. 1, 13, 296 S.E.2d 433, 441 (1982); *State v. Brayboy*, 105 N.C. App. 370, 374, 413 S.E.2d 590, 593, *disc. rev. denied*, 332 N.C. 149, 419 S.E.2d 578 (1992); 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 6.2, at 25 (1986 & Supp. 2000) [hereinafter LAFAVE & SCOTT]. Therefore, to commit the crime of attempted murder, one must specifically intend to commit murder. *See Braxton v. United States*, 500 U.S. 344, 351, 114 L. Ed. 2d 385, 393 (1991); 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 695, at 591-97 (15th ed. 1996 & Supp. 1999) [hereinafter WHARTON'S CRIMINAL LAW.]

It is well settled that three forms of homicide exist under North Carolina law. *See State v. Watson*, 338 N.C. 168, 176, 449 S.E.2d 694, 699 (1994), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995). Only first-degree murder and second-degree murder are relevant to our analysis in this case. The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation. *See* N.C.G.S. § 14-17 (1999); *Watson*, 338 N.C. at 176, 449 S.E.2d at 699; *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). The elements of second-degree murder, on the other hand, are: (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation. *See* N.C.G.S. § 14-17; *Watson*, 338 N.C. at 176, 449 S.E.2d at 699; *State v. Griffin*, 308 N.C. 303, 306, 302 S.E.2d 447, 451 (1983).

This Court has articulated the important distinction between first-degree murder and second-degree murder:

> First degree murder, which has as an essential element the intention to kill, has been called a specific intent crime. Second degree murder, which does not have this element, has been called a general intent crime.

State v. Jones, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). "In connection with [second-degree murder and voluntary manslaughter], the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the *act* which resulted in death is intentionally committed . . . ." *State v. Ray*, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980), *quoted in State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992). Moreover, we have explained that specific intent to kill is " 'a necessary constituent of the elements of premeditation and deliberation in first degree murder [] [and] is not an element of second degree murder or manslaughter.' " *State v. Barber*, 270 N.C. 222, 227, 154 S.E.2d 104, 108 (1967) (quoting *State v. Gordon*, 241 N.C. 356, 358, 85 S.E.2d 322, 323 (1955)); *see State v. Phillips*, 264 N.C. 508, 515, 142 S.E.2d 337, 342 (1965). Therefore, it logically follows that the crime of attempted murder, as recognized in this state, can be committed only when a person acts with the specific intent to commit first-degree murder.

In the present case, the Court of Appeals interpreted *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982), as recognizing a form of malice in second-degree murder that encompasses specific intent to kill. Based on that interpretation, the Court of Appeals reasoned "there are second-degree murders in which the defendant intended to kill, and second-degree murders in which there was no *specific intent to kill*, but the defendant nevertheless acted with malice." *Coble*, 134 N.C. App. at 610, 518 S.E.2d at 253 (emphasis added). Distinguishing first-degree murder and second-degree murder, the Court of Appeals stated, "If the actor intends to kill the victim, but acts without premeditation and deliberation, the actor is guilty of attempted second-degree murder." *Id.* The Court of Appeals then concluded, "Because intent to commit the underlying offense is a necessary element of attempt, it follows that there can be an attempt to commit those forms of second-degree murder in which the malice element contains the intent to kill." *Id.*

Although the Court of Appeals' reading of *Reynolds* was reasonable, a meaningful distinction nonetheless exists between specific intent as an element of a crime and evidence of intent proffered to establish the element of malice for second-degree murder. In *Reynolds* we stated that the element of malice may be established by at least three different types of proof: (1) "express hatred, ill-will or spite"; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to "manifest a mind utterly without

regard for human life and social duty and deliberately bent on mischief"; or (3) a "condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *Reynolds*, 307 N.C. at 191, 297 S.E.2d at 536. We then explained that the third type of malice is established by "intentional infliction of a wound with a deadly weapon which results in death." *Id.*

The element of malice for second-degree murder, therefore, may be established by evidence that a person intentionally inflicted a wound that results in death. *Id.* The element of specific intent to kill for first-degree murder, however, is not satisfied by proof of "an intentional act by the defendant resulting in the death of the victim; the State also must show that the defendant intended for his action to result in the victim's death." *Keel*, 333 N.C. at 58, 423 S.E.2d at 462; *see Jones*, 339 N.C. at 148, 451 S.E.2d at 844. Moreover, as stated above, specific intent to kill is " 'a necessary constituent of the elements of premeditation and deliberation in first-degree murder [] [and] is not an element of second-degree murder or manslaughter.' " *Barber*, 270 N.C. at 227, 154 S.E.2d at 108 (quoting *Gordon*, 241 N.C. at 358, 85 S.E.2d at 323). Therefore, evidence of intent as a component of malice is not equivalent to the element of specific intent to kill.

Because specific intent to kill is not an element of second-degree murder, the crime of attempted second-degree murder is a logical impossibility under North Carolina law. The crime of attempt requires that the actor specifically intend to commit the underlying offense. *See Hageman*, 307 N.C. at 13, 296 S.E.2d at 441. It is logically impossible, therefore, for a person to specifically intend to commit a form of murder which does not have, as an element, specific intent to kill. As the United States Supreme Court stated, "Although a murder may be committed without an intent to kill, attempt to commit murder requires a specific intent to kill." *Braxton*, 500 U.S. at 351, 114 L. Ed. 2d at 393. Accordingly, the crime of attempted murder is logically possible only where specific intent to kill is a necessary element of the underlying offense. *See, e.g., State v. Collins*, 334 N.C. 54, 58-59, 431 S.E.2d 188, 191 (1993) (first-degree murder conviction set aside for failure to instruct jury on lesser-included offense of "attempted murder"); *State v. Gilley*, 306 N.C. 125, 130, 291 S.E.2d 645, 648 (1982) ("attempted murder" recognized where completed offense would have constituted first-degree murder), *overruled on other grounds by State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989).

We note that our Court of Appeals faced a similar logical impossibility in *State v. Lea*, 126 N.C. App. 440, 485 S.E.2d 874 (1997). In *Lea*, a case involving two defendants, one defendant was convicted of attempted first-degree felony murder. On appeal, the Court of Appeals concluded that "the offense of 'attempted felony murder' does not exist in North Carolina." *Id.* at 450, 485 S.E.2d at 880. The Court of Appeals first explained that felony murder "does not require that the defendant intend the killing, only that he or she intend to commit the underlying felony." *Id.* at 449, 485 S.E.2d at 880. The Court of Appeals next explained that an attempt crime "requires proof that the defendant *specifically intended* to commit the crime he is charged with attempting." *Id.* Quoting the United States Supreme Court, the Court of Appeals recognized that " 'attempt to commit murder requires a specific intent to kill.' " *Id.* at 450, 485 S.E.2d at 880 (quoting *Braxton*, 500 U.S. at 351, 114 L. Ed. 2d at 393). Therefore, the Court of Appeals concluded, "a charge of 'attempted felony murder' is a logical impossibility in that it would require the defendant to intend what is by definition an unintentional result." *Id.* at 450, 485 S.E.2d at 880.

Likewise, a charge of attempted second-degree murder is a logical impossibility. Second-degree murder, like felony murder, does not have, as an element, specific intent to kill. Rather, where the element of malice in second-degree murder is proved by intentional conduct, a defendant need only intend to commit the underlying act that results in death. *See Reynolds*, 307 N.C. at 191, 297 S.E.2d at 536. Therefore, as in *Lea*, a charge of attempted second-degree murder would require a defendant to specifically intend what is by definition not a specifically intended result. *See Lea*, 126 N.C. App. at 450, 485 S.E.2d at 880.

Our conclusion is buttressed by a multitude of cases from other jurisdictions. This persuasive authority rejects the offense of attempted second-degree murder where the substantive offense of second-degree murder does not include, as an element, specific intent to kill. *See, e.g., Huitt v. State*, 678 P.2d 415, 419-20 (Alaska Ct. App. 1984) (rejecting offense of attempted second-degree murder where statute did not require specific intent to kill); *Fenstermaker v. State*, 128 Idaho 285, 291, 912 P.2d 653, 659 (Ct. App. 1995) (recognizing crime of attempted second-degree murder where requisite intent for second-degree murder is defined in part as "intent to take life"); *State v. Shannon*, 258 Kan. 425, 429-30, 905 P.2d 649, 652-53 (1995) (rejecting attempted second-degree murder where second-degree

murder statute did not require specific intent to kill); *State v. Earp*, 319 Md. 156, 162-67, 571 A.2d 1227, 1230-33 (1990) (rejecting crime of attempted second-degree murder where specific intent to kill is not a necessary element of second-degree murder).

Legal scholars have likewise recognized that the offense of attempted murder requires the element of specific intent to kill. *See, e.g.*, WHARTON'S CRIMINAL LAW § 695, at 591-97 ("[A]n attempt to commit murder requires a specific intent to kill."); LAFAVE & SCOTT, at 25 ("attempted murder requires an intent to bring about the result described by the crime of murder (i.e., the death of another)").

In the present case, defendant could have been separately indicted for the crime of assault with a deadly weapon with intent to kill. *See* N.C.G.S. § 14-32 (1999). Like first-degree murder, assault with a deadly weapon with intent to kill has, as an element, specific intent to kill. *See id.*; N.C.P.I.—Crim. 208.10 (1989). Because assault with a deadly weapon with intent to kill requires proof of an element not required for attempted murder—use of a deadly weapon—it is not a lesser-included offense of attempted murder, *see State v. Westbrooks*, 345 N.C. 43, 55, 478 S.E.2d 483, 491 (1996), and must be charged in a separate indictment.

We note this case presents an issue of first impression since this Court has not directly addressed the question of whether the crime of attempted second-degree murder exists under North Carolina law. Nevertheless, because our appellate courts have indirectly referenced this purported crime on several occasions, *see State v. Smith*, 347 N.C. 453, 463, 496 S.E.2d 357, 363, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998), *State v. Cozart*, 131 N.C. App. 199, 203, 505 S.E.2d 906, 909-10 (1998), *disc. rev. denied*, 350 N.C. 311, —— S.E.2d —— (1999), *State v. Lea*, 126 N.C. App. 440, 445, 485 S.E.2d 874, 877, the prosecutor's decision here to seek a verdict of attempted second-degree murder, and the trial court's decision to instruct the jury accordingly, were both reasonable.

Nonetheless, a crime denominated as "attempted second-degree murder" does not exist under North Carolina law. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA v. CRAIG DARRYL GRIGSBY

No. 364PA99

(Filed 7 April 2000)

Assault— intent to kill—sufficiency of evidence

The State's evidence of defendant's intent to kill was sufficient to withstand defendant's motion to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury where it tended to show that defendant threw the victim, an assistant restaurant manager, to his knees; defendant was carrying a knife and demanded to know how many people were in the building and how much money was there; defendant tied the victim's hands with duct tape, and the victim told defendant not to hurt him, that he would give him whatever he wanted; defendant jumped onto the victim's back once the victim seized defendant's knife and struggled with the victim, causing the victim to be seriously injured; defendant threatened the victim before and after the scuffle without appearing to hear the victim's acquiescence in his demands; defendant had attempted to obtain and had subsequently regretted not being equipped with a gun at the assault; and defendant had instead obtained and chosen to use an assault-type knife with finger holes, designed to enable an assailant to repeatedly stab a victim without losing his grip.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 134 N.C. App. 315, 517 S.E.2d 195 (1999), vacating a conviction and sentence for assault with a deadly weapon with intent to kill inflicting serious injury entered by Gore, J., on 30 October 1997 in Superior Court, New Hanover County, and remanding for entry of a verdict for a lesser included offense and for resentencing. Heard in the Supreme Court 15 February 2000.

Michael F. Easley, Attorney General, by Laura E. Crumpler and Donald R. Esposito, Jr., Assistant Attorneys General, for the State-appellant.

Nora Henry Hargrove for defendant-appellee.

FREEMAN, Justice.

On 14 April 1997 defendant was indicted on charges of assault with a deadly weapon with intent to kill inflicting serious injury and

attempted robbery with a dangerous weapon. A jury found defendant guilty as charged. On 30 October 1997 defendant was sentenced to 133 to 169 months' incarceration for the assault conviction and to 117 to 150 months' incarceration for the robbery conviction, to run consecutively. The Court of Appeals concluded that each element of assault with a deadly weapon inflicting serious injury was supported by evidence in the record but that the evidence was insufficient as to defendant's intent to kill. It accordingly vacated defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious injury and ordered the case be remanded for entry of a guilty verdict on the lesser included offense. *State v. Grigsby*, 134 N.C. App. 315, 517 S.E.2d 195 (1999). We reverse and remand for reinstatement of the conviction and judgment entered by the trial court on 30 October 1997.

The victim, David Love, testified that around 7:00 a.m. on 10 January 1996 he arrived at TGI Friday's restaurant in Wilmington, North Carolina, where he worked as assistant general manager. He heard a buzzer from the locked back door of the restaurant and let in a beer salesman to check inventory. Some time later, Love heard the buzzer sound again, and, assuming it was the salesman, he unlocked and opened the door. He was immediately grabbed by his hands and thrown to his knees. His assailant, whom he later identified as defendant, appeared to be very agitated and started yelling and repeatedly demanding to know how many people were in the building and how much money was there. Defendant began tying Love's hands with duct tape, and Love told defendant not to hurt him, that he would give him whatever he wanted. Leaving Love on his knees with his hands bound, defendant put down the knife he had carried in with him and went over to a bag and pulled out a can of lighter fluid, threatening to burn Love if he did not get what he wanted.[1]

At this point, Love, who had been robbed before, noted defendant had made no attempt to disguise himself and began to fear for his life: "[I]f you're going to rob a place and you've got a deadly weapon with you, you['d] better cover your face up unless you're not planning on leaving any witnesses." Love figured he would "rather be stabbed to death than burned to death" and lunged for the knife while defendant was pulling the can of lighter fluid from his bag. Defendant then jumped onto Love's back, but Love had a firm grip on the knife, which

1. Upon asking whether it could consider the lighter fluid in determining whether defendant had assaulted Love with the intent to kill, the jury was instructed it could not, that it could consider only the knife for that purpose.

was an "assault-type" knife with finger holes. Love started "wailing [sic] away" at defendant with the knife and was certain he had stabbed defendant. Defendant then started running for the back door; but Love, who thought defendant might have another knife or gun under his coat, managed to stab him once more in the back or shoulder. Defendant then fled out the back door. Love discovered shortly afterwards that he, too, had been stabbed and his lung punctured. He later surmised that, although he had held the knife the entire time after defendant put it down, he had been cut when defendant jumped on his back and grabbed his arms. Love said that the entire episode took only about five minutes, and the struggle itself less than a minute, but he felt nothing but "total fear." Although Love was offering to give defendant whatever he wanted, defendant was not listening to him, but was "like a machine."

An acquaintance of defendant's later testified that during the preceding year defendant had asked him if he knew where to find a gun. About a week before the robbery, defendant asked the witness, who had baby-sat for defendant's sister, if he knew how to drive from the restaurant to Hampstead, where defendant's sister lived. He had also accompanied defendant to a pawnshop to buy a knife (different from that used in the robbery), which the witness later gave away.

Another witness testified that during the same two-week period in early January 1996 when the robbery occurred and while defendant had been staying at his sister's, defendant asked where he could get a gun. The witness did not know, and said so, and that was the end of the matter. But when the witness saw defendant shortly after the scuffle with Love, defendant remarked to him that "if [he] had had a gun, [he] would have gotten away with it."

The only issue before this Court is whether the evidence was sufficient as to defendant's intent to kill to withstand defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The elements of this charge are (1) an assault, (2) with a deadly weapon, (3) an intent to kill, and (4) infliction of a serious injury not resulting in death. *State v. James*, 321 N.C. 676, 687, 365 S.E.2d 579, 586 (1988). In order to withstand a motion to dismiss this charge, the State must present "substantial evidence" of each element. *Id.* " 'Substantial evidence is that amount of evidence that a reasonable mind might accept as adequate to support a conclusion.' " *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994) (quoting *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981)). "When considering a motion to dismiss, '[i]f the trial court

determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may support reasonable inferences of the defendant's innocence.' " *Id.* (quoting *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979)). "[T]he evidence is to be considered in the light most favorable to the State and . . . the State is entitled to every reasonable inference to be drawn therefrom." *Id.*

The Court of Appeals correctly determined that substantial evidence supported each of the three elements of the lesser included offense, assault with a deadly weapon inflicting serious injury. We conclude that, in addition, evidence in the record supports the intent-to-kill element of the greater offense. "An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred." *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956), *quoted in Alexander*, 337 N.C. at 188, 446 S.E.2d at 87. "[T]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred." *Alexander*, 337 N.C. at 188, 446 S.E.2d at 87 (quoting *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982)). Moreover, an assailant "must be held to intend the natural consequences of his deliberate act." *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973).

Considered in the light most favorable to the State, the following facts and circumstances surrounding defendant's assault of Love reasonably support the inference that defendant's intent was not only to rob or to injure, but to kill: that defendant leapt onto Love's back once Love seized defendant's knife and that he struggled with Love, causing Love to be seriously injured; that defendant threatened Love before and after the scuffle without appearing to hear Love's acquiescence in his demands (*cf. State v. Irwin*, 55 N.C. App. 305, 285 S.E.2d 345 (1982) (evidence that defendant had threatened to kill victim if demands were not met was conditional intent to kill, or specific intent *not* to kill if the victims complied)); that defendant had attempted to obtain and had subsequently regretted not being equipped with a gun at the assault; and that defendant had instead obtained and chosen to use an assault-type knife with finger-holes, designed to enable an assailant to repeatedly stab a victim without losing his grip.

We hold that the evidence, viewed in the light most favorable to the State, supports the charge of assault with a deadly weapon with intent to kill inflicting serious injury, and that the trial court did not err in submitting that charge for the consideration of the jury. The Court of Appeals thus erred in vacating and remanding this case for entry of judgment and sentencing on the lesser included offense.

REVERSED.

SHARON LYNN LOVELACE, ADMINISTRATRIX OF THE ESTATE OF SHAYLA MEAGEN MOORE, AND SHARON LYNN LOVELACE, INDIVIDUALLY v. CITY OF SHELBY AND THOMAS LOWELL LEE

No. 312A99

(Filed 7 April 2000)

Immunity— public duty doctrine—911 operator—delay in dispatching fire department—inapplicability

The public duty doctrine will not be expanded to insulate a city from liability for alleged negligence of a city 911 operator in causing the death of plaintiff's daughter in a fire at plaintiff's home by failing timely to dispatch the fire department to plaintiff's home after receiving a call reporting the fire. The public duty doctrine, as it applies to local governments, is limited to the facts of *Braswell v. Braswell*, 330 N.C. 363 (1991).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. 408, 515 S.E.2d 722 (1999), reversing and remanding an order entered 12 March 1998 by Payne (Ronald K.), J., in Superior Court, Cleveland County. Heard in the Supreme Court 15 November 1999.

Deaton & Biggers, P.L.L.C., by W. Robinson Deaton, Jr., and Lydia A. Hoza; and Hamrick, Mauney, Flowers, Martin & Moore, by Fred A. Flowers, for plaintiff-appellant.

Scott, Hollowell, Palmer & Windham, LLP, by Martha Raymond Thompson, for defendant-appellee City of Shelby.

ORR, Justice.

Plaintiff, Sharon Lynn Lovelace, individually and in her capacity as administratrix of the estate of her deceased daughter, Shayla Meagan Moore (Shayla), initiated this action against defendants on 5 November 1997. Plaintiff alleged that defendant City of Shelby (City) was negligent in the dispatch of fire-fighting personnel to plaintiff's home, resulting in Shayla's death, and that the City, through its negligent dispatch of fire-fighting personnel, caused plaintiff severe emotional distress. Plaintiff also asserted claims against defendant Lee, but he is not a party to this appeal. On 16 January 1998, the City filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the ground that plaintiff failed to state a claim upon which relief could be granted.

On 11 March 1998, the trial court granted plaintiff's motion to amend the complaint to allege additionally that the City's negligence was the direct and proximate cause of Shayla's death and that the City's actions created a "special duty" between plaintiff, Shayla, and the City. On 12 March 1998, the trial court denied the City's 12(b)(6) motion.

The City appealed to the Court of Appeals, assigning as error the trial court's denial of the 12(b)(6) motion because "plaintiff has failed to state a claim upon which relief can be granted under the Public Duty Doctrine." The Court of Appeals reversed the trial court's 12 March 1998 order and remanded to the trial court for entry of an order dismissing plaintiff's case. *See Lovelace v. City of Shelby*, 133 N.C. App. 408, 414, 515 S.E.2d 722, 726 (1999). The Court of Appeals concluded that plaintiff had not alleged facts that adequately established the "special duty" exception to the public duty doctrine. *See id.* at 413, 515 S.E.2d at 726. Judge Wynn dissented on the grounds that plaintiff alleged sufficient facts to establish negligence and alleged sufficient facts to demonstrate that the case fell within the "special duty" exception to the public duty doctrine. *Id.* at 414, 515 S.E.2d at 726 (Wynn, J., dissenting). Based on the dissent, plaintiff appealed to this Court pursuant to N.C.G.S. § 7A-30(2).

Because this appeal is based on defendant City's motion to dismiss, we must treat plaintiff's factual allegations as true. *See Cage v. Colonial Bldg. Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994). The facts, as alleged, show that on 29 June 1996, plaintiff and her three minor children, including Shayla, resided at 706 Calvary Street, Shelby, North Carolina, when a fire was discovered inside the house.

Their home was located 1.1 miles from the Shelby fire station. Plaintiff exited the house with two of her three minor children, but Shayla failed to follow them. The fire was reported to the City by calling its 911 emergency number. According to the pleadings, Helen Earley, the 911 system operator for the City, delayed dispatching the fire department until six minutes after she received the call reporting the fire. The fire department did not arrive at plaintiff's home until approximately ten minutes after that initial 911 call was placed.

While plaintiff and others waited for the fire department to arrive, Shayla could be heard inside the house talking and calling for her mother. Bystanders, including police officers who arrived on the scene before the fire department, made several attempts to enter the house, but the intensity of the flames thwarted their rescue attempts. Shayla was alive inside the house for several minutes immediately following the beginning of the fire and prior to the fire department's arrival.

The issue in this case is whether the public duty doctrine insulates the City of Shelby from liability for the alleged negligence of Helen Earley, a 911 operator for the City, and, if so, whether plaintiff sufficiently alleged facts to support the "special duty" exception to the public duty doctrine.

As early as this Court's decision in *Hill v. Alderman of Charlotte*, 72 N.C. 55 (1875), the state and its agencies have been immune from tort liability under the common law doctrine of sovereign immunity. Sovereign immunity continues to be a viable protection against tort claims for local governments. It is subject, however, to certain legislatively created exceptions allowing local governments to purchase liability insurance to protect the public, *see* N.C.G.S. §§ 153A-435 (1999) (applying to counties), 160A-485 (1999) (applying to cities), and court-made exceptions for public officials involved in conduct that is either corrupt, malicious, or outside of and beyond the scope of their official authority, *see Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997).

This Court adopted for the first time the common law public duty doctrine and explained its application to local governments in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991). We stated in *Braswell*:

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of

> the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

Id. at 370-71, 410 S.E.2d at 901 (citation omitted).

The holding in *Braswell* was specifically limited to the facts in that case and to the issue of whether the sheriff negligently failed to protect the decedent. This limitation is consistent with the origin of the public duty doctrine in the United States in *South v. Maryland ex rel. Pottle*, 59 U.S. 396, 15 L. Ed. 433 (1855).

While this Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection, *see Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998); *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 449 (1998), we have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public, *see Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999) (refusing to extend the public duty doctrine to shield a city from liability for the allegedly negligent acts of a school crossing guard). We decline to expand the public duty doctrine in this case. Thus, the public duty doctrine, as it applies to local government, is limited to the facts of *Braswell*.

Because we decline to expand the public duty doctrine as it applies to local governments, we reverse the decision of the Court of Appeals and remand to that court for reinstatement of the trial court's order denying defendant's Rule 12(b)(6) motion to dismiss.

REVERSED.

ALEX H. THOMPSON, AND WIFE, SHEILA THOMPSON v. MICHAEL S. WATERS, D/B/A WATERHOUSE REALTY & CONSTRUCTION AND LEE COUNTY

No. 267PA99

(Filed 7 April 2000)

Immunity— public duty doctrine—county building inspectors—inapplicability

The public duty doctrine does not bar plaintiffs' claim against a county for negligent inspection by its building inspectors of a private residence constructed for plaintiffs.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished, unanimous decision of the Court of Appeals, 133 N.C. App. 194, 520 S.E.2d 611 (1999), affirming an amended order signed by Stanback, J., on 6 August 1998 in Superior Court, Lee County. A conditional petition for discretionary review as to additional issues was allowed by the Supreme Court on 22 July 1999. Heard in the Supreme Court 17 November 1999.

Cunningham, Dedmond, Petersen & Smith, L.L.P., by Bruce T. Cunningham, Jr., for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Coleman M. Cowan, for defendant-appellee Lee County.

Stella A. Boswell on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

FRYE, Chief Justice.

Plaintiffs filed a complaint in Superior Court, Lee County, alleging negligent inspection by defendant Lee County and negligent construction by defendant Michael Waters. Defendant Lee County contends that the public duty doctrine bars plaintiffs' claim. We conclude that the public duty doctrine does not bar plaintiffs' claim against Lee County for negligent inspection.

This appeal is before us based on defendant Lee County's motion to dismiss for failure to state a claim upon which relief can be granted, N.C. R. Civ. P. 12(b)(6); thus, we treat plaintiffs' factual alle-

gations as true. *See Cage v. Colonial Bldg. Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994). The question then becomes whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory. *See Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991).

Plaintiffs alleged the following in their complaint: In September of 1994, plaintiffs entered into a contract with defendant Waters to construct a private residence. The building inspectors for Lee County made periodic inspections of the home and were grossly negligent in that they approved construction that was in violation of the North Carolina State Building Code and good building practice. Within two weeks of the completion of the home, plaintiffs began experiencing substantial structural defects including stress fractures, cracks, settling of foundations, and shifting of walls. On 14 November 1996, plaintiffs received a report from the Lee County Department of Inspection outlining the numerous defects and building code violations in the residence.

Defendant Lee County filed a motion to dismiss the action against Lee County on the basis of the public duty doctrine. In response, plaintiffs alleged that the case was not within the bounds of the public duty doctrine or, in the alternative, that there existed a special relationship between plaintiffs and Lee County.

The Superior Court allowed defendant Lee County's motion to dismiss. The Court of Appeals affirmed the Superior Court's ruling in a unanimous, unpublished decision. *Thompson v. Waters*, 133 N.C. App. 194, 520 S.E.2d 611 (1999). This Court allowed plaintiffs' petition for discretionary review on 22 July 1999. Defendant Waters is not a party to this appeal.

Plaintiffs contend that the public duty doctrine does not insulate building inspectors from responsibility for their negligent acts or, in the alternative, that a special relationship or special duty existed between plaintiffs and the County. Defendant Lee County counters that plaintiffs' claim is barred by the public duty doctrine.

In *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), this Court applied the public duty doctrine to local law enforcement and held that a municipality and its agents could not be held liable for failure to furnish police protection to specific individuals. The Court also adopted two generally recognized exceptions to the public duty doc-

trine in *Braswell*: first, where there is a special relationship between the injured party and the governmental entity, and second, where 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.' " *Id.* at 371, 410 S.E.2d at 902 (quoting *Coleman v. Cooper*, 89 N.C. App. 188, 194, 366 S.E.2d 2, 6, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988)).

Notwithstanding our application of the public duty doctrine in *Braswell*, this Court, for reasons stated therein, declined to apply the public duty doctrine in *Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999). In *Isenhour*, the plaintiff brought an action against a school crossing guard and the City of Charlotte for the injuries and wrongful death that resulted when a child was struck by an automobile while crossing the street. *Id.* at 602, 517 S.E.2d at 123. The Court concluded that the public duty doctrine did not shield the City or the crossing guard, in her official capacity, from liability. *Id.* at 608, 517 S.E.2d at 126. In *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 449 (1998), and *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998), a majority of this Court extended the application of the public duty doctrine so as to bar plaintiffs' claims against a state agency, the Department of Labor. We are now asked to extend the public duty doctrine as adopted in *Braswell* in this case against a county for the alleged negligence of its building inspector. We decline to do so.

The public duty doctrine has caused confusion in other jurisdictions. Several courts have expressed difficulty applying or interpreting the doctrine and its exceptions. *See Jean W. v. Commonwealth*, 414 Mass. 496, 499, 610 N.E.2d 305, 307 (1993); *Doucette v. Town of Bristol*, 138 N.H. 205, 209, 635 A.2d 1387, 1390 (1993); *Schear v. Board of County Comm'rs*, 101 N.M. 671, 674, 687 P.2d 728, 731 (1984). In some states where sovereign immunity has been either legislatively or judicially abrogated, courts have abandoned the public duty doctrine as another form of sovereign immunity. *See, e.g., Adams v. State*, 555 P.2d 235, 241-42 (Alaska 1976); *Schear*, 101 N.M. at 677, 687 P.2d at 734; *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 536, 247 N.W.2d 132, 137 (1976). Some courts have criticized the doctrine as speculative and the cause of "legal confusion, tortured analyses, and inequitable results in practice." *Doucette*, 138 N.H. at 209, 635 A.2d at 1390; *see also Jean W.*, 414 Mass. at 509, 610 N.E.2d at 313. Moreover, courts in at least three states have renounced the public

duty doctrine when considering claims for negligent building inspections. *See Adams*, 555 P.2d at 241-42; *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979); *Coffey*, 74 Wis. 2d at 540, 247 N.W.2d at 139.

This Court has not heretofore applied the public duty doctrine to a claim against a municipality or county in a situation involving any group or individual other than law enforcement. After careful review of appellate decisions on the public duty doctrine in this state and other jurisdictions, we conclude that the public duty doctrine does not bar this claim against Lee County for negligent inspection of plaintiffs' private residence. Because we hold that the public duty doctrine does not apply, we need not address plaintiffs' contentions that the special duty or special relationship exceptions to the doctrine apply.

The trial court granted defendant's Rule 12(b)(6) motion to dismiss plaintiffs' claim against the County on the basis of the public duty doctrine. The Court of Appeals affirmed on the same basis. For the reasons stated herein, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further remand to the Superior Court, Lee County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. MARVIN EARL WILLIAMS, JR.

No. 264A90-5

(Filed 7 April 2000)

1. Discovery— capital defendant—post-conviction—written motion—time for filing

To be entitled to post-conviction discovery under N.C.G.S. § 15A-1415(f), a capital defendant must file a written motion for discovery within 120 days of the triggering occurrence under § 15A-1415(a). However, for capital defendants retroactively entitled to post-conviction discovery under *State v. Green*, 350 N.C.

400, the 120-day deadline for filing motions for discovery under § 15A-1415(f) runs from the date of certification of that decision, 29 June 1999.

2. Discovery— capital defendant—post-conviction—motion not timely

A capital defendant was not entitled to post-conviction discovery because his motion was not timely filed where (1) it was filed over three years after the U.S. Supreme Court denied defendant's petition for writ of certiorari on direct appeal, the triggering occurrence under N.C.G.S. § 15A-1415(a), and approximately two and one-half years after the effective date of that statute and the date his motion for appropriate relief was filed, and (2) defendant's motion for appropriate relief was not pending on the effective date of the statute.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 12 March 1999 by Jones (Arnold), J., in Superior Court, Wayne County, granting defendant's motion for discovery under N.C.G.S. § 15A-1415(f). Heard in the Supreme Court 13 December 1999.

Michael F. Easley, Attorney General, by Valérie B. Spalding, Special Deputy Attorney General, for the State-appellant.

Shelby Duffy Benton and Glenn A. Barfield for defendant-appellee.

MARTIN, Justice.

At the 30 April 1990 Criminal Session of Superior Court, Wayne County, defendant was convicted of first-degree murder and sentenced to death. On 10 September 1993 this Court granted defendant a new trial due to "reasonable doubt" instructional error. *State v. Williams*, 334 N.C. 440, 434 S.E.2d 588 (1993). The state petitioned the United States Supreme Court for writ of certiorari, and on 28 March 1994 that Court vacated and remanded the case to this Court for reconsideration in light of *Victor v. Nebraska*, 511 U.S. 1, 127 L. Ed. 2d 583 (1994). *North Carolina v. Williams*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994). On 30 December 1994, upon reconsideration, this Court found no error. *State v. Williams*, 339 N.C. 1, 452 S.E.2d 245 (1994). On 2 October 1995 the United States Supreme Court denied defendant's petition for writ of certiorari on direct appeal. *Williams v. North Carolina*, 516 U.S. 833, 133 L. Ed. 2d 61 (1995).

On 3 July 1996 defendant filed a motion for appropriate relief (MAR) in the Superior Court, Wayne County. On 22 May 1997 the trial court denied defendant's MAR. On 11 February 1999 defendant filed a motion for postconviction discovery in the trial court. On 12 March 1999 the trial court granted defendant's motion for postconviction discovery pursuant to N.C.G.S. § 15A-1415(f). On 22 July 1999 we allowed the state's petition for writ of certiorari to review the trial court's order.

The state contends defendant is not entitled to postconviction discovery because defendant did not timely request discovery under section 15A-1415(f). We agree.

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 (the Act). Among other provisions, a capital defendant is required to file his or her MAR within 120 days from the latest of the following events or occurrences (the "triggering occurrence"):

(1) The court's judgment has been filed, but the defendant failed to perfect a timely appeal;

(2) The mandate issued by a court of the appellate division on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;

(3) The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina;

(4) Following the denial of discretionary review by the Supreme Court of North Carolina, the United States Supreme Court denied a timely petition for writ of certiorari seeking review of the decision on direct appeal by the North Carolina Court of Appeals;

(5) The United States Supreme Court granted the defendant's or the State's timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina or North Carolina Court of Appeals, but subsequently left the defendant's conviction and sentence undisturbed; or

(6) The appointment of postconviction counsel for an indigent capital defendant.

N.C.G.S. § 15A-1415(a)(1)-(6) (1999).

This Court has recognized that the legislative intent underlying the discovery statute, N.C.G.S. § 15A-1415(f), is to "expedite the postconviction process in capital cases while ensuring thorough and complete review." *State v. Bates*, 348 N.C. 29, 37, 497 S.E.2d 276, 280-81 (1998); *accord State v. Green*, 350 N.C. 400, 407, 514 S.E.2d 724, 728, *cert. denied*, —— U.S. ——, 144 L. Ed. 2d 840 (1999); *State v. Atkins*, 349 N.C. 62, 109, 505 S.E.2d 97, 126 (1998), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 1036 (1999). Toward that end, N.C.G.S. § 15A-1415(f) provides for "early and full disclosure to counsel for capital defendants so that they may raise all potential claims in a single motion for appropriate relief." *Bates*, 348 N.C. at 37, 497 S.E.2d at 281. Moreover, the statute authorizes postconviction discovery to "assist the capital defendant in investigating, preparing, or presenting a motion for appropriate relief." N.C.G.S. § 15A-1415(f); *accord Bates*, 348 N.C. at 36, 497 S.E.2d at 280.[1] Because the purpose of the statute is to assist capital defendants in investigating, preparing, or presenting all potential claims in a single MAR, it logically follows that any requests for postconviction discovery must necessarily be made within the same time period statutorily prescribed for filing the underlying MAR.

We have not previously addressed the manner by which the discovery provisions contained in N.C.G.S. § 15A-1415(f) are to be executed. Specifically, we have assumed, but have not decided, that subsection (f) requires a capital defendant to file a written motion in order to obtain "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). Because this Court now must decide the question of whether defendant timely requested postconviction discovery, we first examine whether, and by what means, he or she must do so.

The statute does not, by its express terms, require a capital defendant to file a motion to obtain postconviction discovery.

1. Although the statutory language at issue is addressed to the "interests of justice" exception to disclosure applicable to sensitive information within the state's files, we believe this same policy objective—assisting the capital defendant in investigating, preparing, or presenting a motion for appropriate relief—represents the overall legislative intent behind section 15A-1415(f)'s provision of postconviction discovery to capital defendants.

However, the requirement of a written motion is consistent with the custom and practice in our trial courts. Further, a written motion provides a logical means of notice that a capital defendant is exercising his or her discovery rights under the statute and will promote more accurate and uniform application of subsection (f). We therefore conclude that a capital defendant must file a written motion to be entitled to postconviction discovery under N.C.G.S. § 15A-1415(f).

[1] Accordingly, we hold that, to be entitled to postconviction discovery under section 15A-1415(f), a capital defendant must file a written motion for discovery within 120 days of the triggering occurrence under section 15A-1415(a).

One limited exception exists for those capital defendants retroactively entitled to postconviction discovery under our decision in *State v. Green*, 350 N.C. 400, 514 S.E.2d 724. In *Green* we held that defendants whose MARs had been allowed or were still pending on the effective date of N.C.G.S. § 15A-1415(f) were retroactively entitled to discovery. *Id.* at 406, 514 S.E.2d at 728. Until our decision in *Green*, section 15A-1415(f) had not been retroactively applied to cases in which petitions arising from the denial of motions for appropriate relief were pending in this Court on 21 June 1996. Accordingly, as to defendants entitled to postconviction discovery under *Green*, the 120-day deadline for filing motions for discovery under section 15A-1415(f) will run from the date of certification of our decision in *Green*, 29 June 1999.

[2] In the present case, defendant did not file his motion for postconviction discovery within the 120-day deadline prescribed for filing his MAR under N.C.G.S. § 15A-1415(a). Rather, defendant filed a motion for postconviction discovery on 11 February 1999, over three years after the United States Supreme Court denied defendant's petition for writ of certiorari on direct appeal, the apparent triggering occurrence under section 15A-1415(a), and approximately two and one-half years after the effective date of the statute, 21 June 1996, and the filing of his MAR, 3 July 1996. Defendant is therefore not entitled to discovery at this juncture unless otherwise eligible under the *Green* exception. Because defendant filed his MAR on 3 July 1996, it was not pending on the effective date of the statute, 21 June 1996. Accordingly, defendant is not retroactively entitled to discovery under *Green*.

We reverse the order of the Superior Court, Wayne County, allowing defendant's motion for discovery pursuant to N.C.G.S.

§ 15A-1415(f) and remand this case to that court for entry of an order consistent with this opinion.

REVERSED.

K&S ENTERPRISES v. KENNEDY OFFICE SUPPLY COMPANY, INC.

No. 539A99

(Filed 7 April 2000)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 135 N.C. App. 260, 520 S.E.2d 122 (1999), affirming a judgment entered 30 June 1998 by Smith (John W.), J., in District Court, New Hanover County. Heard in the Supreme Court 14 March 2000.

Donald E. Britt, Jr., and Nora Henry Hargrove for plaintiff-appellee.

George B. Currin for defendant-appellant.

PER CURIAM.

AFFIRMED.

ANDREWS v. CARR

No. 561P99

Case below: 135 N.C.App. 463

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

BRANCH v. BRENTWOOD FOOD & BEVERAGE, INC.

No. 7P00

Case below: 135 N.C.App. 631

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 2000.

BRANDLE v. NATIONWIDE INS. CO.

No. 542P99

Case below: 135 N.C.App. 384

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000. Conditional petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed as moot 6 April 2000.

CANNON v. CANNON

No. 515P99

Case below: 351 N.C. 186
351 N.C. 352

Motion by plaintiff pro se to reconsider the petition for writ of supersedeas denied 6 April 2000. Motion by plaintiff pro se to reconsider dismissal of appeal or certiorari denied 6 April 2000. Motion by plaintiff pro se for judicial notice denied 6 April 2000. Justices Martin and Wainwright recused.

CLAYTON v. BURNETT

No. 60P00

Case below: 135 N.C.App. 746

Petition by defendants (Burnett, Kenneth Henderson Trucking Company, Inc. and Henderson) for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000. Petition by defendant (Chip Lee Hall) for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

DILLARD v. DILLARD

No. 468P99

Case below: 133 N.C.App. 657

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 2000. Petition by defendant pro se for writ of certiorari to review the order of the North Carolina Court of Appeals denied 6 April 2000.

DURHAM v. DESSENBERGER

No. 419A99

Case below: 134 N.C.App. 498

Motion by defendant to dismiss appeal denied 9 March 2000.

EVANS v. McLAMB SUPERMARKET

No. 52P00

Case below: 136 N.C.App. 441

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

GOODWIN v. SCHNEIDER NAT'L, INC.

No. 181P99

Case below: 132 N.C.App. 585
350 N.C. 593
350 N.C. 830

Motion (second) by plaintiff to reconsider denial of petition for discretionary review denied 6 April 2000.

HARDIN v. MOTOR PANELS, INC.

No. 61P00

Case below: 132 N.C.App. 351

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

HATCHER v. SUPERIOR COURT OF ROBESON COUNTY

No. 39P00

Case below: Robeson County Superior Court

Petition by defendant pro se for writ of certiorari to review the order of Superior Court, Robeson County, denied 6 April 2000. Petition by plaintiff pro se for writ of prohibition dismissed 6 April 2000. Motion by pro se to appoint Judge Weeks dismissed 6 April 2000.

HLASNICK v. FEDERATED MUT. INS. CO.

No. 78PA00

Case below: 136 N.C.App. 320

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 6 April 2000. Petition by defendant (State Farm) for discretionary review pursuant to G.S. 7A-31 allowed 6 April 2000.

IN RE APPEAL OF WHITESIDE ESTATES, INC.

No. 57P00

Case below: 136 N.C.App. 360

Petition by petitioner (Whiteside Estates, Inc.) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 2000.

LANDERS v. WHITMIRE

No. 70P00

Case below: 136 N.C.App. 442

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

LITTLE v. ATKINSON

No. 79P00

Case below: 136 N.C.App. 430

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

MULTIMEDIA PUBL'G OF N. C., INC. v.
HENDERSON COUNTY

No. 116P00

Case below: 136 N.C.App. 567

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

RILEY v. N.C. BD. OF TRANSP.

No. 53P00

Case below: 136 N.C.App. 441

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 2000. Motion by Attorney General to dismiss petition for discretionary review allowed 6 April 2000. Motion by defendant (Eidson) to dismiss petition for discretionary review allowed 6 April 2000.

ROBERTS v. SWAIN

No. 572PA99

Case below: 135 N.C.App. 613

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed as to first issue 6 April 2000. Conditional petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 6 April 2000.

ROYAL v. ARMSTRONG

No. 106P00

Case below: 136 N.C.App. 465

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000. Justices Orr and Martin recused.

STATE v. BROOKS

No. 48P00

Case below: 136 N.C.App. 124

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. BUSH

No. 104P00

Case below: 136 N.C.App. 667

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. CABE

No. 111P00

Case below: 136 N.C.App. 510

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 April 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. CHAVIS

No. 109P00

Case below: 136 N.C.App. 668

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. CLAYTON

No. 54P00

Case below: 136 N.C.App. 443

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 April 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. COOPER

No. 82P00

Case below: 136 N.C.App. 668

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. CUMMINGS

No. 4A95-2

Case below: Brunswick County Superior Court
350 N.C. 839

Petition by defendant to rehear the denial of a petition for a writ of certiorari to reveiw an order of the Brunswick County Superior Court pursuant to Rule 31 dismissed 6 April 2000.

STATE v. DAVIDSON

No. 4P00

Case below: 136 N.C.App. 232

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. DAVIS

No. 103P00

Case below: 136 N.C.App. 668

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. DEESE

No. 80P00

Case below: 136 N.C.App. 413

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 April 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. GARNER

No. 44P00

Case below: 136 N.C.App. 1

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 April 2000. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 2000.

STATE v. HEADEN

No. 92P00

Case below: 130 N.C.App. 613

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 2000.

STATE v. JOHNSON

No. 470P99

Case below: 134 N.C.App. 734

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 April 2000.

STATE v. JONES

No. 497A93-3

Case below: Duplin County Superior Court

351 N.C. 365

Motion by defendant to reconsider the denial of the PWC-S in light of the grant of certiorari in *State v. Blanche Moore* dismissed 6 April 2000.

STATE v. KEEL

No. 134A93-7

Case below: Edgecombe County Superior Court

Motion by defendant for reconsideration of petition for writ of certiorari dismissed 6 April 2000 and remanded to the Superior Court for reconsideration in light of decision today in *State v. Marvin Earl Williams, Jr.*

STATE v. LAMBERT

No. 578P99

Case below: 135 N.C.App. 633

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. LEGRANDE

No. 215A96-6

Case below: Stanly County Superior Court

Petition by defendant pro se for writ of habeas corpus denied 6 April 2000.

STATE v. LYNCH

No. 242A93-3

Case below: Gaston County Superior Court

Petition by defendant for writ of supersedeas denied 6 April 2000. Petition by defendant for writ of certiorari to review the order of the Superior Court, Gaston County, denied 6 April 2000.

STATE v. MACK

No. 135P00

Case below: 137 N.C.App. 178

Motion by Attorney General for temporary stay denied 29 March 2000. Petition by Attorney General for writ of supersedeas denied 6 April 2000. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

STATE v. MASSEY

No. 105P00

Case below: 136 N.C.App. 232

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 2000.

STATE v. McCANTS and CORBETT

No. 62P00

Case below: 136 N.C.App. 442

Petition by defendant (Corbett) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 2000.

STATE v. PETERSON

No. 491A93-2

Case below: Cumberland County Superior Court

Petition by defendant pro se for writ of certiorari to review the order of the Superior Court, Cumberland County, denied 6 April 2000.

STATE v. RICHMOND

No. 347A95-2

Case below: Cumberland County Superior Court

Petition by defendant pro se for writ of certiorari to review the order of the Superior Court, Cumberland County, denied 6 April 2000.

STATE v. TODD

No. 71P00

Case below: 133 N.C.App. 658

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 2000.

STATE EX REL. DESSELBERG v. PEELE

No. 73P00

Case below: 136 N.C.App. 206

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 2000.

TREXLER v. POLLOCK

No. 581P99

Case below: 135 N.C.App. 601

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 6 April 2000. Motion by plaintiff for petition for discretionary review to be treated as a petition for writ of certiorari denied 6 April 2000.

TWADDELL v. ANDERSON

No. 49P00

Case below: 136 N.C.App. 56

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 April 2000.

WINBORNE v. EASLEY

No. 435A98-3

Case below: 136 N.C.App. 191

Notice of appeal by defendants pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 6 April 2000. Petition by defendants for writ of supersedeas denied 6 April 2000. Motion by defendants for temporary stay denied 6 April 2000.

WRENN v. MARIA PARHAM HOSP., INC.

No. 16P00

Case below: 135 N.C.App. 672
350 N.C. 372

Petition by plaintiff to rehear the denial of plaintiff's petitions for discretionary review and for writ of certiorarin pursuant to Rule 31 dismissed 6 April 2000.

STATE OF NORTH CAROLINA v. HENRY LOUIS WALLACE

No. 241A97

(Filed 5 May 2000)

1. Criminal Law— motion for appropriate relief—short-form indictments—constitutionality—jurisdiction issue

Although defendant only challenged the constitutionality of the nine short-form murder indictments in an assignment of error in the amended record and filed a motion for appropriate relief to challenge the validity of the short-form indictments for the eight counts of first-degree rape and two counts of first-degree sexual offense, these issues were properly preserved because: (1) a challenge to an indictment alleged to be invalid on its face that could deprive the trial court of jurisdiction may be made at any time; and (2) defendant could challenge the trial court's jurisdiction by his motion for appropriate relief.

2. Indictment and Information— short-form indictments—constitutionality

The trial court did not err in concluding the short-form indictments used to charge defendant with nine counts of first-degree murder, eight counts of first-degree rape, and two counts of first-degree sexual offense do not violate defendant's right to due process under the Fifth and Fourteenth Amendments and his right to notice and trial by jury under the Sixth Amendment because: (1) indictments based on N.C.G.S. § 15-144, § 15-144.1, or § 15-144.2 are in compliance with both the North Carolina and United States Constitutions; (2) the United States Supreme Court has not applied the due process clause of the Fourteenth Amendment in a manner which requires that a state indictment for a state offense must contain each element and fact which might increase the maximum punishment for the crime charged; and (3) the United States Supreme Court has specifically declined to apply the Fifth Amendment requirement of indictment by grand jury to the states via the Fourteenth Amendment.

3. Venue— motion for change—pretrial publicity—prejudice not shown

The trial court did not abuse its discretion by failing to grant defendant's motion for change of venue under N.C.G.S. § 15A-957 based on pretrial publicity including extensive media coverage

and telephone surveys in a case involving defendant's convictions for nine counts of first-degree murder, eight counts of first-degree rape, one count of second-degree rape, two counts of first-degree sexual offense, two counts of second-degree sexual offense, one count of assault with a deadly weapon, and five counts of robbery with a dangerous weapon, because: (1) the trial court's recognition of the probable time frame for the trial as well as the size of the prospective jury pool was reasonable since they may have impacted whether the environment for defendant's trial was prejudicial; (2) the most reliable determination for whether pretrial publicity was prejudicial or inflammatory is jurors' responses to voir dire questioning; (3) there was no identifiable prejudice shown by a juror who formed an opinion about defendant's guilt prior to trial since he later clearly stated his ability to set aside that opinion and base his decision on the evidence and the law as presented; (4) there was no showing of infection of the jury pool depriving defendant of a fair trial where there is a large heterogeneous group of potential jurors, and the danger of juror familiarity with the victims and their families was not present like in a small close-knit venire; (5) factual news accounts of the crimes and pretrial proceedings are not sufficient to establish prejudice against a defendant; and (6) the telephone surveys did not measure the prejudicial effect of the media coverage.

4. Confessions and Incriminating Statements— delay—voluntariness—Miranda warnings—no fruit of the poisonous tree

The trial court did not err by denying defendant's motion to suppress his pretrial statements to police in a case involving defendant's convictions for nine counts of first-degree murder, eight counts of first-degree rape, one count of second-degree rape, two counts of first-degree sexual offense, two counts of second-degree sexual offense, one count of assault with a deadly weapon, and five counts of robbery with a dangerous weapon, because: (1) the delay in taking defendant before a judicial official was not unnecessary within the meaning of N.C.G.S. § 15A-501(2) in light of the number of crimes to which defendant confessed, the amount of time necessary to record the details of the crimes, the investigators' accommodation of defendant's request to sleep; furthermore, there was no indication that taking defendant to the Law Enforcement Center before he saw a magistrate caused him to confess, no indication that police asked defendant about any of the crimes to which he later confessed

before he was read his Miranda rights, and no indication that any portion of his confession was a result of the delay during which he discussed unrelated subjects with investigators; (2) defendant's later confessions could not be termed "fruit of the poisonous tree" since there was no prior inadmissible statement or evidence to function as the "poisonous tree"; and (3) investigators did not improperly induce defendant to confess based on their statements that they would attempt to contact defendants' girlfriend and the mother of his child since they made the statement only in response to defendant's request to see his girlfriend and hold his child, defendant admitted his confession was not given in exchange for the request to see his girlfriend and child, and investigators advised defendant that the police had no control over whether they would come to the station.

5. Jury— selection—capital trial—challenge for cause—ability to set aside opinion

The trial court did not err by denying defendant's challenge for cause of a prospective juror who formed an opinion about defendant's guilt prior to trial based on pretrial publicity and defense counsel's statement that the facts were not in dispute in a case involving defendant's convictions for nine counts of first-degree murder, eight counts of first-degree rape, one count of second-degree rape, two counts of first-degree sexual offense, two counts of second-degree sexual offense, one count of assault with a deadly weapon, and five counts of robbery with a dangerous weapon, because during voir dire, the juror clearly stated his ability to set aside that opinion and base his decision on the evidence and the law as presented.

6. Evidence— expert testimony—cross-examination—basis of opinion—confessions of additional unrelated murders—limiting instruction—no unfair prejudice

The trial court did not abuse its discretion by denying defendant's motion in limine and by overruling his objections to the cross-examination of defense experts regarding two additional and unrelated murders to which defendant confessed after his arrest in a case involving defendant's convictions for nine counts of first-degree murder, eight counts of first-degree rape, one count of second-degree rape, two counts of first-degree sexual offense, two counts of second-degree sexual offense, one count of assault with a deadly weapon, and five counts of robbery with a dangerous weapon, because: (1) N.C.G.S. § 8C-1, Rule 705

allows cross-examination of experts regarding the basis for any opinion, and both experts testified they were able to classify or diagnose defendant, in part, by studying the acts to which he confessed; and (2) the trial court was aware of the balancing required by N.C.G.S. § 8C-1, Rule 403 for potential danger of unfair prejudice to defendant, and was careful to give a proper instruction limiting the jury's consideration of the evidence solely to the basis for the experts' opinions.

7. Homicide— deliberation—requested instructions—verbatim not required

The trial court did not err by denying parts of defendant's requested instructions on the element of deliberation in a prosecution for nine counts of first-degree murder because: (1) the trial court is not required to give a requested instruction verbatim as long as the instruction, if correct in law and supported by evidence, is given in substance; (2) the trial court utilized the North Carolina pattern jury instructions, which provide an adequate definition of deliberation; and (3) defendant's proposed instructions merely articulate variations on the definition.

8. Sentencing— capital—peremptory instructions—statutory mitigating circumstances—controverted evidence

The trial court did not err by denying defendant's motion for a peremptory instruction regarding the two statutory mitigating circumstances of N.C.G.S. § 15A-2000(f)(2), a capital felony committed while defendant was under the influence of mental or emotional disturbance, and N.C.G.S. § 15A-2000(f)(6), the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, in a capital sentencing proceeding involving defendant's convictions for nine counts of first-degree murder because the expert testimony upon which defendant relies was controverted through evidence including: (1) defendant's girlfriend, who had lived with defendant for two years until shortly before he was arrested, testified she had not observed anything unusual about defendant and had not known him to experience hallucinations; (2) defendant held numerous jobs involving management responsibilities during the time these crimes were committed; (3) defendant maintained a relationship with his girlfriend and other women during this time which did not involve any type of abuse; and (4) defendant was able to carry out nine premeditated, calculated, and vicious murders while carefully avoiding detection.

9. Sentencing— capital—aggravating circumstances—pecuniary gain—pattern jury instruction

Even though defendant failed to object at trial, the trial court did not commit plain error in its instruction on the N.C.G.S. § 15A-2000(e)(6) pecuniary gain aggravating circumstance as to three victims in a capital sentencing proceeding involving defendant's convictions for nine counts of first-degree murder because the trial court's instruction mirrored the pattern jury instruction.

10. Sentencing— capital—aggravating circumstances—pecuniary gain—sufficiency of evidence

The trial court did not err by submitting the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance, that the capital felony was committed for pecuniary gain, for the murder of one of the victims because the evidence that the victim's boss gave her a roll of quarters as she left work the night of her death, along with defendant admitting in his statement to the police that he took the quarters from the victim's apartment, is such that a jury could reasonably conclude pecuniary gain was a motive for the murder.

11. Criminal Law— prosecutor's argument—capital sentencing—imagining emotions and fear

The trial court did not err by overruling defendant's objection to the prosecutor's statements during the sentencing phase closing argument to "think about being murdered during the course of being raped" in a case involving defendant's convictions for nine counts of first-degree murder, eight counts of first-degree rape, one count of second-degree rape, two counts of first-degree sexual offense, two counts of second-degree sexual offense, one count of assault with a deadly weapon, and five counts of robbery with a dangerous weapon, because even though arguments asking jurors to put themselves in the place of the victims will not be condoned, the prosecution is allowed to ask the jury to imagine the emotions and fear of a victim.

12. Criminal Law— prosecutor's argument—capital sentencing—sympathy for victims—mistrial properly denied

The trial court did not abuse its discretion by denying defendant's motion for mistrial in a capital sentencing proceeding based on the prosecution's alleged improper argument that the defense did not want the jurors to play a sympathy game in a case involv-

ing defendant's convictions for nine counts of first-degree murder because the trial court sustained defendant's objection to the statement and remedied any prejudice by instructing the jury not to consider the statement.

13. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing nine death sentences for nine counts of first-degree murder because: (1) a sentence of death has never been found to be disproportionate in North Carolina where the jury has found defendant guilty of murdering more than one victim; (2) defendant was convicted under the theory of premeditation and deliberation for each murder; and (3) the jury found the three aggravating circumstances under N.C.G.S. § 15A-2000(e)(5), § 15A-2000(e)(9), and § 15A-2000(e)(11) for each murder, all of which standing alone our Supreme Court has held to be sufficient to support a sentence of death.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing nine sentences of death entered by Johnston, J., on 29 January 1997 in Superior Court, Mecklenburg County, upon jury verdicts finding defendant guilty of nine counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments was allowed by the Supreme Court on 9 March 1999. Heard in the Supreme Court 16 November 1999.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellant.

WAINWRIGHT, Justice.

On 4 April 1994, defendant Henry Louis Wallace was indicted for the murders of (1) Caroline Love, (2) Shawna Hawk, (3) Audrey Ann Spain, (4) Valencia M. Jumper, (5) Michelle Stinson, (6) Vanessa Little Mack, (7) Betty Jean Baucom, (8) Brandi June Henderson, and (9) Deborah Slaughter. In addition, defendant was indicted for the following crimes: (1) first-degree rape of Love, (2) second-degree rape of Hawk, (3) two counts of second-degree sexual offense against Hawk (fellatio and cunnilingus), (4) first-degree rape of Spain, (5) robbery with a dangerous weapon of Spain, (6) first-degree rape of

Jumper, (7) first-degree sexual offense against Jumper, (8) first-degree rape of Stinson, (9) first-degree sexual offense against Stinson, (10) first-degree rape of Mack, (11) robbery with a dangerous weapon of Mack, (12) first-degree rape of Baucom, (13) robbery with a dangerous weapon of Baucom, (14) first-degree rape of Henderson, (15) robbery with a dangerous weapon of Henderson, (16) assault with a deadly weapon inflicting serious injury against T.W., Henderson's ten-month-old son, (17) assault on a child under twelve years of age against T.W., (18) first-degree rape of Slaughter, and (19) robbery with a dangerous weapon of Slaughter.

Between September 1996 and January 1997, defendant was tried capitally before a jury. On 7 January 1997, the jury found defendant guilty of nine counts of first-degree murder, each on the basis of malice, premeditation, and deliberation, and under the felony murder rule. In addition, the jury found defendant guilty of eight counts of first-degree rape, one count of second-degree rape, two counts of first-degree sexual offense, two counts of second-degree sexual offense, one count of assault with a deadly weapon, one count of assault on a child under the age of twelve, and five counts of robbery with a dangerous weapon.

After a capital sentencing proceeding, the jury recommended a sentence of death for each of the nine counts of first-degree murder. On 29 January 1997, the trial court entered judgment in accordance with the recommendations and sentenced defendant to nine death sentences. In addition, the trial court sentenced defendant to eight consecutive life sentences for the first-degree rape convictions, a consecutive forty-year sentence for the second-degree rape conviction, two consecutive life sentences for the first-degree sexual offense convictions, two consecutive forty-year sentences for the second-degree sexual offense convictions, five consecutive forty-year sentences for the robbery with a dangerous weapon convictions, and a consecutive two-year sentence for the assault on a child under the age of twelve conviction. The trial court arrested judgment on the assault with a deadly weapon conviction. Defendant appeals to this Court as of right from the sentences of death. Defendant's motion to bypass the Court of Appeals on the other convictions was allowed by this Court on 9 March 1999.

The State presented evidence tending to show that defendant murdered nine women in the Charlotte area over a two-year period. Defendant was identified as a suspect in three of the later murders by

a palm print found on the car of one of the victims. As will be detailed below, defendant was arrested on an outstanding larceny charge and interrogated by police. He confessed to the murders of Caroline Love, Shawna Hawk, Audrey Spain, Valencia Jumper, Michelle Stinson, Vanessa Mack, Betty Baucom, Brandi Henderson, and Deborah Slaughter. The State presented the following evidence:

Caroline Love Murder

On 15 June 1992, Caroline Love was living in an apartment with Sadie McKnight, defendant's girlfriend. That night, after completing her shift at the Bojangles' restaurant on Central Avenue in Charlotte, Love asked the night manager if she could buy a roll of quarters to do her laundry. The night manager exchanged a roll of quarters for a ten-dollar bill, and Love left the premises. As Love walked toward her apartment, her cousin, Robert Ross, saw her walking, offered her a ride, and drove her home. Ross watched as Love entered her apartment.

A few days later, Love's employer contacted Love's sister, Kathy Love (Kathy), and informed her that Love had not come to work in two days. Kathy went to Love's apartment and left a note. However, the next day, Kathy was again informed Love had not come to work. Kathy then contacted defendant, whom she knew, to find Love's roommate, McKnight. Kathy, McKnight, and defendant went to the police station to file a missing person report. Later, Kathy went into Love's apartment. She noticed that some of the furniture had been moved and that the sheets from Love's bed were missing, but there was no evidence of Love's whereabouts. During the investigation of the missing person report, Investigator Tony Rice of the Charlotte-Mecklenburg Police Department determined that the roll of quarters Love bought prior to leaving work on 15 June 1992 was missing from her apartment. Love was not found as a result of the missing person report.

On 13 March 1994, defendant confessed to the murder of Caroline Love. At trial, the State introduced redacted versions of defendant's tape-recorded confession. In the confession, defendant stated he made a copy of McKnight's house key and went to the apartment when neither McKnight nor Love was there. Defendant heard Love enter the apartment. He indicated to Love that he was in the bathroom and would leave as soon as he came out. Upon coming out of the bathroom, however, defendant went into the living room where Love was watching television and kissed her on the cheek. Love

promised not to tell McKnight about the kiss if defendant promised not to do it again. Defendant then put his arms around Love in a manner similar to a wrestling choke hold. Defendant confessed that there was a scuffle, that Love scratched him on his arms and face, and that he kept holding Love until she passed out. Defendant then moved Love to her bedroom, removed her clothes, tied her hands behind her back with the cord of a curling iron, and placed tape over her mouth. Defendant had oral sex and sexual intercourse with Love, during which she was semiconscious. While engaged in intercourse with Love, defendant continued to apply the choke hold because Love began to regain consciousness. Defendant applied the choke hold until Love's body became limp. Defendant stated he could tell she was still alive because he could feel her heart and pulse. Afterwards, defendant strangled Love to death.

Defendant further confessed that he left the apartment to move his car closer to the stairwell and then returned to the apartment with a large orange trash bag. Defendant wrapped Love's body in a bed sheet and put the body inside the trash bag. Defendant placed some clothing into another bag to make it appear Love had left. Defendant carried the bags down the stairs, placed them in the backseat of his car, and then drove around Charlotte trying to find a place to dump Love's body. Defendant stopped the car while driving down Statesville Road, removed the trash bag containing Love's body from his car, and dumped the bag into the woods. The following day, defendant drove back to the location because he feared the orange bag would be noticeable from the road. Defendant stated that he removed the body from the orange trash bag and then moved the body into a shallow ravine. Defendant also admitted taking a roll of quarters from Love's dresser.

Later on 13 March 1994, after defendant's confession, defendant directed Rice and other investigators to the site where he had dumped Love's body. Subsequently, Dr. James Michael Sullivan, a forensic pathologist and medical examiner employed by the Medical Examiner's Office of Mecklenburg County, went to the area of Statesville Road to recover Love's skeletal remains. Dr. Sullivan performed an autopsy on those remains. Based on the history provided by the police, the absence of any significant findings to contradict a history of strangulation, and the location of the unclothed remains in a wooded area, Dr. Sullivan determined that the cause of death was homicide by means of strangulation.

Shawna Hawk Murder

In February 1993, Shawna Hawk was living with her mother, Sylvia Denise Sumpter, in Charlotte. Hawk was a paralegal student at Central Piedmont Community College and worked at a Taco Bell restaurant on Sharon Amity Road, where defendant was her manager. On 19 February 1993, Sumpter arrived home and began to cook dinner. Hawk's car was not there, but Sumpter saw Hawk's coat and purse in a closet. This seemed unusual because it was very cold outside, Hawk never went anywhere without her purse, and Sumpter had seen Hawk earlier in the day wearing the coat. Sumpter called Hawk's boyfriend, Darryl Kirkpatrick, to ask if he had seen Hawk, but Kirkpatrick said he had not.

Sumpter then learned that Hawk was to have picked up her godson from daycare but had not done so. Sumpter looked through Hawk's purse and noticed that her keys were not there and that some money was missing. Kirkpatrick arrived at the home to comfort Sumpter. Kirkpatrick and Sumpter decided to file a missing person report and called the police. Subsequently, Kirkpatrick walked through the house looking in each room. He entered a bathroom downstairs and noticed the shower curtain outside the bathtub. When Kirkpatrick pulled the shower curtain back, he saw Hawk curled up and submerged in water. Kirkpatrick ran upstairs and told Sumpter to call 911. Emergency personnel arrived, tried to resuscitate Hawk, and then transported her to the hospital, where she was pronounced dead.

On 20 February 1993, Dr. Sullivan performed an autopsy on Hawk's body. He discovered a contusion on the left side of Hawk's scalp above the ear and a laceration of the left eardrum with some hemorrhaging behind the eardrum evidencing a blunt trauma prior to death. Dr. Sullivan indicated that based on the bruising present, the blow occurred prior to death but that it was unlikely that the blow caused unconsciousness. Dr. Sullivan also observed hemorrhages in the lining of the eyes (conjunctiva), on the skin of the face, in the lining of the mouth, and in the muscles in the front of the neck overlying the voice-box area, all of which were an indication of ligature strangulation. Dr. Sullivan defined a ligature as "an instrument, a cord or a band or something that's made into a cord or a band, then circles the neck and is used to forcibly compress the neck." Based on his observations, Dr. Sullivan opined that the cause of Hawk's death was ligature strangulation.

Defendant confessed that he stopped by Hawk's home to see her and that they talked for a while. As defendant was leaving, Hawk gave him a hug. Defendant then told Hawk he wanted her to have sex with him. Defendant took Hawk to her bedroom, told her to remove her clothing, and told her to perform oral sex on him, which she did. Then, defendant performed oral sex on Hawk. The two then engaged in sexual intercourse. Defendant admitted that Hawk was afraid and cried the whole time. Afterwards, defendant told Hawk to put her clothes on, and he took her into the bathroom. Defendant placed Hawk in a choke hold, with her head between his arms, until she passed out. Defendant then filled the bathtub with water and placed Hawk in it. Defendant also admitted taking fifty dollars from Hawk.

Audrey Spain Murder

In June 1993, Audrey Spain, age twenty-four, lived in an apartment in Charlotte. On 23 June 1993, Spain was to report to work at 6:30 p.m. at a Taco Bell restaurant on Wendover Road. Spain did not show up for work. Mark Lawrence, Spain's manager, thought it was unusual for Spain not to come to work, so he drove by Spain's apartment that evening. Lawrence saw Spain's car in the parking lot. Lawrence then called Spain and left a message on her answering machine.

The next morning, 24 June 1993, Lawrence rode by Spain's apartment and again saw her car in the lot. Lawrence called Spain's sister and left a message to express his concern. Spain did not show up for work that evening. Spain's sister never returned Lawrence's call, so Lawrence called 911. Thereafter, officers periodically rode by the apartment and knocked on the door, but got no response.

On 25 June 1993, maintenance personnel from the apartment complex entered the apartment through a sliding glass door and discovered Spain's body on the bed. Lawrence again stopped by Spain's apartment, and an officer informed Lawrence they had discovered Spain dead in her apartment.

On 26 June 1993, Dr. Sullivan conducted an autopsy on Spain's body. There was a ligature made from a T-shirt and a bra around Spain's neck with the end of the T-shirt stuffed into her mouth. After removing the ligature, Dr. Sullivan discovered a furrow, or mark, left by the ligature. Dr. Sullivan also observed hemorrhages in the conjunctiva, on the skin of the face, in the voice box, and in the muscles in the front of the neck, as well as minor blunt-trauma injuries,

including a small facial abrasion, small linear abrasions on her right back and on the knee, and a small contusion over the right hip. Dr. Sullivan opined that the cause of death was strangulation.

Defendant confessed that he went to Spain's house and that they smoked marijuana together. Defendant admitted that his motive for visiting Spain was robbery. He stated that he put Spain in a choke hold in her living room and inquired about the combination for the safe at her workplace, but she said she did not know the combination. Defendant also asked about money in her personal bank account, but she said she did not have any money because she had just returned from a vacation. Defendant said he did not remember asking Spain to remove her clothes. Spain begged defendant not to hurt her, but defendant maintained the choke hold until Spain passed out. Defendant then dragged Spain into her bedroom and had intercourse with her. Afterwards, defendant took Spain into the bathroom, where he put her into the shower to wash off any evidence. Defendant placed Spain into her bed and tied a T-shirt and bra around her neck. Before leaving, defendant took Spain's keys and Visa credit card. He used the Visa card to purchase gas. Defendant returned to Spain's apartment to make phone calls so it would seem as though she had not died on the day defendant killed her.

Valencia Jumper Murder

In August 1993, Valencia Jumper was a senior at Johnson C. Smith University in Charlotte, studying political science. She also worked at Food Lion on Central Avenue and at Hecht's in South Park Mall. On 9 August 1993, a friend of Jumper's, Zachery Douglas, spoke with Jumper on the phone about meeting later that night. Subsequently, Douglas arrived at Jumper's apartment in the early morning hours of 10 August 1993 and noticed smoke coming from her apartment. Douglas testified that he turned the door knob, and the door was unlocked, so he opened the door. Douglas stated that there was too much smoke for him to enter the apartment any further. Douglas then alerted a neighbor, who called the fire department.

As firefighters arrived on the scene to fight the fire, firefighter Dennis Arney entered the kitchen and noticed that a burner on the stove had been left on. Based on examinations at the fire scene, the information provided by firefighters, and the observed pattern the fire traveled, the investigators believed the fire originated from a pot left burning on the stove. Firefighters found Jumper's body in the bedroom of her apartment.

On 10 August 1993, Dr. Sullivan performed an autopsy on Jumper's body. Jumper's body was extensively charred. Dr. Sullivan was told that the fire was thought to have been accidentally caused by a pot of beans left burning on the stove. However, he found no soot in Jumper's airway, indicating there was no significant inhalation of smoke during the fire. After learning there was no carbon monoxide in Jumper's blood, Dr. Sullivan listed thermal burns as the cause of death. After defendant's confession, Dr. Sullivan reexamined the Jumper autopsy and amended the cause of Jumper's death. Dr. Sullivan testified that the cause of Jumper's death was strangulation.

Defendant confessed to Jumper's murder. He indicated that Jumper was like a little sister to him and that they often spent time with one another. On the night in question, defendant stated that he stopped by Jumper's apartment and that they talked for a while and then defendant left. Defendant later returned to Jumper's apartment and asked her to call McKnight because they had gotten into a fight. When Jumper reached toward the phone, defendant put her in a choke hold. Defendant told Jumper to go to the bedroom. Jumper begged defendant not to hurt her and stated she would do anything he wanted. Jumper removed her clothes. Defendant and Jumper engaged in oral sex and sexual intercourse. Afterwards, while Jumper was putting her clothes back on, defendant put a towel around her neck and choked her until she passed out. Defendant stated that Jumper started bleeding from the nose, so he kept the pressure on the towel for about five minutes until he felt no pulse. Then defendant wiped his fingerprints from certain areas of the apartment. Defendant went into the kitchen and noticed a bottle of rum, so he took the bottle to the bedroom and poured the rum on Jumper's body, on the bed, and on the floor nearby. Defendant then went back into the kitchen, opened a can of beans, put the beans in a pot on the stove, and turned the stove on high. Defendant took the battery out of the smoke detector. Defendant went back into the bedroom, lit a match, and threw it on Jumper's rum-soaked body before leaving the apartment. Defendant returned to the apartment twenty minutes later. When he saw smoke rushing out the door, he left and went home. Defendant admitted taking jewelry from Jumper's body and pawning it in a local pawn shop.

Michelle Stinson Murder

In September 1993, Michelle Stinson, age twenty, lived in an apartment in Charlotte, with her two young sons. On 15 September

1993, Stinson's friend, James Mayes, stopped by her apartment to visit with Stinson and her children. Mayes knocked on the front door, but no one answered. Mayes heard the children knocking on the window and telling him their mother was sleeping on the kitchen floor. Mayes thought they were playing a game, but Stinson did not answer. Mayes had turned to leave when the oldest child came out the back door and grabbed him. Mayes picked up the child and went back into the apartment through the back door. Mayes discovered Stinson lying on the kitchen floor with blood around her. Mayes picked up the phone but realized the cord had been cut or jerked out of the wall. Mayes took the children and asked neighbors to help him find a phone. He then called the police.

Dr. Sullivan performed an autopsy on Stinson's body on 16 September 1993. He discovered four stab wounds to the left side of the back. Two of the four stab wounds caused injury to the heart and lungs and were potentially fatal. Dr. Sullivan also observed evidence of ligature strangulation in the form of a band of abrasions and contusions over the front of the neck and small hemorrhages in the skin of the face, the conjunctiva, and internally in the muscles of Stinson's neck. Dr. Sullivan opined that the cause of Stinson's death was stab wounds to the chest with strangulation as a contributing cause.

Defendant confessed that he stopped by Stinson's apartment around 11:00 p.m., with the intention of raping and murdering her. They talked for a while, and then defendant got ready to leave and they hugged. At that point, defendant told Stinson that he wanted to have sex with her and that he wanted her to remove her clothes. Stinson told defendant she was sick, but defendant did not believe her and wanted her to produce some sort of medication, which she could not do. Defendant began to choke Stinson. Stinson then agreed to have sex with defendant and removed her clothes. Defendant told Stinson he wanted her to perform oral sex on him, but she stated she did not know how. Defendant responded, "well you're about to learn." Stinson then performed oral sex on defendant. After having sexual intercourse on the kitchen floor, defendant administered a choke hold until Stinson became unconscious. Defendant strangled Stinson with a towel he had retrieved from the bathroom. Stinson began to gasp for air, so defendant took a knife and stabbed her approximately four times. Defendant used a washcloth to wipe his fingerprints from a glass, the door, the phone, the wall, and the floor. Before defendant left the apartment, Stinson's oldest son awoke, and defendant told him to go back to bed. Defendant left through the back door, using a

towel to avoid leaving fingerprints, and threw the knife and washcloth over a fence near the back of Stinson's apartment.

Vanessa Mack Murder

In February 1994, Vanessa Mack was living in an apartment in Charlotte with her two young daughters. She worked at Carolinas Medical Center. On 20 February 1994, Barbara Rippy, the grandmother of Mack's oldest daughter, went to Mack's apartment to pick up Mack's youngest daughter, as she did every Sunday morning so Mack could go to work. Rippy arrived at 6:00 a.m. and went to the back door, but the door was ajar. Rippy called out, but Mack did not respond. As she entered, Rippy noticed Mack's four-month-old daughter lying on the couch, which she felt was unusual. Rippy entered the bedroom and saw Mack's feet hanging off the side of the bed. Rippy testified that Mack's feet were the only part of her body exposed and that they appeared gray and felt cold. Rippy called 911. Rippy then picked up Mack's daughter and went outside. As she left the apartment, fire department and police department vehicles arrived.

Officer Jeffrey Bumgarner of the Charlotte-Mecklenburg Police Department found Mack lying on her bed. Bumgarner observed a towel around Mack's neck and blood coming from her nose, ears, and the back of her head. Bumgarner also noticed a pocketbook, with its contents scattered on the bed.

Dr. Sullivan performed an autopsy on Mack's body on 21 February 1994. He observed minimal evidence of blunt trauma as well as evidence of strangulation. There was a ligature in place around Mack's neck. The ligature was made of a long-sleeve pull-over type shirt and a towel. Dr. Sullivan also observed small hemorrhages in the conjunctiva, on the skin of the face, and in the muscles in the front of the neck. He also observed small areas of bruising beneath the ligature likely caused by the pinching of the ligature. Dr. Sullivan opined that the cause of Mack's death was strangulation.

Defendant confessed that he had been in Mack's neighborhood and had called to see if she was at home. When she answered, he hung up the phone. He then walked over to her apartment. Defendant admitted that his motives for going to see Mack were robbery, to support his cocaine addiction, and murder. Defendant stated that he tried to find a way to maneuver Mack into the position he needed in order to administer a choke hold, but she refused to give defendant a hug, so he asked for something to drink. When Mack turned her back,

defendant pulled out a pillowcase he had brought with him and placed it around her neck. As Mack resisted, defendant put more pressure on the pillowcase and explained that this was a robbery. Defendant and Mack went into the bedroom, where defendant commanded Mack to give him all the money she had, including her automated teller machine (ATM) card and personal identification number (PIN). After Mack gave defendant everything, he told her to remove her clothes, which she did. Defendant and Mack engaged in sexual intercourse. Afterwards, defendant told Mack to put her clothes back on. Defendant then tightened the pillowcase around Mack's neck until she passed out. Defendant added another garment to keep the pillowcase from loosening. Defendant then checked on Mack's baby and stayed until the baby went to sleep. Defendant left the apartment, walked down the street, and called a cab. Later, defendant attempted to use the ATM card at several banks and discovered that the PIN given to him by Mack was not correct.

Betty Baucom Murder

In March 1994, Betty Baucom lived in an apartment in Charlotte with her adopted daughter. On 9 March 1994, Baucom, an assistant manager at the Bojangles' restaurant on Central Avenue, was scheduled to work, but she did not report to work. Baucom's unit director, Jeffrey Ellis, called Baucom's apartment several times but received no answer. Ellis also talked with some of Baucom's co-workers, but no one had heard from her. Additionally, Ellis called Baucom's mother, but she had not heard from Baucom.

The next morning, Ellis became increasingly worried because Baucom was again scheduled to work but did not report. Neither Baucom's mother nor Baucom's aunt had heard from Baucom. Ellis and another employee drove to Baucom's apartment to check on her. They knocked on the door and looked in the windows, and everything appeared normal. Ellis then called Baucom's mother again. Ellis and Baucom's mother decided to contact the police department, and they reported Baucom as a missing person.

Officer Gregory Norwood of the Charlotte-Mecklenburg Police Department received a call on the morning of 10 March 1994 to respond to an apartment where a young woman had been found. She was not breathing. Maintenance personnel let Norwood into the apartment. Norwood discovered Baucom's body lying facedown on her bed with a towel around her neck. Approximately an hour after Ellis called police, an officer approached Ellis in the parking lot of

the Bojangles' restaurant and told him they had found Baucom's body.

Dr. Sullivan performed an autopsy on Baucom's body on 11 March 1994. He observed blunt-trauma injuries and evidence of strangulation, including a ligature in place around her neck. The ligature consisted of a small sheet or pillowcase in a knot with an additional towel wrapped between the skin of the neck and the sheet. Dr. Sullivan observed small abrasions and small contusions of the skin of the neck beneath the ligature and small hemorrhages in the conjunctiva. Additionally, Dr. Sullivan observed abrasions over the left shoulder, both arms, the right upper chest, and the abdomen, and a blunt-trauma injury to the head with an area of abrasion over the right forehead. During the internal examination, Dr. Sullivan observed a buildup of blood in the lungs, enlargement of the brain, small hemorrhages in the muscles in the front of the neck, and small hemorrhages in the lining of the voice box. He testified that the injuries observed were consistent with a struggle. Dr. Sullivan opined that the cause of Baucom's death was strangulation.

Defendant confessed that he went to Baucom's apartment and told her he needed to use the phone. Baucom let defendant into her apartment. They talked for a while. As defendant was getting ready to leave, he placed a choke hold on Baucom, and she fell to the floor. Defendant told her this was a robbery and demanded the alarm code, keys, and combination to the safe for the Bojangles' restaurant where Baucom was the manager. Baucom was very upset, and she took approximately thirty minutes to produce the safe's combination. Defendant then released the choke hold. Defendant remembered Baucom asking, "Why did you do that to me?" Defendant responded that he was a sick person and that he had hurt many people. Baucom then embraced defendant, said that she forgave him, and told him he needed help. Defendant stated he then became enraged and grabbed Baucom by the throat, slammed her to the floor, and then scuffled with her. Defendant got Baucom to her feet and took her into the bedroom, where he told her to remove her clothes. Baucom told defendant she did not want to remove her clothes because she had a medical problem. She then showed defendant a rash, which defendant stated looked like an ordinary rash. Defendant then told Baucom he wanted her to perform oral sex on him. She grabbed his penis and started pulling and scratching. Defendant and Baucom began to scuffle again, and defendant sustained a bite on his shoulder and scratches on his abdomen. Defendant was able to tighten the towel

around Baucom's neck until she was nearly unconscious. At this point, Baucom removed her clothes and engaged in sexual intercourse with defendant. Afterwards, defendant told Baucom to put her clothes back on. He then placed a towel around her neck and asked her if she had any money. Baucom gave defendant the money in her purse, and he took a gold chain from around her neck.

After strangling Baucom to death, defendant took her television and left in her car. Defendant sold the television for drugs. He then returned to Baucom's apartment to make sure Baucom was dead and to take her VCR. While in Baucom's apartment, defendant used a wet cloth to wipe off the phone, door knobs, and the wall on which some of the struggle took place. Defendant used money from Baucom's purse, the gold chain, and the VCR to purchase more drugs. Defendant kept Baucom's car almost two days. Defendant then left the car in a parking lot, because he thought police officers were following him. Defendant stated that he wiped the interior and most of the exterior of the car, but forgot to wipe the trunk lid.

Brandi Henderson Murder

In March 1994, Brandi Henderson was living in an apartment with her boyfriend, Verness Lamar Woods, and their ten-month-old son, T.W. On 9 March 1994, Woods was at the apartment taking care of T.W. because Henderson had a doctor's appointment. As Henderson was leaving, defendant went to the apartment to say he was leaving town. Defendant stayed for only a few minutes and then left. Henderson returned during the afternoon. Around five o'clock in the evening, Woods left to go to work. When Woods left, Henderson and T.W. were alone in the apartment, the apartment was neat and clean, and the front door was locked. Woods returned to the apartment around midnight to find the front door unlocked, items scattered about the living room, and the stereo missing. Woods then went through the apartment. He first came to T.W.'s bedroom where he turned on the light and saw T.W. sitting on the bed gasping for air with something white coming out of his mouth and a pair of shorts around his neck. Woods immediately ran to T.W. to remove the shorts, which were tied tightly around T.W.'s neck. Woods then realized that Henderson was lying facedown on the bed. Woods rolled her onto her back and saw that towels were tied around her neck and that her face was blue. Woods removed the two towels from Henderson's neck and then called 911. He moved Henderson's body from the bed to the floor and began administering CPR pursuant to instructions from the 911 operator.

When police officers arrived, it was obvious Henderson was dead. T.W. was taken to the hospital.

Upon being taken to Carolinas Medical Center, Dr. Tom Brewer examined T.W. in the emergency room. Dr. Brewer testified that T.W. was awake, breathing, and had stable vital signs. However, his failure to pull away when stuck with a needle was some evidence that he was not acting normally. There were red marks around T.W.'s neck consistent with something being tied around his neck. In addition, there was very fine bruising on T.W.'s cheeks and eyelids caused by a buildup of blood pressure as a result of his jugular vein being blocked. Moreover, T.W.'s altered mental status indicated his brain was not functioning normally because of some compromise of blood flow to the brain. Within fifteen to thirty minutes, T.W. became more alert and began interacting with his environment. Dr. Brewer testified that he believed the ligature and T.W.'s injuries caused great pain and suffering.

Dr. Sullivan performed an autopsy on Henderson's body on 10 March 1994. Dr. Sullivan observed minor blunt-trauma injuries and lacerations. He also observed evidence of strangulation including small hemorrhages in the eyes, over the skin of the face and neck, in the muscles in the front of the neck, and in the lining of the voice box. Dr. Sullivan opined that the cause of death was strangulation.

Defendant confessed that he planned to murder Henderson on Tuesday morning, but when he arrived at the apartment, Woods was present. Defendant left the apartment, found Baucom's apartment in the same apartment complex, and murdered Baucom. He returned to Henderson's apartment the same night when he knew Woods would be at work. Defendant pretended he had something to leave for Woods. Henderson and defendant talked for a while, and then defendant asked for something to drink. When Henderson reached into the cabinet, defendant choked her and told her to go into the bedroom. Henderson begged defendant to allow her to hold her son, but he said, "I don't know if that would be a good idea for what we're about to do." Defendant told her this was also going to be a robbery and demanded money. Henderson gave defendant a "Pringle's" can filled with approximately twenty dollars worth of coins and said there was no other money in the house. Defendant also told Henderson he would be taking the television and stereo when he left. Defendant then told Henderson to remove her clothes, which she did. Henderson grabbed her son, laid him across her chest, and turned his

head away so he could not see what was going on. Defendant and Henderson started to have sexual intercourse in Henderson's bedroom but moved to T.W.'s bedroom so he would not cry. Once in T.W.'s room, defendant and Henderson continued to have sexual intercourse, with T.W. lying across Henderson's chest. Afterwards, defendant told Henderson to put her clothes back on, and he put his clothes on. Defendant went into the bathroom, got a towel, and wiped off everything. Thereafter, defendant folded the towel, put it around Henderson's neck, and strangled her to death. Henderson's body fell to the floor. Defendant picked up Henderson's body and put it onto T.W.'s bed. He also tied the towel in a knot around her neck. T.W. started crying, so defendant gave him a pacifier. Defendant looked for something T.W. could drink but could not find anything. Defendant then took another towel from the bathroom and tied the towel tight around T.W.'s neck so it would be difficult for him to breathe and so he would stop crying. T.W. stopped crying and laid down next to his mother's body. Defendant then ran into the living room, disconnected the stereo, and loaded it into Baucom's car. Defendant also took a television that was sitting on the floor. Before leaving, defendant took some food that had been delivered and the container of coins. Defendant sold the television and stereo for $175.00 which he used to purchase crack cocaine.

Deborah Slaughter Murder

In March 1994, Deborah Slaughter lived alone in an apartment in Charlotte. On 12 March 1994, Slaughter's mother, Lovey Slaughter (Lovey), went to Slaughter's apartment to return a picture she had taken a few days before. Lovey had a key to the apartment and anticipated letting herself in because Slaughter was supposed to be at work. When Lovey arrived, she knocked on the door and got no response. She put the key into the lock and discovered the door was not locked. As Lovey walked through the door, she saw Slaughter's body lying on the floor. Lovey called 911.

Officer Ronnie Chambers of the Charlotte-Mecklenburg Police Department entered Slaughter's apartment and found a purse with its contents scattered on the floor. Chambers then noticed Slaughter's body lying on the floor faceup. There was white fabric in Slaughter's mouth and a towel around her neck. Chambers also observed several puncture wounds in Slaughter's chest.

On 14 March 1994, Dr. Sullivan performed an autopsy on Slaughter's body. During the external examination, he observed a lig-

ature around Slaughter's neck and a sock balled up and stuffed into her mouth, holding her mouth open. The evidence of strangulation included the ligature around Slaughter's neck and hemorrhages in the conjunctiva. The ligature was comprised of two towels, the inner towel encircled around the neck, and the outer towel tied tightly in a single knot. Dr. Sullivan also observed blunt-trauma injuries, including abrasions of the skin of the face and a single scalp contusion. Additionally, Dr. Sullivan observed sharp-trauma injuries caused by thirty-eight stab wounds to the chest and abdomen. Three of the stab wounds caused injury to the heart, and twelve of the stab wounds caused injury to the left lung; each of these stab wounds could have been fatal. Stab wounds also caused injury to the liver and stomach. Dr. Sullivan opined that Slaughter's death was caused by multiple stab wounds, with strangulation as a contributing factor in the death.

Defendant confessed that he went to Slaughter's apartment to use drugs with her. Defendant realized that Slaughter had some money when she said she could not buy any drugs because she had to make her money last until the next week. Defendant asked Slaughter to get him something to drink. As Slaughter turned around, defendant put a towel he brought with him around Slaughter's neck and tightened it. Slaughter fell to her knees. Defendant stated that Slaughter then realized that defendant was the one who had killed two other girls in nearby apartments. Defendant told Slaughter to remove her clothes and to perform oral sex on him. Defendant remembered Slaughter saying, "I don't do that; you might as well go ahead and kill me." Defendant tightened the towel and asked if she wanted to change her mind. Slaughter stated that she would not perform oral sex on defendant. Defendant engaged in sexual intercourse with Slaughter. Afterwards, defendant told Slaughter to put her clothes on. Defendant, knowing Slaughter carried a knife in her purse at all times, asked Slaughter to empty the contents of her purse onto the floor, which she did. Defendant kicked the knife away and then told Slaughter to open the wallet and give him everything in it. As Slaughter did this, defendant grabbed the knife. Slaughter handed defendant forty dollars from the wallet. Slaughter hit defendant and screamed for the police. Defendant then tightened the towel around Slaughter's neck until she fell to the floor and started kicking. Defendant tightened the towel more and tried to sit on top of Slaughter's legs to keep Slaughter from alerting the neighbor downstairs. Defendant went to the bathroom to retrieve another towel, which he tied with the first around Slaughter's neck. Defendant

stabbed Slaughter with the knife from her purse approximately twenty times in the abdomen. Defendant then washed the knife clean and wiped his fingerprints from it and placed it back with the contents of Slaughter's purse on the floor.

Defendant left Slaughter's apartment to purchase crack cocaine. He returned to Slaughter's apartment to smoke the crack cocaine. When he left the second time, defendant took a coat, a baseball hat, and a butcher knife from Slaughter's apartment. Defendant threw all three items away after leaving the apartment.

The State also introduced evidence regarding the investigation which led to defendant's arrest. Following the Henderson murder on 9 March 1994, which was discovered prior to the Baucom murder, investigators noticed similarities between the Henderson murder and the Mack murder. Both victims were black females, there was no forced entry in either case, and there was a ligature used in both cases.

On 10 March 1994, investigators held a meeting to discuss similar cases involving strangulation. During this meeting, investigators learned that another victim, Baucom, had been discovered in the same apartment complex as Henderson. The Baucom murder exhibited characteristics similar to the Mack and Henderson cases. Defendant became a suspect in these crimes when investigators asked victims' family members and friends for the names of persons the victims might have allowed into their apartments. Defendant's name was on the list.

On 11 March 1994, after Baucom's vehicle was recovered, police compared a palm print lifted from Baucom's vehicle to defendant's prints and found a match. Investigators then began an extensive search for defendant based on an outstanding warrant for his arrest on a larceny charge.

On 12 March 1994, during the search for defendant, investigators learned that Slaughter had been discovered in her apartment. The Slaughter case exhibited characteristics similar to the Mack, Henderson, and Baucom cases.

Between 5:30 and 6:00 p.m. on 12 March 1994, defendant was arrested on the outstanding order for arrest. During questioning, after defendant had been advised of his *Miranda* rights, investigators told defendant of the evidence connecting defendant to the crimes, including photos of defendant attempting to use Mack's ATM card at

teller machines and the matching palm print from Baucom's car. Defendant confessed to the murders of Love, Hawk, Spain, Jumper, Stinson, Mack, Baucom, Henderson, and Slaughter. Defendant did not testify at trial but presented evidence from three expert witnesses. Further facts necessary to the discussion of the issues raised by defendant will be presented as needed.

PRETRIAL ISSUES

[1] By an assignment of error contained in an amendment to the record allowed by this Court on 19 August 1999, defendant contends the short-form indictments used to charge him with nine counts of first-degree murder are constitutionally inadequate. In addition, in a motion for appropriate relief filed on 28 October 1999, defendant challenges the constitutionality of the short-form indictments charging him with eight counts of first-degree rape and two counts of first-degree sexual offense.

Initially, we address whether these issues are properly before this Court. Defendant did not contest the murder indictments at trial but argues that a jurisdictional issue can be raised at any time. Defendant contends that the constitutionally inadequate indictments deprived the trial court of jurisdiction to hear the cases. He makes the same jurisdiction argument with regard to the rape and sexual offense indictments contested in his motion for appropriate relief.

It is well settled that "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). An attack on an indictment is waived when its validity is not challenged in the trial court. *See State v. Robinson*, 327 N.C. 346, 361, 395 S.E.2d 402, 411 (1990). However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court. *See, e.g., State v. McGaha*, 306 N.C. 699, 295 S.E.2d 449 (1982); *State v. Sellers*, 273 N.C. 641, 161 S.E.2d 15 (1968). As to the indictments challenged in defendant's motion for appropriate relief, this Court has held that a motion for appropriate relief filed while an appeal is pending properly raises the issue of an indictment's conferral of jurisdiction to a trial court. *See State v. Sturdivant*, 304 N.C. 293, 307-08, 283 S.E.2d 719, 729 (1981). Although a motion for appropriate relief generally does not allow a defendant to raise an issue that could have been raised on direct appeal, *see* N.C.G.S. § 15A-1419(a)(3) (1999), a chal-

lenge to the trial court's jurisdiction may be raised by a motion for appropriate relief. Therefore, these issues are properly before this Court.

[2] Defendant argues the short-form indictments violate his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and his rights to notice and trial by jury under the Sixth Amendment. Defendant contends the United States Supreme Court's recent ruling in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), requires a finding that the short-form indictments are unconstitutional because they fail to allege all of the elements of the crimes charged. Specifically, he argues they fail to allege those elements which differentiate first-degree murder, rape, and sexual offense from second-degree murder, rape, and sexual offense. We disagree.

Each of the nine indictments against defendant for murder utilized the same language:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the [date] day of [month], [year], in Mecklenburg County, Henry Louis Wallace did unlawfully, wilfully, and feloniously and of malice aforethought kill and murder [victim's name].

Only the names of the victims and the dates of the murders differed from one indictment to the next. Each of these indictments complied with N.C.G.S. § 15-144, which provides for a short-form version of an indictment for murder:

> In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing the murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; . . . and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be.

N.C.G.S. § 15-144 (1999). This Court has consistently held indictments based on this statute are in compliance with both the North

Carolina and United States Constitutions. *See, e.g., State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996); *State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 786, 792-93 (1985); *State v. Williams*, 304 N.C. 394, 422, 284 S.E.2d 437, 454 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982).

Similarly, the eight indictments against defendant for first-degree rape contained identical language with the exceptions of the dates and victims' names:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the [date] day of [month], [year], in Mecklenburg County, Henry Louis Wallace did unlawfully, wilfully and feloniously with force and arms engage in vaginal intercourse with [victim's name], by force and against the victim's will.

The two indictments for first-degree sexual offense also used the same language, substituting the phrase "a sexual act" for "vaginal intercourse." Each of these indictments complied with the statutes authorizing short-form indictments for rape and sexual offense. *See* N.C.G.S. §§ 15-144.1, -144.2 (1999). Indictments under these statutes have been held to comport with the requirements of the North Carolina and United States Constitutions. *See, e.g., State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d 864, 872 (1984); *State v. Lowe*, 295 N.C. 596, 604, 247 S.E.2d 878, 883-84 (1978).

Defendant's argument is based on *Jones*, 526 U.S. 227, 143 L. Ed. 2d 311. In *Jones*, the United States Supreme Court was called upon to interpret the federal carjacking statute, 18 U.S.C. § 2119, as it was written at the time of the offense. The statute provided:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

18 U.S.C. § 2119 (Supp. V 1993). The question presented to the Court was whether the statute provided for one offense with three maximum penalties or three separate offenses. The majority recognized the susceptibility of the statute to both readings but reasoned that a finding of three separate offenses would avoid a significant constitutional problem. In subsections (2) and (3), the statute provides for greater punishment if either serious bodily injury or death results from the carjacking. *See id.* The Court determined that the findings in subsections (2) and (3) which allowed for greater punishments amounted to additional elements of the respective offenses subject to the requirements of the Fifth and Sixth Amendments. The Court restated the principle:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Jones, 526 U.S. at 243 n.6, 143 L. Ed. 2d at 326 n.6. To avoid the possibility that a greater punishment might be imposed without the predicate fact or element being charged in the indictment or submitted to a jury for proof beyond a reasonable doubt, the Court held three separate offenses existed and one specific offense must be charged from the outset. *Id.* at 252, 143 L. Ed. 2d at 331.

In the instant case, defendant cites to the principle stated in footnote six above as a restatement of constitutional law which requires any indictment, whether it be for a state or federal offense, to charge all facts which might increase the maximum penalty for the crime. Defendant contends that this pronouncement reaffirms a line of United States Supreme Court cases defining due process. He further argues that this Court's prior rulings confirming the constitutionality of short-form indictments were in error.

We first examine the cases which defendant claims require all of the facts or elements to be alleged in the indictment. In *Hodgson v. Vermont*, 168 U.S. 262, 42 L. Ed. 461 (1897), the United States Supreme Court reviewed the information upon which the defendant was tried and convicted for violations of Vermont's liquor laws.

Stating the due process requirements for charging a defendant, the Court noted:

> that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offence, so that he may appear in court prepared to meet every feature of the accusation against him.

Id. at 269, 42 L. Ed. at 463. While the Court held a defendant must be made aware of the "nature and cause" of the charge against him and the "essential particulars of the offence," the holding does not require every element of an offense or every fact which might increase the maximum punishment to be charged in an indictment.

Defendant also cites *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975), and *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281 (1977), which address the due process requirements of the United States Constitution in prosecutions for state offenses. In each of these cases, the due process issue was whether certain facts or elements had to be proven to a jury beyond a reasonable doubt. Due process as applied to the states via the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375 (1970). In *Jones*, the Court engaged in a discussion of *Mullaney* and *Patterson*. Defendant contends this discussion infers an intent by the Court to extend the due process requirement of the Fifth Amendment as detailed in *Jones* to the Fourteenth Amendment as discussed in *Mullaney* and *Patterson*. We discern no such intent. The holdings in *Mullaney* and *Patterson* make no mention of the requirements of an indictment and only apply the proof beyond a reasonable doubt standard to all elements of a crime. Likewise, in *McMillan v. Pennsylvania*, 477 U.S. 79, 91 L. Ed. 2d 67 (1986), the Court, in determining the proper standard by which a sentence-enhancement finding must be made, addressed the applicability of the reasonable doubt standard. There was no discussion of the requirements of an indictment.

Defendant also cites *United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444 (1995), and *Hamling v. United States*, 418 U.S. 87,

41 L. Ed. 2d 590 (1974), as further evidence that the requirement that all elements be listed in an indictment is well established. However, these cases along with *Jones* involve application of Fifth Amendment due process which applies to the federal government and federal prosecutions, not to the state prosecution of a state offense, as in this case. *See also Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350 (1998); *Hodgson*, 168 U.S. 262, 42 L. Ed. 461.

Defendant has not cited, and we have not discovered, any United States Supreme Court case which has applied the Due Process Clause of the Fourteenth Amendment in a manner which requires that a state indictment for a state offense must contain each element and fact which might increase the maximum punishment for the crime charged. Furthermore, it is informative to note the United States Supreme Court has specifically declined to apply the Fifth Amendment requirement of indictment by grand jury to the states via the Fourteenth Amendment. *See Hurtado v. California*, 110 U.S. 516, 28 L. Ed. 232 (1884). The Court's refusal to incorporate the grand jury indictment requirement into the Fourteenth Amendment along with the lack of precedent on this issue convinces us that the Fourteenth Amendment does not require the listing in an indictment of all the elements or facts which might increase the maximum punishment for a crime. Indeed, the Supreme Court specifically stated that its decision in *Jones* "announce[d] [no] new principle of constitutional law, but merely interpret[ed] a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century." *Jones*, 526 U.S. at 251-52 n.11, 143 L. Ed. 2d at 331 n.11. In light of our overwhelming case law approving the use of short-form indictments and the lack of a federal mandate to change that determination, we decline to do so. Defendant's arguments in objection to his indictments for first-degree murder, first-degree rape, and first-degree sexual offense are without merit and are overruled.

[3] By an assignment of error, defendant next contends the trial court erred by failing to grant his motions for change of venue. Defendant filed a motion to change venue on 9 August 1994. The trial court conducted an extensive and lengthy evidentiary hearing on defendant's motion from 23 January through 27 January 1995, at which time defendant presented evidence of pretrial publicity, including numerous television and newspaper reports and two press conferences held by Charlotte-Mecklenburg Police Department officials. Defendant also presented evidence of a telephone survey conducted

by Dr. Robert Bohm, a criminal justice professor at the University of North Carolina at Charlotte, which measured public opinion regarding the cases.

At the hearing, defendant argued that the pretrial publicity was prejudicial and inflammatory and that the attitude of the community, as exemplified by the comments of public officials, the media, and responses to polling, was such that he could not receive a fair trial in this venue. The trial court orally denied defendant's motion, making the following findings of fact:

> The passage of time and the publicity or lack thereof after the pole [sic] was taken, could amelierate [sic] or exacerbate the responses to the questions about which the Defendant expressed concerns.
>
> Mecklenburg County is a large urban county with a population of approximately five hundred thousand, and a voting aged population probably in excess of three hundred fifty thousand.
>
> To quote defense counsel, quote, "it is a large diverse county with many intelligent people", period, end quote.

With regard to the pretrial publicity, the trial court found some of the coverage to be "inflammatory and misleading" but found the remaining coverage either "favorable" to defendant or "factual, informative, and not inflammatory or prejudicial." The trial court concluded that defendant "has not established . . . a reasonable likelihood that pretrial publicity would prevent him from receiving a fair and impartial trial in Mecklenburg County."

On 30 September 1996, defendant renewed his motion and presented evidence of a second telephone survey conducted by Dr. Katherine Jamieson, an associate professor of criminal justice at the University of North Carolina at Charlotte. Defendant also presented evidence detailing additional newspaper and television reports regarding defendant and the crimes with which he was charged. The trial court denied defendant's renewed motion to change venue. Defendant introduced evidence to supplement his motion to change venue on at least three additional occasions before and during the trial. The trial court denied each renewed motion to change venue.

On appeal, defendant contends the trial court erred in denying his motions to change venue because (1) the trial court's reasons for its initial denial of his motion were improper and amounted to an abuse

of discretion; (2) there was identifiable prejudice caused by the trial court's rulings in that a juror who expressed an opinion regarding defendant's guilt or innocence served on the jury over defendant's objection; and (3) the pool of potential jurors was infected by pretrial publicity, making it reasonably unlikely that defendant could receive a fair trial in Mecklenburg County. We disagree.

We begin our review of defendant's assignment of error by restating the applicable law. N.C.G.S. § 15A-957, which governs motions for change of venue, provides:

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

N.C.G.S. § 15A-957 (1999). The test for determining whether a motion for change of venue should be allowed is well settled.

> A defendant's motion for a change of venue should be granted when he establishes 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, 254-55, 307 S.E.2d 339, 347 (1983). The burden of proof in a hearing on a motion for change of venue rests with the defendant. *See State v. Madric*, 328 N.C. 223, 226, 400 S.E.2d 31, 33 (1991). To meet that burden, a defendant must "establish specific and identifiable prejudice against [defendant] as a result of pretrial publicity" and "must show *inter alia* that jurors with prior knowledge decided the case, that [defendant] exhausted his peremptory challenges, and that a juror objectionable to [defendant] sat on the jury." *State v. Billings*, 348 N.C. 169, 177, 500 S.E.2d 423, 428 (emphasis omitted), *cert. denied*, 525 U.S. 1005, 142 L. Ed. 2d 431 (1998). The determination of whether a defendant has carried his burden is within the sound discretion of the trial court, and absent a

showing of abuse of discretion, its ruling will not be overturned on appeal. *See Madric*, 328 N.C. at 226-27, 400 S.E.2d at 33-34; *State v. Gardner*, 311 N.C. 489, 497, 319 S.E.2d 591, 598 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985).

Defendant first argues the trial court's reasons for denying his initial motion were erroneous. The trial court made references to the passage of time and the size and diversity of Mecklenburg County in its findings of fact, but did not describe these factors as the reasons for its decision. Noting the possible effects of time on an atmosphere of pervasive media coverage is not erroneous where defendant's motion was first considered in January 1995, more than eighteen months before his trial began. The trial court's recognition of the probable time frame for the trial as well as the size of the prospective jury pool was reasonable. Such factors can be expected to influence possible prejudice toward defendant. Although the evidence of pretrial publicity, most of which was favorable to defendant or factually neutral, was substantial at the time of defendant's motion, we cannot say the trial court abused its discretion in recognizing facts which, ultimately, may have impacted whether the environment for defendant's trial was prejudicial.

Furthermore, the trial court did not err in stating its belief that the best evidence of whether pretrial publicity was prejudicial or inflammatory was jurors' responses to *voir dire* questioning. This Court has repeatedly emphasized that " '[t]he best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection process.' " *State v. Jaynes*, 342 N.C. 249, 264, 464 S.E.2d 448, 458 (1995) (quoting *Madric*, 328 N.C. at 228, 400 S.E.2d at 34), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). Our recognition in *Jaynes* of prospective juror responses as the most reliable evidence of potential juror prejudice does not preclude a pretrial change of venue in every case as argued by defendant in his brief. Nor is it a standard to be applied only by the appellate courts. Trial courts in this State have ordered venue changes in numerous cases where prejudice to the defendant has been apparent prior to trial. While juror responses may provide the most reliable evidence, other forms of evidence can provide a sufficient basis for a determination that a fair and impartial trial is reasonably unlikely. Defendant's first argument is without merit.

Defendant, in his second argument, contends identifiable prejudice was established when a juror with a previous opinion of defend-

ant's guilt sat on the jury. However, our review of the record indicates juror Thomas Bishop, who had formed an opinion about defendant's guilt, later clearly stated his ability to set aside that opinion and base his decision on the evidence and the law as presented. We presume that prospective jurors tell the truth in answering such questions because our courts could not function without the ability to rely on such presumptions. *See State v. Barnes*, 345 N.C. 184, 207, 481 S.E.2d 44, 56 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). Therefore, we presume juror Bishop was truthful in declaring his ability to consider only the evidence at trial. We have no evidence to suggest otherwise. Because the trial court could reasonably conclude defendant had not adequately proven actual prejudice based on the responses of the juror, it did not err in denying defendant's motion to change venue. *See Jaynes*, 342 N.C. at 265, 464 S.E.2d at 458.

Defendant's third argument relating to the infection of the jury pool by pervasive pretrial publicity is also meritless. Defendant cites *Jerrett*, 309 N.C. 239, 307 S.E.2d 339, as support for his argument. In *Jerrett*, this Court recognized that a defendant has met his burden to show prejudice where the totality of circumstances indicates pretrial publicity has so "infected" a jurisdiction that a defendant cannot receive a fair trial. *Id.* at 258, 307 S.E.2d at 349. The crimes in *Jerrett* occurred in Alleghany County, a small rural community with a population of 9,587 at the time of the trial. *Id.* at 252 n.1, 307 S.E.2d at 346 n.1. Examination of prospective jurors in *Jerrett* revealed that one-third of the jurors knew the victim or members of the victim's family and that many of the jurors knew possible witnesses for the prosecution. *Id.* at 257, 307 S.E.2d at 348-49.

The instant case is distinguishable from *Jerrett*. The population of Mecklenburg County at the time of defendant's arrest was approximately 511,433, *see North Carolina Manual 1993-1994*, at 879 (Lisa A. Marcus ed.), and reflected a large heterogeneous group of potential jurors in contrast to the small close-knit venire in *Jerrett*. Juror familiarity with the victims and their families is not present in this case as it was in *Jerrett*. While it is clear that a large number of potential jurors was exposed to information about the case through the media, this Court has consistently held that factual news accounts of the crimes and pretrial proceedings are not sufficient to establish prejudice against a defendant. *See State v. Dobbins*, 306 N.C. 342, 345, 293 S.E.2d 162, 164 (1982).

Notwithstanding this case's dissimilarity to *Jerrett*, the evidence presented was insufficient to show infection of the jury pool so as to

deprive defendant of a fair trial. In addition to media coverage, defendant points to the two telephone surveys as further evidence of a biased jury pool. The surveys indicated that media coverage of the crimes was widespread and that a large number of persons was aware of the crimes and defendant's identity. However, the surveys did not measure the prejudicial effect of the media coverage, including potential jurors' attitudes toward the presumption of innocence or their ability to confine their determinations as jurors to the evidence presented in court. *See State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983) (a similar survey did not provide evidence of the prejudicial effect of publicity where it had not addressed the presumption of innocence or whether jurors could confine their decisions to the evidence presented in court). Although the surveys asked questions relating to the death penalty and defendant's guilt, answers to these questions outside the context of the presumption of innocence and the juror's duty to consider only the evidence presented at trial are not reliable evidence of bias or prejudice. Viewing the totality of the circumstances, including the amount of media coverage, the number of potential jurors available in Mecklenburg County, and the passage of time between defendant's arrest and his trial, we conclude there was not a reasonable likelihood that defendant could not receive a fair and impartial trial in Mecklenburg County. Defendant's assignment of error is overruled.

[4] By an assignment of error, defendant next contends the trial court erred by denying his motion to suppress his pretrial statements to police. On 7 November 1994, defendant filed a motion to suppress statements he made to police during a series of interviews which began on the afternoon of 12 March and continued through 13 March 1994. The trial court conducted an evidentiary hearing on that motion at the 27 March 1995 session of Superior Court, Mecklenburg County. On 20 April 1995, the trial court denied the motion and on 3 October 1996, filed a written order to that effect which contained extensive findings of fact and conclusions of law.

In his brief, defendant agrees with the trial court's findings of fact describing the events following his arrest. The extensive findings of fact are summarized as follows: Defendant was arrested 12 March 1994 at approximately 5:00 p.m. at a friend's apartment. Officers Gilbert Allred and Sidney Wright of the Charlotte-Mecklenburg Police Department placed defendant under arrest pursuant to an outstanding order for arrest on a misdemeanor larceny charge. The officers transported defendant to the Law Enforcement Center (LEC) rather

than the Intake Center where prisoners were normally taken. Both arresting officers testified that they observed no indications that defendant was under the influence of alcohol or drugs. He was "very calm and collected" but appeared tired and "a little wrinkled." Defendant was cooperative with the officers and did not object to being taken to see investigators at the LEC rather than the Intake Center. At the LEC, defendant was placed in an interview room and released to the custody of other officers.

The trial court found that Investigators Mark Corwin and Darrell Price met with defendant in an interview room at the LEC beginning at 6:43 p.m. that same day. The officers provided defendant with food and drink and allowed him regular breaks to use the restroom. There was no evidence defendant was deprived of food, drink, or the opportunity to use the restroom at any time during the entire interview process. During the initial interview, investigators and defendant talked about sports, his employment and military experience, and his biographical information. Defendant also voluntarily raised the issue of his drug use. He gave inconsistent answers about the last time he had used crack cocaine, indicating on one occasion that he had last used drugs the week before and on another occasion that he had used drugs that morning. However, there were no indications defendant was under the influence of any impairing substance or had been deprived of sleep at any time during the interviews. At 10:00 p.m., the investigators advised defendant of his *Miranda* rights which defendant said he understood and agreed to waive. Prior to administering the *Miranda* rights, the officers did not ask defendant about his drug use or the victims for whose murders he was a suspect. Officers asked no questions designed to elicit an incriminating response. However, defendant was under arrest and not free to leave pursuant to the larceny charge.

The trial court further found that after defendant was advised of his *Miranda* rights, Price and Corwin questioned defendant about the latest murders. Investigators C.E. Boothe, Jr., and William Ward, Jr., also questioned defendant during the evening of 12 March and the early morning of 13 March 1994. Investigator Tony Rice met with defendant at 5:07 a.m. on 13 March 1994. Defendant greeted Rice and was happy to see him because they knew each other. Questioning continued after Rice entered the room, and defendant became emotional when he was asked about his girlfriend, Sadie McKnight. Rice asked defendant if he was religious and whether he would mind if Rice said a prayer. Defendant said he did not mind. He cried during

the prayer. After the prayer, defendant sighed and then wrote a list of the names of the victims he had killed. He later gave a detailed, recorded confession concerning each of the victims. Defendant was fed while he gave his confession and was allowed to sleep from 7:30 a.m. until 11:45 a.m.

The trial court also found that at some point during the interviews, defendant requested to see his girlfriend and to hold his daughter. Ward advised defendant that the police would attempt to contact McKnight and Wanda Harrison, the mother of defendant's daughter. He also advised defendant that the police had no control over whether either would come to the station. The trial court further found that the officers did not view this request as a condition for defendant making a statement.

The trial court also found that there was no evidence defendant was coerced or intimidated in any way, nor was there evidence defendant indicated he wished to stop talking with officers or wanted to speak with an attorney. Magistrate Karen Johnson came to the LEC around noon and conducted a first appearance for defendant on murder warrants obtained by investigators. The trial court further found that Magistrate Johnson followed normal procedures and that her ability to be neutral and detached was not affected by going to the LEC.

The trial court found that after his appearance before Magistrate Johnson, defendant continued cooperating with police, providing individual confessions to each murder and taking police to recover articles of evidence. At no time did defendant request an attorney or indicate a desire to stop talking with police.

Defendant contends his pretrial statements to police should have been suppressed for three reasons: (1) police investigators violated N.C.G.S. § 15A-501; (2) investigators' deliberate delay in advising defendant of his *Miranda* rights violated defendant's right against self-incrimination; and (3) defendant's confessions were involuntary because police investigators induced him to waive his rights by agreeing to allow defendant to see his girlfriend and hold his daughter. We disagree.

Defendant first contends police investigators violated N.C.G.S. § 15A-501 by waiting nineteen hours to take defendant before a magistrate after his arrest, taking him to the LEC for questioning prior to his appearance before a magistrate, and waiting three and a half

hours after questioning began before advising defendant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Specifically, defendant argues investigators engaged in a deliberate strategy to obtain his confession by depriving him of his statutory and constitutional rights and the strategy amounted to a substantial violation of N.C.G.S. § 15A-501, which requires suppression of all the confessions given by defendant.

Several duties of police officers after they have arrested a suspect are described in N.C.G.S. § 15A-501:

> Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer:
>
> (1) Must inform the person arrested of the charge against him or the cause for his arrest.
>
> (2) Must, with respect to any person arrested without a warrant and, for purpose of setting bail, with respect to any person arrested upon a warrant or order for arrest, take the person arrested before a judicial official without unnecessary delay.
>
> (3) May, prior to taking the person before a judicial official, take the person arrested to some other place if the person so requests.
>
> (4) May, prior to taking the person before a judicial official, take the person arrested to some other place if such action is reasonably necessary for the purpose of having that person identified.
>
> (5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so.

N.C.G.S. § 15A-501 (1999). Evidence obtained as a result of a "substantial violation" of any provision in chapter 15A must be suppressed. *See* N.C.G.S. § 15A-974(2) (1999). The trial court, in determining whether a violation is substantial, must consider all of the circumstances, including the importance of the interest violated, the extent of the deviation, the willfulness of the deviation, and the deterrent value the exclusion of the evidence will provide. *See id.*; *State v.*

Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987), *cert. denied*, 485 U.S. 963, 99 L. Ed. 2d 430 (1988). In order for mandatory suppression to apply, "a causal relationship must exist between the violation and the acquisition of the evidence sought to be suppressed." *State v. Richardson*, 295 N.C. 309, 322, 245 S.E.2d 754, 763 (1978).

Initially, we address the delay in taking defendant before a judicial official pursuant to N.C.G.S. § 15A-501(2). Defendant was arrested at approximately 5:00 p.m. on 12 March 1994 on the outstanding warrant for larceny. At the time of his arrest, defendant was a suspect in three murders which possessed similar characteristics. Each of these murders involved the strangulation of a female victim, and all had occurred within the previous month. With defendant already under arrest for larceny, investigators attempted to establish a rapport with defendant to facilitate their investigation of the murders. Defendant was cooperative and spoke with investigators about a number of unrelated topics. He also mentioned knowing two of the victims. During this period, defendant was fed and given opportunities to use the restroom. After open communication was established, investigators advised defendant of his *Miranda* rights and began questioning him about the murders and his relationships with the victims. At first, defendant acknowledged knowing several victims but did not admit his involvement in their deaths. He was unable to explain the number of people he knew who had died of unnatural causes. When Rice joined the interrogation, defendant listed the persons he had killed. Investigators were not aware that many of the murders to which defendant confessed were related. As investigators questioned defendant about each victim specifically, defendant confessed to the numerous rapes, sexual offenses, and robberies which accompanied the murders. Defendant continued to cooperate with investigators by providing explicit, sordid, and case-determinative details. Defendant gave complete tape-recorded confessions for each victim. After he completed the recordings, defendant asked to take a nap. Investigators brought a couch into the room where defendant was being questioned, and defendant slept there from approximately 7:30 a.m. until 11:45 a.m. Investigators woke defendant so that he could appear before a magistrate. Defendant was taken before Magistrate Johnson at approximately noon on 13 March 1994.

The dispositive issue here is whether defendant's confession resulted from the delay. This Court, on previous occasions, has held a confession obtained as a result of interrogation prior to an appearance before a magistrate was not obtained as a result of a substantial

violation of chapter 15A. *See, e.g., State v. Littlejohn*, 340 N.C. 750, 459 S.E.2d 629 (1995); *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990); *State v. Martin*, 315 N.C. 667, 340 S.E.2d 326 (1986). In *Littlejohn*, a period of thirteen hours elapsed between the defendant's arrest and the time he was taken before a magistrate. *Littlejohn*, 340 N.C. at 758, 459 S.E.2d at 633. The defendant argued that he would not have confessed if he had been taken before a magistrate earlier. Nevertheless, we refused to find a substantial violation of chapter 15A because the defendant had been advised of his constitutional rights at the beginning of his interrogation and would have received the same notification by a magistrate. *Id.* Similarly, in the instant case, defendant was advised of his rights before he was asked questions regarding the crimes he was suspected of committing. Defendant has not shown he would not have confessed had he been advised of the same rights again by a magistrate. Therefore, we cannot say his confession was the result of the delay in defendant being taken before a magistrate. *See State v. Chapman*, 343 N.C. 495, 471 S.E.2d 354 (1996) (a delay of ten and a half hours was not unnecessary because of the number of crimes involved and the investigators' rights to conduct the interrogation). Moreover, because of the number of crimes to which defendant confessed and the amount of time necessary to record the details of the crimes, along with investigators' accommodation of defendant's request to sleep, we conclude the delay in taking defendant before a judicial official was not unnecessary within the meaning of N.C.G.S. § 15A-501(2).

As part of defendant's first argument, we also address whether there were substantial violations of subsections (3), (4), or (5) of N.C.G.S. § 15A-501 which resulted in defendant's confession. Subsections (3) and (4) allow police to take a defendant to a place, other than before a magistrate, upon a request by the defendant or to have the defendant identified. There is no evidence that either occurred in the instant case. Nevertheless, as stated above, there is no evidence that taking defendant to the LEC before he saw a magistrate caused him to confess. Therefore, no substantial violations of subsections (3) and (4) resulted. As to subsection (5), defendant was advised of his rights before investigators began any interrogation relating to the crimes in this case. Although investigators talked with defendant from approximately 6:45 p.m. until 10:00 p.m. before reading him his *Miranda* rights, there is no evidence police asked defendant about any of the crimes to which he later confessed or that any

portion of defendant's confession was a result of the delay during which he and investigators discussed unrelated subjects. For these reasons, we conclude there was no substantial violation of N.C.G.S. § 15A-501 requiring defendant's confession to be suppressed.

In his second argument, defendant contends the delay in advising him of his *Miranda* rights tainted his later confessions, requiring them to be suppressed. Defendant argues the strategy used by investigators to elicit his confession amounted to a "deliberately coercive or improper tactic" which undermined his free will and rendered his confession, given after he was advised of his *Miranda* rights, involuntary. He cites *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985), and *State v. Barlow*, 330 N.C. 133, 409 S.E.2d 906 (1991), as authority for his position. However, defendant's reliance is misplaced as both cases are inapposite to the issue before us.

In both *Elstad* and *Barlow*, the respective defendants made incriminating statements before they were advised of their *Miranda* rights. In *Elstad*, the United States Supreme Court's inquiry into whether a "coercive" or "improper" tactic undermined the defendant's free will was part of an analysis to determine if the later statements were tainted or caused by the prior, unwarned incriminating statement. *See Elstad*, 470 U.S. at 314, 84 L. Ed. 2d at 235. We performed a similar analysis in *Barlow*. *See Barlow*, 330 N.C. at 139, 409 S.E.2d at 910. In the instant case, defendant made no prior incriminating statement. His discussions with investigators dealt with subjects other than the crimes involved, and although defendant mentioned that he knew two of the victims and that he had used drugs, these statements were voluntary and not inculpatory. Defendant's later confessions could not be termed "fruit of the poisonous tree," *see Wong Sun v. United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455 (1963), because there was no prior inadmissible statement or evidence to function as the "poisonous tree." Defendant's argument has no merit.

In his third argument, defendant contends his pretrial statements to police should have been suppressed because investigators induced him to confess by promising to allow him to see his girlfriend and daughter. He argues the promise led him to confess, rendering his confession involuntary and subject to suppression as a violation of his due process rights under the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. We again disagree.

The voluntariness of a defendant's confession is determined by viewing the "totality of the circumstances." *State v. Corley*, 310 N.C. 40, 47, 311 S.E.2d 540, 545 (1984). To be considered improper and indicative of an involuntary confession, an inducement to confess must convey "hope" or "fear." *State v. Wilson*, 322 N.C. 91, 94, 366 S.E.2d 701, 703 (1988). An "improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage." *State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975). Moreover, where a promise or statement indicating a defendant may receive some form of benefit is made in response to a solicitation by a defendant, the defendant's confession is not deemed involuntary. *See State v. Richardson*, 316 N.C. 594, 604, 342 S.E.2d 823, 831 (1986).

In the instant case, defendant made the request to investigating officers that he be allowed to see his girlfriend and daughter. Investigators' statements that they would attempt to contact defendant's girlfriend and the mother of his child were made only in response to defendant's request. While defendant referred to his request as a "condition" of his confession, there is no evidence investigators used the request as an inducement to obtain his confession. Further, investigators advised defendant that the police had no control over whether McKnight or Harrison would come to the station. Moreover, when asked whether his confession was given in "exchange" for the request to see his girlfriend and child, defendant said it was not. As defendant's request had no relation to relief from the charges faced by him, there was no improper inducement in this situation. *See Pruitt*, 286 N.C. at 458, 212 S.E.2d at 102. Defendant's argument is without merit, and this assignment of error is overruled.

JURY SELECTION ISSUE

[5] By an assignment of error, defendant next contends the trial court erred by denying his challenge for cause of prospective juror Thomas Bishop. Defendant argues the record shows Bishop had formed an opinion regarding defendant's guilt which disqualified him from serving as a juror pursuant to N.C.G.S. § 15A-1212(6). During *voir dire*, Bishop indicated that he had formed an opinion as to defendant's guilt due, in part, to pretrial publicity and defense counsel's statement that the facts in the case were not in dispute. However, the trial court questioned Bishop, and the following exchange took place:

> COURT: And would you be able to put aside what counsel has said and any pretrial information that you may have, namely what

you have read and heard about the case previously, and base your determination on the evidence that is present[ed] in open court and the instructions on the law that I give you?

MR. BISHOP: Yes, sir.

Upon further questioning, Bishop repeatedly confirmed his ability to set aside any information he had received from pretrial publicity and from statements by counsel and decide the case based on the evidence and the law as given by the trial court.

Challenges to the jury panel and the competency of jurors are matters to be decided by the trial judge. *See* N.C.G.S. § 15A-1211(b) (1999). N.C.G.S. § 15A-1212 contains no language requiring mandatory dismissal of jurors and "merely lists the various grounds for making challenges to jurors." *State v. Corbett*, 309 N.C. 382, 389, 307 S.E.2d 139, 145 (1983). The portion of the statute in question provides that a juror may be removed by a challenge for cause on the ground that the juror "[h]as formed or expressed an opinion as to the guilt or innocence of the defendant." N.C.G.S. § 15A-1212(6) (1999). "The trial court is not required to remove from the panel every potential juror who has any preconceived opinions as to the potential guilt or innocence of a defendant." *State v. Cummings*, 326 N.C. 298, 308, 389 S.E.2d 66, 71 (1990). "Where the trial court can reasonably conclude from the *voir dire* examination that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence, excusal is not mandatory." *State v. Green*, 336 N.C. 142, 167, 443 S.E.2d 14, 29, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994); *see also Irvin v. Dowd*, 366 U.S. 717, 6 L. Ed. 2d 751 (1961).

Defendant concedes in his brief that Bishop indicated his ability to set aside his opinion and render a verdict based on the law and evidence as presented in court. Defendant also concedes that this Court's prior decisions hold contrary to his argument on this issue. We perceive no reason to change or reverse our prior holdings, and we decline to do so. This assignment of error is overruled.

GUILT/INNOCENCE PHASE

[6] By an assignment of error, defendant next contends the trial court erred by denying his motion *in limine* and overruling his objections to the cross-examination of defense experts regarding two additional and unrelated murders to which defendant confessed after his arrest. During his confession to the crimes at issue here, defendant

also confessed to killing Tashanda Bethea in South Carolina in April 1990 and Sharon Nance in North Carolina in May 1992. During his presentation of evidence, defendant offered the testimony of Colonel Robert K. Ressler, an expert in the fields of criminology, crime scene analysis, serial offenders, psychology of serial offenders, and criminal abnormal psychology, and Dr. Ann W. Burgess, an expert in the fields of serial offenders, crime classification, psycho-social development, and mental illness.

Col. Ressler testified regarding a classification system he used in studying serial offenders in which crimes and offenders were categorized as organized, disorganized, or mixed. These categories tend to correlate with the presence of a mental illness or disorder. Organized offenders tend to be free from actual mental illness but might display a type of sociopathic behavior. Disorganized offenders tend to exhibit characteristics of actual mental illness. Mixed offenders display characteristics of organization and disorganization. In Col. Ressler's opinion, the crimes in this case fit into the mixed category, exhibiting signs of both organization and disorganization. On direct examination, defendant's counsel highlighted the disorganized characteristics in the nine murders charged here in an effort to prove defendant's diminished mental capacity or mental illness. On cross-examination, the State elicited testimony from Col. Ressler that the crimes, including the two earlier murders, displayed signs of organization, which would point to a lack of mental illness.

Dr. Burgess, on direct examination, testified that defendant was unable to form specific intent to commit the crimes with which he was charged because of mental illness. The cross-examination of Dr. Burgess related to her opinion that defendant suffered from mental illness and that he created fantasies, acted upon them, and could not differentiate the fantasies from reality. The State questioned Dr. Burgess about the uncharged murder of Bethea with regard to whether defendant was relating a fantasy or reality to the expert during his interview. Dr. Burgess mentioned both Bethea and Nance in a group of victims who had been choked when the State asked her if defendant had exercised control over the victims. The trial court gave a limiting instruction to the jury after each mention of Bethea and Nance during Dr. Burgess' cross-examination and during Col. Ressler's cross-examination.

Defendant contends the cross-examination was improper under Rule 403 because it was prejudicial and had no probative value as

impeachment under Rule 705. He concedes Rule 705 allows cross-examination of the basis of an expert's opinion even if the evidence would not ordinarily be allowed, but argues the cross-examination is subject to the Rule 403 balancing test for prejudice. Defendant also argues Rule 705 does not give the State "carte blanche to introduce the basis of an adverse expert opinion regardless of its prejudicial effect and probative value." *State v. Coffey*, 336 N.C. 412, 421, 444 S.E.2d 431, 436 (1994). For the reasons set forth below, we find no merit in defendant's assignment of error.

Rule 705 allows for cross-examination of an expert witness regarding the basis for any opinions given.

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. *The expert may in any event be required to disclose the underlying facts or data on cross-examination.* There shall be no requirement that expert testimony be in response to a hypothetical question.

N.C.G.S. § 8C-1, Rule 705 (1999) (emphasis added). In the instant case, both experts testified that they were able to classify or diagnose defendant, in part, by studying the acts to which he confessed. Col. Ressler and Dr. Burgess reviewed information about the two uncharged murders in formulating their opinions. Under the broad scope of Rule 705, cross-examination relating to the two murders was permissible to probe the basis for the experts' opinions. *See State v. Lyons*, 343 N.C. 1, 468 S.E.2d 204, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). Furthermore, under Rule 403, the determination of whether relevant evidence should be excluded is a matter left to the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion. *See State v. Pierce*, 346 N.C. 471, 490, 488 S.E.2d 576, 587 (1997). In the instant case, defendant has not demonstrated any abuse of discretion by the trial court. To the contrary, a review of the record reveals the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper instruction limiting the jury's consideration of the evidence solely to the basis for the experts' opinions. The trial court gave the instruction during each disputed instance of cross-examination. For these reasons, we conclude

defendant was not prejudiced by this cross-examination. This assignment of error is overruled.

[7] By an assignment of error, defendant next contends the trial court erred in denying parts of his requested instructions on the element of deliberation. The requested instructions consisted of portions of case law which provided additional definitions for deliberation, including:

> The intent to kill must arise from "a fixed determination previously formed after weighing the matter." *State v. Myers*, 309 N.C. 78[, 305 S.E.2d 506 (1983)].
>
> . . . .
>
> . . . Deliberation refers to a "steadfast resolve and deep-rooted purpose, or a design formed after carefully considering the consequences." *State v. Thomas*, 118 N.C. 1113[, 24 S.E. 431] (1896).
>
> . . . .
>
> While the terms "premeditate" and "deliberate" are sometimes used interchangeably, they have separate legal meanings. " 'Premeditate' involves the idea of prior consideration, while 'deliberation' rather indicates reflection, a weighing of the consequences of the act in more or less calmness." *State v. Exum*, 138 N.C. 599[, 50 S.E. 283] (1905).
>
> . . . "The true test [of deliberation]," however, "is not the duration of time as much as it is the extent of the reflection." N.C.P.I.[—Crim.] 206.14; *State v. Buchanan*, 287 N.C. 408[, 215 S.E.2d 80] (1975).

(Citation omitted.) The trial court instructed the jury, utilizing the North Carolina pattern jury instructions, which include the following portion defining deliberation:

> that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

N.C.P.I.—Crim. 206.14 (1994). Defendant concedes this Court has approved the use of the pattern instructions for first-degree murder, including the element of deliberation, *see, e.g., State v. Lewis*, 346 N.C. 141, 484 S.E.2d 379 (1997); *State v. Jones*, 342 N.C. 628, 467 S.E.2d 233 (1996), but argues this Court's cases and the pattern instructions have "strayed from the clear intent of the General Assembly's 1893 creation of the crime of first-degree murder and from solid precedent." Defendant argues the definitions of deliberation in his requested instructions give it a common-sense meaning and adequately supplement the pattern jury instructions, which refer to a "cool state of mind," but not a "total absence of passion or emotion." N.C.P.I.—Crim. 206.14. Defendant argues the pattern instructions are "meaningless and confusing" without the supplementation. We disagree.

This Court has consistently held that "a trial court is not required to give a requested instruction verbatim. Rather, when the request is correct in law and supported by the evidence, the court must give the instruction in substance." *State v. Ball*, 324 N.C. 233, 238, 377 S.E.2d 70, 73 (1989). Our review of the pattern instructions reveals they provide an accurate definition of deliberation. Defendant's proposed instructions merely articulate variations on the definition. Thus, the trial court gave defendant's requested instructions in substance. Ever mindful of our duty to scrutinize the pattern instructions for federal and state constitutional and statutory conflicts, *see Jones*, 342 N.C. at 633, 467 S.E.2d at 235, we conclude the trial court did not err in refusing to give defendant's additional requested instructions. This assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[8] Defendant assigns error to the trial court's denial of his motion for a peremptory instruction regarding two statutory mitigating circumstances: N.C.G.S. § 15A-2000(f)(2), "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance," and N.C.G.S. § 15A-2000(f)(6), "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." Defendant argues the instructions were required because there was uncontroverted evidence in the record supporting both circumstances. We disagree.

Upon request, a trial court should give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if

it is supported by uncontroverted evidence. *See State v. White*, 349 N.C. 535, 568, 508 S.E.2d 253, 274 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). Conversely, if the evidence in support of the mitigating circumstance is controverted, a peremptory instruction is not required. *See State v. Womble*, 343 N.C. 667, 683, 473 S.E.2d 291, 300 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997).

In the instant case, defendant contends the testimony of Dr. Burgess during the guilt/innocence phase of the trial and the testimony of Dr. Faye Sultan, a clinical psychologist, during the sentencing phase of the trial was uncontroverted and supported peremptory instructions for the (f)(2) and (f)(6) mitigating circumstances. Dr. Burgess testified that defendant suffered from mental illness which negated his ability to form specific intent. Dr. Sultan testified that defendant suffered from a number of mental disorders which impaired his ability to conform his conduct to the law.

After a complete review of the record, we conclude the testimony upon which defendant relies was controverted by evidence which tended to show defendant's behavior was not consistent with the mitigating circumstances. In fact, the issues of whether defendant was under the influence of a mental or emotional disturbance and whether he was able to conform his actions to the law were heatedly contested by the prosecution. The State presented testimony by Sadie McKnight, who had lived with defendant for two years until shortly before he was arrested. She testified that she had not observed anything unusual about defendant and had not known him to experience hallucinations. Moreover, the State presented evidence that defendant held numerous jobs involving management responsibilities during the time these crimes were committed and that he maintained a relationship with his girlfriend and other women during this time which did not involve any type of abuse. Further, defendant was able to carry out nine premeditated, calculated, and vicious murders while carefully avoiding detection. As the evidence was, in fact, controverted, the trial court did not err, and this assignment of error is overruled.

[9] Next, defendant makes two assignments of error regarding the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance, which provides, "[t]he capital felony was committed for pecuniary gain." Defendant argues the trial court's instruction was erroneous and the trial court erred in submitting the aggravating circumstance to the jury for consideration in the murder of Caroline Love. First, we

address the propriety of the trial court's instruction. The trial court gave the following instruction: "A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained, or intends or expects to obtain, money or some other thing which can be valued in money, either as compensation for committing it, or as a result of the death of the victim." Defendant claims the instruction allows the jury to find the existence of the aggravating circumstance in a situation where the defendant obtained money or something of value as a result of the murder rather than where the defendant committed the murder for the purpose of obtaining the money or valuable thing. Defendant did not object at trial but asserts the instruction was plain error with respect to the three victims for which it was submitted: Caroline Love, Shawna Hawk, and Valencia Jumper. We disagree.

"[T]o reach the level of 'plain error' . . . , the error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). This Court has previously addressed the sufficiency of the pecuniary gain instruction in the context of plain error. In *State v. Bacon*, 337 N.C. 66, 99-100, 446 S.E.2d 542, 559-60 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995), this Court declined to find plain error with regard to the pecuniary gain instruction because the trial court's instruction was in accordance with the North Carolina pattern jury instruction and because the wording on the issues and recommendation form indicated that the jury found that pecuniary gain was the purpose for the murder. Similarly, in *State v. Bishop*, 343 N.C. 518, 556-57, 472 S.E.2d 842, 862-63 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997), this Court again declined to find plain error where the instruction given was substantially similar to the pattern jury instruction, and the jury answered the question of whether the murder was committed for pecuniary gain in the affirmative.

In the instant case, the trial court's instruction for the pecuniary gain aggravating circumstance mirrored the pattern jury instruction. *See* N.C.P.I.—Crim. 150.10 (1998). On the issues and recommendation form for the murders of Love, Hawk, and Jumper, the circumstance was stated: "Was this murder committed for a pecuniary gain?" The jurors answered "yes" in each case, indicating they found that the

purpose behind the murder was pecuniary gain. In light of our prior holdings and the jury's responses, we decline to find plain error.

[10] Next, we address the sufficiency of the evidence in support of the submission of the pecuniary gain aggravating circumstance in the murder of Caroline Love. Defendant contends the evidence was insufficient because it did not show that obtaining a roll of quarters from Love was the purpose for the murder. We disagree.

"In determining the sufficiency of the evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom." *State v. Syriani*, 333 N.C. 350, 392, 428 S.E.2d 118, 141, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). The State presented evidence that Love had obtained a roll of quarters from her employer as she left work the night of her murder. The manager of the Bojangles' restaurant where Love worked, John Chandler, testified that Love asked him for a roll of quarters in exchange for a ten-dollar bill so that she could do her laundry. Investigator Rice testified that Chandler told him about the quarters and that he was unable to find them when he searched Love's home. Further, in his statement to police which was given in redacted form to the jury, defendant admitted taking the quarters from Love's apartment. Taken in the light most favorable to the State, this evidence is such that a jury could reasonably conclude pecuniary gain was a motive for the murder of Caroline Love. This assignment of error is overruled.

[11] Defendant next assigns error to the trial court's overruling of defendant's objection to statements made by the prosecution during its sentencing phase closing argument. Defendant assigns error to the following argument:

> I may tell you that in the Caroline Love case, Aggravating Circumstance Number 1 is, it was during the course of a rape. What does that tell you? That's a one-liner, isn't it? Remember what it was. Think about a women [sic] being raped. Think about that violation that she went through, that Shawna Hawk went through, and I could list each of those names for you again. You think about that. You think about being murdered during the course of being raped.

The trial court overruled defendant's objection to the last sentence in the preceding argument. Defendant contends the ruling was contrary

to this Court's holding 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).

In *McCollum*, this Court held that an argument asking jurors " 'to put themselves in place of the victims will not be condoned.' " *Id.* at 224, 433 S.E.2d at 152 (quoting *United States v. Pichnarcik*, 427 F.2d 1290, 1292 (9th Cir. 1970)). However, this Court has consistently allowed arguments where the prosecution has asked the jury to imagine the emotions and fear of a victim. *See State v. Warren*, 348 N.C. 80, 109, 499 S.E.2d 431, 447, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998). In the instant case, the prosecutor did not ask the jury members to put themselves in the place of the victim; rather, the prosecutor asked the jury to think about the murder and the rape occurring simultaneously as alleged in the aggravating circumstance. This assignment of error is overruled.

[12] Defendant also assigns error to the trial court's denial of his motion for mistrial based on the prosecution's improper argument. In addition to the statement above, defendant also objected to the following argument of the prosecution:

> The State asked each and every one of you during jury deliberations, would you promise not to base your verdict on sympathy for the victims or for the Defendant. And you agreed not to.
>
> Why does the Defense not want you to? Because in that sympathy game, ladies and gentlemen of the jury, it's a hands-down victory. That's not what we're here about. The State could fill this courtroom with the cries of mothers and fathers—

The trial court sustained defendant's objection to the last sentence above, allowed his motion to strike, and instructed the jury not to consider the statement. Defendant contends the declaration of a mistrial was warranted because the prosecution injected grossly improper considerations into an already emotionally charged case, which prevented him from obtaining a fair sentencing hearing. We disagree.

A trial court must declare a mistrial "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1999). "The scope of appellate review . . . is limited to whether in denying the motion[] for a mistrial, there has been an abuse of judicial discretion." *State v. Boyd*, 321 N.C. 574, 579, 364 S.E.2d 118, 120 (1988).

The trial court sustained defendant's objection to the statement above and instructed the jury not to consider it. Any prejudice to defendant was remedied by the trial court's instruction. As the statements upon which defendant based his motion for mistrial were either proper or not prejudicial, we discern no "irreparable prejudice" arising from the prosecutor's argument. The trial court did not abuse its discretion by denying defendant's motion; therefore, this assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises eleven additional issues which he concedes have been decided previously by this Court contrary to his position: (1) the trial court erred in denying defendant's motions to increase the number of peremptory challenges; (2) the jury's determination that the murders were "especially heinous, atrocious, or cruel" was based on unconstitutionally vague instructions which failed to distinguish death-eligible murders from murders not death-eligible; (3) the trial court's capital sentencing jury instructions defining defendant's burden to prove mitigating circumstances to the satisfaction of each juror did not adequately guide the jury's discretion about the requisite degree of proof; (4) the trial court erred by allowing the jury to refuse to give effect to mitigating evidence if the jury deemed the evidence not to have mitigating value; (5) the trial court's instruction about the course of conduct aggravating circumstance was vague and overbroad; (6) the trial court erred by submitting, over defendant's objection, defendant's age as a mitigating circumstance; (7) the trial court erred by instructing jurors they must be unanimous to answer "no" for Issues One, Three, and Four, and to reject the death penalty in their punishment recommendation; (8) the trial court erred by denying defendant's motion to question prospective jurors about their understanding of the meaning of a life sentence for first-degree murder and of parole eligibility for a life sentence for first-degree murder; (9) the trial court erred by denying defendant's motion to bifurcate the guilt/innocence and penalty phases of the trial into two proceedings with separate juries; (10) the trial court erred by sentencing defendant to death because the death penalty is inherently cruel and unusual; and (11) the trial court erred by sentencing defendant to death because the North Carolina capital sentencing scheme is unconstitutionally vague and overbroad.

Defendant makes these arguments for the purpose of permitting this Court to reexamine its prior holdings and to preserve these argu-

ments for any possible further judicial review in this case. We have thoroughly considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Accordingly, these assignments of error are overruled.

PROPORTIONALITY REVIEW

[13] Finally, defendant contends the death sentences imposed were excessive or disproportionate. Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, it is our statutory duty to ascertain as to each murder (1) whether the evidence supports the jury's findings of the aggravating circumstances upon which the sentence of death was based; (2) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1999).

In the instant case, defendant was convicted of nine counts of first-degree murder. Each conviction was based both on premeditation and deliberation and on the felony murder rule.

Following the capital sentencing proceeding as to the Love murder, the jury found the following submitted aggravating circumstances: the murder was committed for the purpose of avoiding lawful arrest, N.C.G.S. § 15A-2000(e)(4); the murder was committed by defendant while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); the murder was committed by defendant while defendant was engaged in the commission of a sexual offense, N.C.G.S. § 15A-2000(e)(5); the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder 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).

As to the Hawk murder, the jury found the following submitted aggravating circumstances: the murder was committed for the purpose of avoiding lawful arrest, N.C.G.S. § 15A-2000(e)(4); the murder was committed by defendant while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); the murder was committed by defendant while defendant was engaged in the commission of a sexual offense (fellatio), N.C.G.S. § 15A-2000(e)(5); the

murder was committed by defendant while defendant was engaged in the commission of a sexual offense (cunnilingus), N.C.G.S. § 15A-2000(e)(5); the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder 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).

As to the Spain murder, the jury found the following submitted aggravating circumstances: the murder was committed by defendant while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); the murder was committed by defendant while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder 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).

As to the Jumper murder, the jury found the following submitted aggravating circumstances: the murder was committed by defendant while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); the murder was committed by defendant while defendant was engaged in the commission of a sexual offense, N.C.G.S. § 15A-2000(e)(5); the murder was committed by defendant while defendant was engaged in the commission of arson, N.C.G.S. § 15A-2000(e)(5); the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder 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).

As to the Stinson murder, the jury found the following submitted aggravating circumstances: the murder was committed by defendant while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); the murder was committed by defendant while defendant was engaged in the commission of a sexual offense, N.C.G.S. § 15A-2000(e)(5); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder 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).

As to the Mack murder, the jury found the following submitted aggravating circumstances: the murder was committed by defendant while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); the murder was committed by defendant while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder 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).

As to the Baucom murder, the jury found the following submitted aggravating circumstances: the murder was committed by defendant while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); the murder was committed by defendant while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder 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).

As to the Henderson murder, the jury found the following submitted aggravating circumstances: the murder was committed for the purpose of avoiding lawful arrest, N.C.G.S. § 15A-2000(e)(4); the murder was committed by defendant while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); the murder was committed by defendant while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder 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).

As to the Slaughter murder, the jury found the following submitted aggravating circumstances: the murder was committed by defendant while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5); the murder was committed by defendant while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder 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).

As to each murder, three statutory mitigating circumstances were submitted for the jury's consideration: (1) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) defendant's capacity 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 (3) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7). The jury found N.C.G.S. § 15A-2000(f)(2) for each murder, but found N.C.G.S. § 15A-2000(f)(6) only in the murders of Henderson, Baucom, and Slaughter, and did not find N.C.G.S. § 15A-2000(f)(7) for any of the murders. As to each murder, of the thirty-seven nonstatutory mitigating circumstances submitted, twenty-four were found by the jury to exist and have mitigating value.

After a thorough review of the record, including the transcripts, briefs, and oral arguments, we conclude the evidence fully supports the aggravating circumstances found by the jury. Further, we find no indication the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

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 imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). In conducting proportionality review, we compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *See McCollum*, 334 N.C. at 240, 433 S.E.2d at 162. 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, *cert. denied*, 522 U.S. 900, 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).

We conclude this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. First, defendant was convicted of nine counts of first-degree murder. This Court has never found a sentence of death disproportionate in a case where the jury has found a defendant guilty of murdering more than one victim. *See State v. Goode*, 341 N.C. 513, 552, 461 S.E.2d 631, 654 (1995).

Additionally, the jury convicted defendant for each murder under the theory of premeditation and deliberation. This Court has stated 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, in each murder, the jury found the following three aggravating circumstances: (1) "[t]he capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb," N.C.G.S. § 15A-2000(e)(5); (2) "[t]he capital felony was especially heinous, atrocious, or cruel," N.C.G.S. § 15A-2000(e)(9); and (3) "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons," N.C.G.S. § 15A-2000(e)(11). There are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to support a sentence of death. *See Bacon*, 337 N.C. at 110 n.8, 446 S.E.2d at 566 n.8. The N.C.G.S. § 15A-2000(e)(5), (e)(9), and (e)(11) statutory aggravating circumstances, which the jury found here, are among those four. *See id.*

We also compare this case with the cases in which this Court has found the death penalty to be proportionate. While we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, we reemphasize 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). Because of the

number of victims and the vicious, serial nature of the crimes, this case is unlike any other in North Carolina history. As such, it suffices to say this 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.

Accordingly, we conclude defendant received a fair trial and capital sentencing proceeding, free from prejudicial error, and the sentences of death recommended by the jury and entered by the trial court are not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. CHRISTOPHER LUNORE ROSEBORO

No. 156A94-2

(Filed 5 May 2000)

1. Jury— selection—capital sentencing—challenge for cause—failure to preserve issue

The trial court did not err in a capital sentencing proceeding by failing to excuse for cause a prospective juror who expressed strong concerns that the court system was failing but also stated those opinions would not keep him from being fair and impartial, because although defendant's request for additional peremptory challenges was denied, he did not expressly renew his earlier challenge for cause of this juror as required by N.C.G.S. § 15A-1214(h).

2. Jury— selection—capital sentencing—challenge for cause—failure to preserve issue

The trial court did not err in a capital sentencing proceeding by failing to excuse for cause four prospective jurors who were allegedly tainted by the remarks of two pro-death penalty prospective jurors during voir dire because although defendant renewed his challenges to the jurors at a later time, he failed to renew them at a time when he had exhausted his peremptory challenges and failed to renew each of his previously denied challenges for cause as required by N.C.G.S. § 15A-1214(h).

3. Criminal Law— prosecutor's argument—capital sentencing—accomplice's life sentence—opposition to catchall mitigating circumstance

The prosecutor did not improperly imply in his closing argument in a capital sentencing proceeding that an accomplice's life sentence for the same murder could be treated as a nonstatutory aggravating circumstance because he properly argued in opposition to the "cathchall" mitigating circumstance that the jury should not give any mitigating value to the fact that the accomplice was not sentenced to death.

4. Sentencing— peremptory instructions—statutory mitigating circumstances—controverted evidence

The trial court did not err in a capital sentencing proceeding by failing to give a peremptory instruction on the N.C.G.S. § 15A-2000(f)(6) 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, because the record contains conflicting evidence, including: (1) defendant did not intimate in his testimony that he did not know what he was doing or that he could not stop himself even though he was under the influence of crack cocaine the night of the murder; (2) defendant's accomplice testified that defendant motioned for the accomplice to be quiet when defendant was walking towards the sleeping victim's bedroom; and (3) although an expert testified he diagnosed defendant with three mental disorders and opined these disorders impaired his ability to appreciate the criminality of his conduct and conform his conduct to the law, the expert agreed with the evaluation report from Dorothea Dix Hospital suggesting there were no positive findings of any information suggestive of particular impairment during the time specific to the alleged crimes.

5. Sentencing— capital—peremptory instructions—statutory mitigating circumstances—controverted evidence

The trial court did not err in a capital sentencing proceeding by failing to give a peremptory instruction on the N.C.G.S. § 15A-2000(f)(4) mitigating circumstance, that defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor, because there is conflicting evidence, including: (1) the record discloses no evidence from which the jury could have found

defendant guilty of premeditated murder of the victim without finding he actually killed her; (2) defendant's accomplice testified that he went into the victim's apartment on more than one occasion to steal various items but never entered the victim's bedroom, and no forensic evidence suggested the accomplice entered the victim's bedroom; (3) defendant admitted he went into the victim's bedroom and raped her, even though he contends she was already dead when he raped her; and (4) once a jury has found a defendant guilty of first-degree murder at trial, it is inappropriate to focus on anything other than defendant's character or record and any circumstance of the offense.

6. Sentencing— capital—mitigating circumstance—levels of security at prison—irrelevant to show defendant adjusted to prison

The trial court did not err in a capital sentencing proceeding by excluding evidence regarding the levels of security at Central Prison to support the nonstatutory mitigating circumstance, that defendant has adjusted well to the structured environment presented by Central Prison, because: (1) evidence of the different levels of security in the prison is irrelevant to show defendant's character, prior record, or circumstances of the offense; and (2) defendant was not precluded from adducing testimony from a program director at the prison about defendant's good behavior, adjustment, and freedom of movement within the prison.

7. Sentencing— capital—requested instructions—nonstatutory mitigating circumstances—controverted evidence

The trial court did not err in a capital sentencing proceeding by failing to give an instruction on the nonstatutory mitigating circumstance that defendant's criminal conduct was the result of circumstances unlikely to recur because: (1) defendant was not able to explain how the victim's murder occurred; (2) defendant has maintained throughout that his accomplice killed the victim before defendant raped her; (3) without knowing the circumstances that led to defendant's conduct and the victim's murder, a jury could not determine how likely such circumstances were to recur; (4) an expert testified that the combination of defendant's three psychological disorders made it hard to give an opinion without being speculative about how defendant might behave when in the presence of someone who might initiate criminal activity; and (5) the proposed circumstance is subsumed in the other mitigating circumstances submitted to the jury.

8. Evidence— cross-examination—character witnesses—allegations of violence—specific instances

The trial court did not commit plain error in a capital sentencing proceeding by failing to intervene ex mero motu and allowing cross-examination of defendant's character witnesses about allegations of violence by defendant against his wife because: (1) defendant placed his character at issue and the prosecutor thereafter was allowed to cross-examine under N.C.G.S. § 8C-1, Rule 405(a) about specific instances of defendant's misconduct in the context of his marriage; and (2) the prosecutor's questions to the witnesses about whether defendant had been "accused" or "charged" with hitting his wife were intended to address the witnesses' knowledge of defendant's acts of violence against his wife rather than his criminal record.

9. Sentencing— capital—requested instructions—racial considerations in sentencing

The trial court did not err in a capital sentencing proceeding by denying defendant's request for a jury instruction that the race of defendant and the victim should not be considered in the jury's sentencing recommendation because: (1) the same due process considerations that require the trial court to allow voir dire of prospective jurors about racial attitudes in capital cases does not also entitle defendant to a jury instruction about the need to disregard racial considerations in sentencing; and (2) the requested instruction in this case would have, in effect, injected racial bias into the jurors' consideration of defendant's sentence and diverted their attention away from the more pertinent issues of defendant's character and the circumstances of the crime.

10. Sentencing— capital—requested instructions—mitigating circumstances—mental impairments—combined instruction

The trial court did not err in a capital sentencing proceeding by denying defendant's request for separate instructions on each of his three alleged mental impairments (personality disorder, impaired intellectual functioning, and chronic substance dependence) and by giving a single instruction combining each of the mental impairments into a single mitigating circumstance because the trial court's instruction specifically referred to each of defendant's alleged mental disorders and instructed the jury to consider whether one or all of his mental disorders impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

11. Sentencing— capital—aggravating circumstances—evidence overlapping—considered separately

The trial court did not commit plain error in a capital sentencing proceeding by instructing the jury that it could consider as separate aggravating circumstances whether the murder was committed in the course of a burglary and whether the murder was committed in the course of a rape as set forth in N.C.G.S. § 15A-2000(e)(5) because where there is separate substantial evidence to support each aggravating circumstance, it is not improper for each aggravating circumstance to be submitted even though the evidence supporting each may overlap.

12. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing the death sentence for first-degree murder because: (1) the jury found the two submitted aggravating circumstances under N.C.G.S. § 15A-2000(e)(5) that the murder was committed while defendant was engaged in the commission of burglary, and the murder was committed while defendant was engaged in the commission of rape; (2) a death sentence has never been found to be disproportionate in North Carolina where a victim of first-degree murder was also sexually assaulted; (3) defendant was convicted of both felony murder and premeditated and deliberate murder; and (4) defendant sexually assaulted an elderly woman while she was dead or in her "last breath of life" in her home in her own bed.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Patti, J., on 29 August 1997 in Superior Court, Gaston County, upon defendant's conviction of first-degree murder. Heard in the Supreme Court 15 September 1999.

Michael F. Easley, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, and John Barnwell, Assistant Attorney General, for the State.

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

PARKER, Justice.

Defendant Christopher Lunore Roseboro was indicted for one count each of first-degree murder, first-degree rape, and larceny from

the person, and for three counts each of first-degree burglary, felonious larceny, and felonious possession of stolen goods. He was tried at the 28 February 1994 Criminal Session of Superior Court, Gaston County. Defendant was found guilty of first-degree murder on the basis of both premeditation and deliberation and felony murder; he was also convicted of first-degree burglary, first-degree rape, felonious larceny, and possession of stolen property. Following a capital sentencing proceeding, the jury recommended the death sentence for the first-degree murder, and the trial court sentenced defendant accordingly. The trial court also sentenced defendant to consecutive terms of life imprisonment for first-degree rape, fourteen years of imprisonment for first-degree burglary, and three years of imprisonment for felonious larceny. The trial court arrested judgment for the conviction of possession of stolen property. On appeal, this Court affirmed the convictions but granted defendant a new capital sentencing proceeding based on error in the jury instructions at the initial sentencing proceeding. *State v. Roseboro*, 344 N.C. 364, 474 S.E.2d 314 (1996). At defendant's second capital sentencing proceeding, the jury again recommended the death sentence for the first-degree murder conviction, and the trial court sentenced defendant pursuant to the recommendation.

On appeal to this Court, defendant brings forward fifty-eight assignments of error. For the reasons stated herein, we conclude that defendant's capital sentencing proceeding was free of prejudicial error and that the death sentence is not disproportionate.

The State's evidence at the resentencing proceeding tended to show the following. Defendant lived with Roger Bell in a one-bedroom apartment on West Second Avenue in Gastonia next to seventy-two-year-old Martha Edwards. Bell testified that on the night of 13 March 1992, he climbed through the window of the victim's ground-floor apartment, stole two vases and a telephone, and took them back to the apartment. On the second trip back to the victim's apartment, Bell heard snoring and discovered someone sleeping in the bedroom. Thinking no one was at home, Bell became unnerved and left through the kitchen door. At the apartment Bell then told defendant about what had happened. They both decided to return to the victim's apartment to take the floor-model television set that Bell had previously seen. They entered the victim's apartment through the kitchen door and carried the television back to their apartment.

Defendant and Bell returned to the victim's apartment to wipe away any fingerprints that they might have left. Noticing defendant

walking toward the victim's bedroom, Bell told defendant that they needed to leave. Defendant motioned for Bell to remain quiet. Bell then returned to his and defendant's apartment, leaving defendant in Ms. Edwards' apartment. Bell did not see defendant again until the next morning.

Defendant's testimony from his 1994 trial was read into evidence at his resentencing proceeding. Defendant had testified that on the night of the murder, he had smoked crack cocaine and then had fallen asleep. He awoke to find Bell carrying two vases and a telephone into the apartment. Bell left again and returned the second time with a microwave oven and a radio. Bell left again and returned the third time with a pocketbook and silverware. While Bell was gone that third time, defendant smoked more crack cocaine. Bell emptied the contents of the pocketbook and gave defendant a twenty-dollar bill that was in the purse. They then walked to Cherry Street so that defendant could buy more cocaine. In route to Cherry Street, Bell threw the pocketbook into the back of a truck.

Defendant agreed to return to the victim's apartment to help Bell take out the floor-model television. Defendant asked about the woman who was asleep, and Bell responded that he had smothered her. They then went back to the victim's apartment, and defendant went into the victim's bedroom. He saw a pillow on the victim's face and checked to see if she was dead. Observing no movement, defendant then removed the victim's underwear and raped her. Defendant maintained that at the time he raped the victim, she was already dead. Defendant claimed that he was not thinking; that he was "real high" and "paranoid"; and that "something just came over me."

The pathologist who performed the autopsy on the victim's body testified that the lacerations in the vagina showed that she had been sexually assaulted. The pathologist opined that based on the bruises on her face and the fluid in her lungs, the victim had been suffocated. Further, based on the small amount of blood around the vaginal area, the victim was either dying or dead at the time she was raped. The male DNA fractions found in the fluid taken from the victim's vagina matched defendant's DNA. The probability of another, unrelated individual having the same DNA is approximately one in 3.5 billion in the North Carolina black population.

Defendant presented evidence from his sister, his brother, and two cousins, who all claimed that defendant was not a violent person. Defendant's sister testified that defendant's father was ab-

sent during his childhood; that defendant had a good relationship with the grandparents who raised him; and that defendant's wife introduced him to drugs. Defendant's brother and first cousin testified that defendant always worked but that he simply associated with the wrong crowd.

Defense counsel read into evidence the prior testimony of Charles "Peanut" Dameron, who had known defendant since 1976 when they lived in the same area. Dameron had testified in the 1994 trial that on the morning of 14 March 1992, both Bell and defendant made statements to him: Bell told him that he had broken into the apartment and had stolen items. Defendant told him that he had not killed the victim and that Bell had killed her. This testimony was in accord with the statement that Dameron made to Detective Hawkins on 16 March 1992.

Dr. William M. Tyson, an expert in clinical and forensic psychology, testified that he evaluated defendant and found substantial evidence of borderline intelligence functioning, a personality disorder, and chronic substance dependence disorder. Dr. Tyson concluded that the combination of these psychological problems would have reduced defendant to acting on impulse with a limited ability to plan, reason, understand, and appreciate the consequences of his actions at the time of the offense. However, Dr. Tyson admitted that these three disorders did not eliminate defendant's responsibility for the offense; he believed that defendant knew what he was doing. Dr. Tyson also admitted that defendant's evaluation report from Dorothea Dix indicated that he had a history of physical abuse of his wife and that he admitted hitting her.

Benny Mack, a program director in Central Prison, testified that defendant had spoken to a young man on probation in the Think Smart program and had told him to be more respectful of adults and that defendant had always been courteous and respectful. Harold Williams, a staff psychologist at Central Prison, testified that defendant participated in group counseling sessions and was learning to accept some responsibility for his actions. George Denard, a case worker in the programs division at Central Prison, opined that defendant was not as bad as some of the younger inmates in that he is more respectful. Randall Spear, a clinical chaplain at Central Prison, testified that defendant participated in the choir and was involved in other religious activities in the prison. A former inmate testified that defendant got along with many of the inmates.

JURY SELECTION

[1] By one assignment of error, defendant contends that the trial court denied his rights to a fair and impartial jury and a reliable sentencing hearing under both the North Carolina Constitution and the United States Constitution by erroneously failing to excuse for cause prospective juror Harold Smith. Although juror Smith expressed strong concerns that the court system was failing, he felt that his opinions about the court system would not keep him from being fair and impartial. Since defendant had to use a peremptory challenge to remove juror Smith, defendant contends that he was denied his statutory right to fourteen peremptory challenges. At a subsequent point in the jury selection but before the full panel was selected, defendant exhausted his peremptory challenges. Defendant's request for additional peremptory challenges was denied. When this request was denied, defendant announced that he was satisfied with the last seated juror. Defendant did not expressly renew his earlier challenge for cause to juror Smith.

Defendant concedes that he did not comply with the requirements of N.C.G.S. § 15A-1214(h) for preserving this issue for appellate review. Nevertheless, defendant asserts that he sufficiently complied with the spirit of the statute to warrant review. Defendant submits that he clearly signaled to the trial court by his request for additional peremptory challenges during the questioning of the last juror that he desired to excuse juror Smith and that his declaration of satisfaction was not an indication of satisfaction with the panel but rather an indication of having no peremptory challenges remaining. We disagree.

N.C.G.S. § 15A-1214(h) prescribes the only method of preserving for appellate review a denial of a challenge for cause. Counsel must first have exhausted his peremptory challenges, must have renewed for cause as to each prospective juror whose previous challenge for cause had been denied, and must have had his renewed motion denied as to the juror in question. *See State v. Ball*, 344 N.C. 290, 304, 474 S.E.2d 345, 353 (1996), *cert. denied*, 520 U.S. 1180, 137 L. Ed. 2d 561 (1997). Defendant failed to follow this mandatory statutory procedure to preserve for appellate review his exception to the ruling on his challenge for cause and is not entitled to relief. We overrule this assignment of error.

[2] In his next assignment of error, defendant contends that the trial court denied his constitutional rights to a fair and impartial jury and

a fair sentencing hearing by failing to excuse for cause four prospective jurors who were tainted by the remarks of pro-death penalty prospective jurors Bobby Baker and Robert Pearson during *voir dire*. We disagree. The trial court informed the prospective jurors that the penalty of life imprisonment means a term of imprisonment for life. Prospective juror Baker was excused for cause after he stated that he would vote for the death penalty to ensure that justice was upheld. The State then expressed satisfaction with the remaining prospective jurors, including juror Pearson, who expressed concerns about convictions being overturned on appeal.

Defendant moved to strike the remainder of the panel on the basis of these remarks of prospective jurors Baker and Pearson. The trial court denied the motion, noting that it had properly instructed the jury as required by this Court. Defendant then used peremptory challenges to remove each of these four prospective jurors whom he considered to be tainted by these remarks. Defendant renewed this motion and also requested and was allowed an additional peremptory challenge. After exhausting his peremptory challenges, defendant again requested additional peremptory challenges, which the trial court denied.

As noted in the previous assignment of error, defendant failed to properly preserve for appellate review his exception to the trial court's denial of his challenges for cause to any juror. N.C.G.S. § 15A-1214(h) (1997). Although defendant renewed his challenges to the jurors at a later time, he failed to renew them at a time when he had exhausted his peremptory challenges and failed to renew each of his previously denied challenges for cause. *Ball*, 344 N.C. at 304, 474 S.E.2d at 353. Accordingly, we overrule this assignment of error.

SENTENCING

[3] In his next assignment of error, defendant contends that his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution were violated when the prosecutor during closing argument improperly encouraged the jury to consider the sentences of defendant's accomplice, Roger Bell, in determining the proper sentence to be imposed on defendant. Defendant submits that he was denied a fair trial by the trial court's failure to intervene *ex mero motu* and admonish the prosecutor, instruct the jury, or otherwise cure the prejudice. We disagree.

Roger Bell testified for the prosecution, and in the course of his testimony admitted that he was currently serving three consecutive life sentences for convictions relating to the burglary and murder of Ms. Edwards. Defense counsel later stipulated during defendant's presentation of the evidence that defendant had been convicted in March 1994 of first-degree murder, first-degree rape, first-degree burglary, and felonious larceny and that he had received consecutive sentences of life plus seventeen years for the noncapital offenses. During closing argument, the prosecutor addressed each of defendant's proffered mitigating circumstances and offered reasons to reject them. One of those mitigating circumstances was the "catchall" mitigating circumstance: "Any other circumstance arising from the evidence which the jury deems to have mitigating value." N.C.G.S. § 15A-2000(f)(9) (1997). Addressing the "catchall" mitigating circumstance, the prosecutor stated:

> But, ladies and gentlemen, there is not any mitigating circumstance that they argue about Roger Bell's sentence. He has got life plus life plus life. How is that mitigating for Mr. Bell? Excuse me. Toward Mr. Roseboro whereas if he gets life in this case? And they told you what his sentences in the other cases were. If he gets life in this case, then he has life plus life plus fourteen plus three. Less time than Mr. Bell. So how is Mr. Bell's sentence a mitigating? It is not.

Defendant did not object to this argument at the time. When a defendant fails to object to an allegedly improper closing argument, the standard of review is whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. *See State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, — U.S. —, 145 L. Ed. 2d 80, (1999). In a capital trial, the prosecutor is given wide latitude during jury arguments, *see State v. Warren*, 348 N.C. 80, 124, 499 S.E.2d 431, 456, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998), and has a duty to vigorously present arguments for the sentence of death using every legitimate method. *See State v. Daniels*, 337 N.C. 243, 277, 446 S.E.2d 298, 319 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995).

Evidence of a co-defendant's sentence is not relevant to a defendant's character or record or to the circumstances of the killing; hence, such evidence is not relevant to show a mitigating circumstance. *See State v. Sidden*, 347 N.C. 218, 231, 491 S.E.2d 225, 232 (1997), *cert. denied*, 523 U.S. 1097, 140 L. Ed. 2d 297 (1998). This Court has, how-

ever, recognized that the jury may consider an accomplice's sentence as a mitigating circumstance under the "catchall" instruction. *See State v. Williams*, 305 N.C. 656, 687, 292 S.E.2d 243, 262, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982); *see also* N.C.G.S. § 15A-2000(f)(9). With respect to the "catchall" mitigating circumstance, the jury here was instructed: "Finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value." Therefore, the prosecution could properly argue in opposition to the "catchall" mitigating circumstance that the jury should not give any mitigating value to the fact that Bell was not sentenced to death. The prosecution did not imply, as defendant argues, that Bell's sentence could be treated as a nonstatutory aggravating circumstance. The argument did not warrant the trial court's intervention *ex mero motu*, and we overrule this assignment of error.

[4] In another assignment of error, defendant contends that the trial court violated his Eighth and Fourteenth Amendment rights by refusing to give a peremptory instruction on the statutory mitigating circumstance that "the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired" at the time of the offense. *See* N.C.G.S. § 15A-2000(f)(6). Defendant claims that this circumstance was supported by uncontroverted and credible evidence. We disagree.

A defendant is entitled, upon request, to a peremptory instruction on a statutory mitigating circumstance when the evidence supporting the circumstance is uncontroverted. *See State v. Simpson*, 341 N.C. 316, 344, 462 S.E.2d 191, 207 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996). A review of the record reveals that all the evidence did not support this mitigating circumstance. Defendant's testimony at his 1994 trial was read into evidence at this capital resentencing proceeding. Despite the fact that defendant was under the influence of crack cocaine on the night of the murder, he did not intimate in his testimony that he did not know what he was doing or that he could not stop himself. Defendant testified that when Bell returned from his second trip to the victim's apartment with more stolen items, defendant asked, "For you to be getting all this stuff, . . . where are these people at?" Bell first told defendant that the woman was asleep; and defendant replied, "Can't nobody sleep that hard and don't hear nobody go in their house." Once inside the victim's apartment, defendant asked again, "I don't hear nobody around. . . . Where is the people at?" When Bell and defendant went

back to the apartment later, defendant entered the victim's bedroom. He said that while he was in her bedroom, "Something just came over me. I don't know what it was. And, like I say, I committed a sex act with the woman." Further, Bell testified at the resentencing hearing that when defendant was walking down the hall toward Ms. Edwards' bedroom, he motioned for Bell to remain quiet.

In addition, Dr. Tyson, an expert in psychology, testified that he diagnosed defendant with three mental disorders and opined that these disorders impaired defendant's ability to appreciate the criminality of his conduct and conform his conduct to the law. However, Dr. Tyson did agree with defendant's evaluation report from Dorothea Dix indicating "no positive findings of any information suggestive of particular impairment during the time specific to the alleged crimes."

The record thus discloses conflicting evidence concerning whether defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. "[A] peremptory instruction is inappropriate when the evidence surrounding that issue is conflicting." *State v. Noland*, 312 N.C. 1, 20, 320 S.E.2d 642, 654 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). Therefore, the trial court did not err by denying defendant's motion for a peremptory instruction on this mitigating circumstance. We overrule this assignment of error.

[5] In another assignment of error, defendant contends that the trial court erred in failing to submit for the jury's consideration the statutory mitigating circumstance that "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). Defendant asserts that evidence was presented from which the jury could have found the existence of the (f)(4) mitigating circumstance and that the failure to submit this mitigating circumstance violated his right to due process and to be free from cruel and unusual punishment. We disagree.

After considering all the evidence, the jury in the guilt-innocence phase of defendant's 1994 trial found him guilty of premeditated and deliberate murder. The record discloses no evidence from which the jury could have found defendant guilty of premeditated murder of Ms. Edwards without finding that he actually killed her. Bell testified that he entered the victim's apartment on more than one occasion to steal various items but never entered the victim's bedroom, and no

forensic evidence suggested that Bell had been in the victim's bedroom. Conversely, defendant testified that Bell had told him that he, Bell, had killed the victim. Defendant admitted that he entered the victim's bedroom and raped her; this statement is consistent with the forensic evidence. Defendant maintained that the victim was already dead when he raped her; the pathologist opined that, in light of the small amount of vaginal bleeding, the victim was either dead or "in the last breath of life" when she was raped. The evidence demonstrates either that Bell killed the victim and defendant raped her afterwards or that defendant both killed and raped the victim. Accordingly, the trial court did not instruct the jury that it could find defendant guilty of premeditated and deliberate murder on a theory of aiding and abetting.

Defendant concedes that his conviction of first-degree murder cannot be relitigated for purposes of determining guilt or innocence. However, defendant submits that the jury's factual findings underlying the determination that defendant was guilty of first-degree murder at the guilt-phase does not preclude the resentencing jury from relitigating any of the facts underlying the conviction for purposes of determining the existence of the (f)(4) mitigating circumstance, which might be favorable to him. Under the guise of the (f)(4) mitigating circumstance, defendant is essentially seeking to retry the question of guilt, that is, whether he had a sufficiently culpable state of mind at the time of the murder. We have held that once a jury has found a defendant guilty of first-degree murder at trial, it is inappropriate for the sentencing jury to focus on anything other than the defendant's character or record and any circumstance of the offense. *See State v. Walls*, 342 N.C. 1, 52-53, 463 S.E.2d 738, 765 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). We have recognized that the defendant's character or record and the circumstances of the offense do not encompass "[l]ingering or residual doubt" of defendant's guilt. *State v. Hill*, 331 N.C. 387, 415, 417 S.E.2d 765, 779 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684, (1993). "Therefore, residual doubt is not a relevant circumstance to be submitted in a capital sentencing proceeding." *Id.*

Furthermore, this Court has held that once a jury has convicted a defendant of first-degree murder on a theory of premeditated and deliberate murder, at the sentencing proceeding the trial court does not need to instruct the jury to make a factual finding of the defendant's state of mind at the time of the 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). The trial jury in this case found defendant guilty of premeditated and deliberate murder. The evidence before the sentencing jury failed to support a finding that defendant was an accomplice in or accessory to a capital felony committed by another person, but it also failed to support a finding that defendant's participation was relatively minor. Accordingly, the trial court did not err in failing to submit the (f)(4) mitigating circumstance; and this assignment of error is without merit.

[6] In the next assignment of error, defendant contends that the trial court erred in violation of defendant's Eighth and Fourteenth Amendment rights by excluding evidence regarding the levels of security at Central Prison to support the nonstatutory mitigating circumstance that "[d]efendant has adjusted well to the structured environment presented by Central Prison." We disagree. During the presentation of defendant's evidence, Benny Mack, a program director at Central Prison, gave a favorable opinion of defendant. On redirect examination, defendant asked Mack to define the "maximum security prison" and to describe the different levels of security within the prison system. At that point, the trial court excused the jury and asked defense counsel about the relevance of this inquiry. Mack then described the different levels of security, the corresponding population in each level, and the different degrees of supervision in each level. Following this testimony, the trial court ruled:

> If you want to ask the witness in front of the jury if he is working, if Mr. Roseboro is working, if he is doing good deeds, you can ask him all those questions, but the jury just doesn't need to know the different levels of security.

In *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), the United States Supreme Court established that a jury in a capital case cannot "be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 57 L. Ed. 2d at 990; *see* N.C.G.S. § 15A-2000(a)(3). The United States Supreme Court has also held that evidence of a defendant's ability to adjust to prison life is relevant to a jury's sentencing recommendation and that a defendant is entitled to present evidence concerning his conduct and ability to adjust in prison. *Skipper v. South Carolina*, 476 U.S. 1, 4-5, 90 L. Ed. 2d 1, 6-7 (1986). Nonetheless, the trial court has the authority "to exclude, as irrelevant, evidence not bearing on the defendant's character, prior

record, or the circumstances of his offense." *Lockett*, 438 U.S. at 604 n.12, 57 L. Ed. 2d at 990 n.12.

Here, evidence as to the different levels of security in the prison is irrelevant to show defendant's character, prior record, or circumstances of the offense. Defendant argues that the trial court, in excluding the evidence, prevented him from showing that he was not considered by the prison staff to be dangerous or to require special supervision. However, the court's ruling did not preclude defendant from adducing testimony from Mack about defendant's good behavior, adjustment, and freedom of movement within the prison. The trial court ruled only that defendant could not present testimony about the levels of security at the prison since it was not pertinent to defendant. Thus, the trial court did not abuse its discretion; and this assignment of error is overruled.

[7] In another assignment of error, defendant contends that the trial court erred by refusing his request to submit for the jury's consideration the nonstatutory mitigating circumstance that defendant's criminal conduct was the result of circumstances unlikely to recur. Defendant claims that all the evidence demonstrates that the victim's death arose out of an unusual combination of events that are not likely to be duplicated in the future, namely, Bell's conduct which led defendant into the victim's home. We do not agree.

In order to succeed on the claim that the trial court erred by refusing to submit a mitigating circumstance for the jury's consideration, defendant must show that "(1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury." *State v. Benson*, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988). A review of the record reveals that the evidence does not support the circumstance that defendant's criminal conduct was the result of circumstances unlikely to recur. To the contrary, defendant was not able to explain how the victim's murder occurred. Defendant has maintained throughout that Bell killed the victim before defendant raped her. Without knowing the circumstances that led to defendant's conduct and the victim's murder, a jury could not determine how likely such circumstances were to recur.

Dr. Tyson, defendant's expert psychologist, testified that defendant suffered from three psychological disorders: a personality disorder, borderline intellectual functioning, and chronic substance

dependence. Dr. Tyson opined that the combination of all three of these psychological disorders contributed to the defendant's impulsiveness. Dr. Tyson also testified that "[i]t would be very hard to give an opinion without being speculative" about how defendant with these three psychological disorders "might behave when in the presence of someone who might initiate criminal activity." Thus, to conclude that defendant would not commit a similar crime under similar circumstances in the future would be speculation.

Further, the refusal of the trial court to submit the proposed mitigating circumstance is not error when the proposed circumstance is subsumed in the other mitigating circumstances submitted to the jury. *Benson*, 323 N.C. at 327, 372 S.E.2d at 521-22. In addition to finding that the proposed mitigating circumstance was not supported by the evidence, the trial court also rejected the circumstance on the basis that it was subsumed in another mitigating circumstance to be submitted to the jury, namely, "But for the initial unilateral act of burglary committed by Roger Bell, this series of events which ultimately resulted in the Defendant's commission of the crimes for which he has been convicted would probably not have occurred." Defendant argues that each of the two circumstances has a different focus and rests on independent evidence. We disagree. Both circumstances involve Bell setting in motion a series of events that led to the victim's death. Thus, the trial court properly determined that the proposed mitigating circumstance was subsumed in another mitigating circumstance to be submitted to the jury. We overrule this assignment of error.

[8] In another assignment of error, defendant contends that the trial court committed plain error when it failed to intervene *ex mero motu* and allowed cross-examination of defendant's character witnesses about allegations of violence by defendant against his wife. We disagree. On direct examination, defendant called three members of his family who testified either that defendant was not a violent person or that they had never known him to be violent. On cross-examination, the prosecutor questioned each witness about his or her knowledge of defendant's violent behavior toward his wife. Two of the three witnesses admitted that they had heard that defendant had hit his wife.

Defendant did not object to any of the prosecutor's questions at that time. Having failed to object, defendant is entitled to relief based on this assignment of error only if he can demonstrate plain error.

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *See State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue. The State in rebuttal can then introduce evidence of defendant's bad character. *See State v. Gappins*, 320 N.C. 64, 69, 357 S.E.2d 654, 658 (1987). Such evidence offered by the defendant or the prosecution in rebuttal must be "a pertinent trait of his character." N.C.G.S. § 8C-1, Rule 404(a)(1) (1999). Rule 405(a) provides in pertinent part:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

N.C.G.S. § 8C-1, Rule 405(a) (1999). Defendant placed his character at issue by having members of his family testify about his reputation for nonviolence or peacefulness, "a pertinent trait of his character." In accordance with Rule 405(a), the prosecutor then cross-examined these witnesses about whether they knew of or had heard any accusations that defendant had hit or been violent toward his wife.

Defendant argues that the prosecutor failed to limit his inquiry only to specific instances of misconduct by defendant by asking very general questions about whether the witnesses knew about any "violence in the marriage" or "allegations" of violence. Given that defendant's character witnesses testified that defendant was not a violent person, the prosecution was entitled to probe their knowledge of defendant's violence in his marriage. Such an inquiry was directed at specific instances of defendant's misconduct in the context of his marriage, not just general charges of violent behavior. On this basis, defendant's argument that the prosecutor elicited irrelevant information concerning problems in defendant's marriage is without merit.

Defendant also argues that the trial court should not have allowed the prosecution to ask the character witnesses whether defendant had been "accused" of or "charged" with hitting his wife. One of the passages cited by defendant is as follows:

Q. You indicated that you had never known Chris [defendant] to be violent?

A. No.

Q. Had you heard any accusations from Laurie [wife] about him being violent during their marriage?

A. One time.

Q. One time? Do you know if Laurie ever had him charged with being violent toward her, any kind of criminal action?

A. One time that I know of.

Q. One time? He was married to Laurie for eight years. How long did he live with Laurie?

A. I think up until maybe six months before he got in trouble, these charges was brought against him.

Defendant relies on *State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988), in which we held that it was error to allow the prosecution to cross-examine a character witness about whether he knew that the defendant had been charged with a crime. "The fact that the defendant had been charged with a crime does not show he is guilty of the crime." *Id.* at 238, 367 S.E.2d at 623. However, *Martin* is distinguishable. Notwithstanding the prosecution's choice of words, the questions in this case were intended to address the witness' knowledge of defendant's acts of violence against his wife rather than his criminal record, as in *Martin*. In *Martin*, the question was based entirely on the fact that the defendant had been charged with selling marijuana in jail. *Id.* at 237, 367 S.E.2d at 623. Here, the prosecution's questions were based on evidence from the prior trial: a witness' testimony that defendant's wife had told him about defendant hitting her and defendant's evaluation report from Dorothea Dix which stated that defendant admitted hitting his wife.

We conclude that the prosecutor's questions were not improper cross-examination and that allowing the witness to answer was not error, much less plain error. Defendant is not entitled to relief, and this assignment of error is overruled.

[9] In the next assignment of error, defendant contends that the trial court committed constitutional error by denying defendant's request for a jury instruction that the race of defendant and the victim should

not be considered in the jury's sentencing recommendation. We disagree. Defendant's proposed jury instruction was as follows:

> MEMBERS OF THE JURY, I instruct you that you may *not* consider the race of the Defendant or that of the victim in making your determination about whether death or life imprisonment is the appropriate punishment for the Defendant. Because of the range of discretion that will be entrusted to you, there is a unique opportunity for racial prejudice to operate in this case. It remains an unfortunate fact in our society that racial prejudice can improperly influence a jury. Even subtle, less conscious racial attitudes must be eliminated by you from your consideration of the appropriate sentence in this case. It would be a violation of your oaths and you[r] duty under the laws of the United States and the State of North Carolina for you to give any consideration whatsoever to racial factors in reaching your decision in this case.

In *Turner v. Murray*, 476 U.S. 28, 90 L. Ed. 2d 27 (1986), the United States Supreme Court held that, upon request, "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Id.* at 36-37, 90 L. Ed. 2d at 37. Defendant argues that the same due process considerations that require the trial court to allow *voir dire* of prospective jurors about racial attitudes in capital cases also entitled defendant to a jury instruction about the need to disregard racial considerations in sentencing. Rejecting a similar argument in *State v. Richardson*, 342 N.C. 772, 467 S.E.2d 685, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996), we noted that "*Turner* is not authority for the proposition that a trial court in the trial of an interracial crime must instruct the jury to disregard racial considerations where defendant requests such an instruction." *Id.* at 792, 467 S.E.2d at 696.

Given this precedent, the trial court was not required to instruct the jurors that they should avoid giving any consideration to racial factors in defendant's sentencing. Contrary to defendant's position, the instruction in this case would have, in effect, injected racial bias into the jurors' consideration of defendant's sentence and diverted their attention away from the more pertinent issues of defendant's character and the circumstances of the crime. Therefore, we conclude that the trial court did not err in refusing to give the requested instruction. We overrule this assignment of error.

[10] In another assignment of error, defendant contends that the trial court erred by denying defendant's request for separate instructions on each of defendant's alleged mental impairments and by giving a single instruction combining all of the mental impairments into a single mitigating circumstance. Defendant argues that the trial court's failure to instruct on the three separate mitigating circumstances impinged on the jury's full consideration of the mitigating evidence in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution. Defendant also disputes the trial court's instruction on the ground that it limited the jury's consideration to the evidence that defendant "used crack cocaine before the killing," ignoring defendant's chronic cocaine dependence. He contends that the instruction improperly limited the scope of the circumstance. We disagree.

Dr. Tyson testified that defendant suffered from three psychological disorders: personality disorder, impaired intellectual functioning, and chronic substance dependence. Dr. Tyson opined that these disorders "potentiat[ed]" each other, limited defendant's "ability to function as an adult, to think through his behavior, make decisions with any appreciation of the future." Both Bell and defendant testified that defendant was using crack cocaine on the night of the murder. Based on this evidence, defendant requested three separate mitigating circumstances under N.C.G.S. § 15A-2000(f)(6) each of which instructed 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" by one of the following: defendant's "personality disorder," "borderline range of intelligence," and "long-term, chronic and severe abuse of crack-cocaine at and around the time of the offenses." The trial court rejected defendant's request and subsequently combined all of defendant's allegedly impairing mental conditions into the single (f)(6) mitigating circumstance. The trial court instructed in pertinent part as follows:

> You would find this mitigating circumstance if you find that the Defendant suffered from a personality disorder and/or had a borderline range of intelligence and/or used crack cocaine before the killing and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

The trial court's instruction specifically referred to each of defendant's alleged mental disorders and instructed the jury to con-

sider whether one or all of defendant's mental disorders impaired defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Defendant was not prohibited from presenting evidence on each of these disorders and had ample opportunity to argue the weight of that evidence to the jury. *See State v. McLaughlin*, 341 N.C. 426, 452, 462 S.E.2d 1, 15 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996). The instruction given comported with defendant's evidence and was a correct statement of the law. Therefore, we overrule this assignment of error.

[11] In the next assignment of error, defendant contends that the trial court erred when it instructed the jury that it could consider as separate aggravating circumstances whether the murder was committed in the course of a burglary and whether the murder was committed in the course of a rape as set forth in N.C.G.S. § 15A-2000(e)(5). We disagree.

Defendant did not object to this instruction at trial; therefore, our review is limited to review for plain error. N.C. R. App. P. 10(b)(2). "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*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998).

We have consistently held that "where there is separate substantial evidence to support each aggravating circumstance, it is not improper for each aggravating circumstance to be submitted even though the evidence supporting each may overlap." *State v. Conaway*, 339 N.C. 487, 530, 453 S.E.2d 824, 851 (1995), *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). Moreover, "[w]e have interpreted N.C.G.S. § 15A-2000(e) to permit the submission of separate aggravating circumstances pursuant to the same statutory subsection if the evidence supporting each is distinct and separate. . . . [I]t is proper for a trial court to allow such multiple submission of the (e)(5) aggravating circumstance." *State v. Bond*, 345 N.C. 1, 34-35, 478 S.E.2d 163, 181 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997).

Defendant argues that the burglary and the rape were not separate and distinct felonies since both felonies were committed against

the same victim and occurred as part of one transaction. To the contrary, the evidence shows that defendant, along with Bell, broke into the victim's home at night with the intent to steal her television. Defendant and Bell returned later, and defendant entered the victim's bedroom and raped her. A review of the record discloses that the evidence is sufficient to support separate crimes of burglary and rape.

Defendant also argues that the legislature did not intend for a jury to consider each crime specified in N.C.G.S. § 15A-2000(e)(5) as a separate aggravating circumstance. Defendant asserts that under the rules of statutory construction the wording of N.C.G.S. § 15A-2000(e)(5) requires that a defendant who commits a murder while engaged in a burglary and while raping the victim be treated for purposes of sentencing the same as a defendant who murders the victim while engaged solely in a burglary. We hold, as defendant concedes this Court has done previously, that the General Assembly did not so intend. *See id.* The trial did not commit error, much less plain error, in submitting each of these aggravating circumstances for the jury's consideration, and this assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises eleven additional issues that have been decided contrary to his position previously by this Court: (i) whether the trial court erred when it did not instruct the jury that it would have to consider and determine whether defendant had a sufficiently culpable state of mind to warrant the imposition of the death sentence; (ii) whether the trial court erred when it denied defendant's motion to question prospective jurors regarding parole eligibility or to instruct prospective jurors that defendant would not be eligible for parole for at least twenty years; (iii) whether the trial court erred when it refused to include defendant's requested instruction regarding parole eligibility in its final charge to the jury; (iv) whether the trial court erred when it instructed the jury that their verdict on Issues One, Three, and Four must be unanimous; (v) whether the trial court erred when it instructed the jury that defendant had the burden to prove the mitigating circumstances by a preponderance of evidence and that the evidence must "satisfy" the jury that the mitigating circumstances existed; (vi) whether the trial court erred when it instructed the jurors that they were to decide whether any of the nonstatutory mitigating circumstances had mitigating value; (vii) whether the trial court erred when it refused to give defendant's requested instruction

defining the type of factors that might be considered mitigating; (viii) whether the trial court erred when instructing the jurors on Issues Three and Four that they "may" consider any mitigating circumstance or circumstances that they determined to exist; (ix) whether the trial court erred when it instructed the jury on Issues Three and Four that "each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue Two"; (x) whether the trial court erred when it denied defendant's request for allocution; and (xi) whether the death penalty statute is unconstitutionally vague and overbroad and imposed in a discretionary and discriminatory manner.

Defendant raises these issues for purposes of urging this Court to reexamine its prior holdings. We have considered defendant's arguments on these issues and conclude that there is no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY

[12] Finally, defendant argues that the death sentence imposed upon him in this case is excessive and disproportionate to the sentence imposed in similar cases, considering both the crime and the defendant. This Court exclusively has the statutory duty in capital cases to review the record and determine (i) whether the record supports the aggravating circumstances found by the jury; (ii) whether the death sentence was entered 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). Having thoroughly reviewed 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 suggestion that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. Accordingly, we turn to our final statutory duty of proportionality review.

The jury at defendant's capital trial in 1994 found defendant guilty of first-degree murder based on premeditation and deliberation and felony murder. At defendant's 1997 capital resentencing proceeding, the jury found both the submitted aggravating circumstances: (i) that the murder was committed while defendant was engaged in the commission of burglary, N.C.G.S. § 15A-2000(e)(5); and (ii) that the mur-

der was committed while defendant was engaged in the commission of rape, N.C.G.S. § 15A-2000(e)(5).

The jury found two statutory mitigating circumstances: (i) that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6); and (ii) that defendant aided in the apprehension of another capital felon, N.C.G.S. § 15A-2000(f)(8). Three statutory mitigating circumstances were submitted but not found: (i) no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (ii) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); and (iii) the catchall, N.C.G.S. § 15A-2000(f)(9). Of the nine nonstatutory mitigating circumstances submitted, the jury found four that had mitigating value.

We begin our analysis by comparing this case to those cases in which this Court has determined the sentence of death to be disproportionate. We have determined the death penalty to be disproportionate on seven occasions. *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*, 522 U.S. 900, 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). We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. Notably, "this Court has never found a death sentence disproportionate in a case involving a victim of first-degree murder who was also sexually assaulted." *State v. Penland*, 343 N.C. 634, 666, 472 S.E.2d 734, 752 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997).

Defendant contends that there are several cases in which this Court has affirmed life sentences in similar cases involving murder and a sexual offense. However, "the fact that in one or more cases factually similar to the one under review a jury or juries have recommended life imprisonment is not determinative, standing alone, on the issue of whether the death penalty is disproportionate in the case under review." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 46, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). The determination of whether the death penalty is disproportionate in this particu-

lar case "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *Id.*, 443 S.E.2d at 47.

Several characteristics in this case support the determination that the imposition of the death penalty was not disproportionate. Defendant was convicted of both felony murder and premeditated and deliberate murder. We have noted that "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). Moreover, defendant sexually assaulted an elderly woman while she was dead or in her "last breath of life" in her home in her own bed. "A murder in the home 'shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure.' " *State v. Adams*, 347 N.C. 48, 77, 490 S.E.2d 220, 236 (1997) (quoting *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998).

This case is similar to cases in which this Court has found the death penalty proportionate. In *State v. Williams*, 350 N.C. 1, 510 S.E.2d 626, *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 162 (1999), we affirmed the death sentence where the defendant raped and brutally beat an elderly woman during an attempt to steal money to enable him to buy crack cocaine. Although the jury found no statutory mitigating circumstances, the jury did find as nonstatutory mitigating circumstances that at the time the defendant committed the crime, he was under the influence of crack cocaine and/or alcohol and that under oath, defendant expressed remorse for his actions and apologized to the victim's family. *Id.* at 37, 510 S.E.2d at 649. The jury found three aggravators, including two under N.C.G.S. § 15A-2000(e)(5). *Id.* (committed while in the commission of first-degree burglary and while in the commission of first-degree rape). In *State v. Adams*, 347 N.C. 48, 490 S.E.2d 220, we also affirmed the death sentence where the defendant murdered an elderly woman in her home after breaking in to steal money to buy drugs. As did *Williams* and *Adams*, this case involves the premeditated murder of an elderly woman in her home. The fact that defendant in this case raped the victim in her own bed while she was dead or in her "last breath of life" elevates the brutality.

For the foregoing reasons we conclude that defendant's death sentence was not excessive or disproportionate. We hold that de-

fendant received a fair capital sentencing proceeding, free from prejudicial error. The sentence of death is, therefore, left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. GARY DEAN GREENE

No. 456A87-5

(Filed 5 May 2000)

1. **Jury— selection—capital sentencing—meaning of life imprisonment**

The trial court did not err in a capital resentencing proceeding by instructing a prospective juror in the presence of other jurors that life imprisonment means imprisonment in the state's prison for life, and that he should not consider what some other arm of the government might do in the future, because: (1) a defendant's eligibility for parole is not a proper matter for consideration by a jury in a capital case; (2) the trial court appropriately instructed the juror in language set forth in the pattern jury instructions for capital murders committed prior to 1 October 1994; and (3) defendant waived this issue because he failed to object to the trial court's remarks to the jurors about the meaning of a life sentence.

2. **Jury— selection—death penalty views—conflicting answers—judgment of trial court**

The trial court did not abuse its discretion in a capital resentencing proceeding by excusing for cause a juror who told the prosecutor that it would be hard for him to find the death penalty warranted under any circumstances and his religious beliefs would substantially impair his duty as a juror to recommend to the trial court a punishment of death if the evidence warranted it, but thereafter upon further questioning stated he could follow the law and vote for the death penalty even though it was against his beliefs, because conflicting answers given by prospective jurors illustrate that a prospective juror's bias may not be provable with unmistakable clarity, and thus, the reviewing courts must defer to the trial court's judgment.

3. Evidence— limiting cross-examination—witness's criminal record—no prejudice—waiver

The trial court did not violate defendant's Eighth and Fourteenth Amendment rights in a capital resentencing proceeding by limiting defendant's cross-examination of a State's witness as to her criminal record because: (1) although the Rules of Evidence do not apply in sentencing proceedings, Rule 609(b) could properly be used as a helpful guide to determine that defendant did not give proper notice of his intent to impeach the witness with a conviction, defendant did not make an offer of proof of whether the witness was actually convicted of the offenses, the exact nature of the offenses, or how long ago the convictions were obtained; (2) nothing in the record shows how defendant was prejudiced by exclusion of this impeachment evidence or that such information was relevant; and (3) defendant waived this constitutional issue since he did not raise it in the trial court.

4. Sentencing— capital—mitigating circumstance—no significant history of prior criminal activity

The trial court did not err in a capital resentencing proceeding by failing to submit to the jury the mitigating circumstance of no significant history of prior criminal activity under N.C.G.S. § 15A-2000(f)(1), after defendant requested it, because the focus is on whether the criminal activity is such as to influence the jury's sentencing recommendation and the evidence in the present case reveals: (1) most of defendant's prior criminal activity was recurrent, recent, and similar in nature to his conduct the day of the robbery and murder of his father; and (2) defendant had a significant history of recurrent and escalating criminal conduct, most of which was close in time to the robbery-murder.

5. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing the death sentence for first-degree murder because: (1) defendant was found guilty of first-degree murder based on premeditation and deliberation and under the felony murder rule; (2) the jury found the two aggravating circumstances that the murder was committed while defendant was engaged in the commission of a robbery under N.C.G.S. § 15A-2000(e)(5), and the murder was committed for pecuniary gain under N.C.G.S. § 15A-2000(e)(6); and (3) defendant showed no remorse for the murder of his vulnerable father.

Justice ORR dissenting.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered on 28 May 1998 by Lamm, J., after a capital resentencing proceeding held in Superior Court, Caldwell County, upon defendant's conviction of first-degree murder. Heard in the Supreme Court 11 October 1999.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, and Amy C. Kunstling, Assistant Attorney General, for the State.

Marshall L. Dayan for defendant-appellant.

FREEMAN, Justice.

Defendant, Gary Dean Greene, was indicted on 8 December 1986 for robbery with a dangerous weapon and the first-degree murder of his father, Pressly ("Press") Greene. He was tried capitally before a jury in August 1987 in Superior Court, Caldwell County. The jury found defendant guilty of robbery with a dangerous weapon and of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. The trial court subsequently sentenced defendant to death for the murder conviction and to forty years' imprisonment for the robbery conviction. On appeal, this Court found no error. *State v. Greene*, 324 N.C. 1, 376 S.E.2d 430 (1989).

The United States Supreme Court allowed defendant's writ of certiorari, vacating the sentence of death and remanding for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Greene v. North Carolina*, 494 U.S. 1022, 108 L. Ed. 603 (1990). This Court found *McKoy* error and remanded the case for a new capital sentencing proceeding. *State v. Greene*, 329 N.C. 771, 408 S.E.2d 185 (1991). Defendant was again sentenced to death on 28 May 1998 in Superior Court, Caldwell County.

At the resentencing proceeding, the State's evidence tended to show that in early 1986, defendant and his girlfriend since the summer of 1984, Cindy Jones Hopson, moved into a trailer behind the home of defendant's parents. Thereafter, defendant continued a pattern of habitually stealing money from his father.

On 1 May 1986, around 3:30 p.m., Hopson picked defendant up from work in defendant's car. They used the last of their money to buy beer and drank most of it while riding around in the car. Upon returning to the trailer, defendant and Hopson drank the remaining

beer. Wanting more, defendant told Hopson he was going to kill Press and left the trailer carrying a shotgun. When defendant returned to the trailer, he was soaking wet, had "speckles of blood" on his shoes, and was carrying the shotgun. He informed Hopson, "I beat the son of a bitch to death."

Defendant asked Hopson to get him a change of clothes. As Hopson walked to the bedroom to get the clothes, she saw defendant standing in the bathroom holding a wad of money in one hand. Defendant changed and put his wet clothes and shotgun in a brown paper grocery bag.

Defendant and Hopson then left the trailer to take the dog belonging to Hopson's mother to get a haircut. Having forgotten the dog's chain, Hopson returned to the trailer for it at which time she noticed water running out of the basement of Press' house. Defendant told her the water was from his rinsing the basement to wash away Press' blood. Defendant said that he first hit his father when Press was bent over the well in the basement and that he dragged Press' body to the bottom of the basement stairs to make it look like Press had accidentally fallen down the stairs.

On the way to the home of Hopson's mother, defendant and Hopson stopped at a local grocery store to purchase beer with the money that defendant had stolen from his father. As they continued their trip, they drove over the Catawba River bridge on Highway 321, where defendant threw into the river the bag containing his wet clothes and shotgun. Later that same evening, on the return trip to his trailer, defendant threw the shoes he was wearing at the time of the murder into the Catawba River. Further along their route home, defendant instructed Hopson to pull over so he could conceal the money he had stolen. Defendant told Hopson he would kill her if she ever breathed a word of what he had done and she should never admit to anything.

When defendant and Hopson returned home, they were told that defendant's mother had discovered Press dead and had called law enforcement. The investigating officer, Captain Danny Barlow, from the Caldwell County Sheriff's Department, Hopson, and defendant went to defendant's trailer where defendant offered to allow Barlow to search the trailer.

The Caldwell County Sheriff's Department closed Press' case on 27 May 1986, ruling the death accidental.

Sometime after May 1986, Hopson moved out of the trailer. One night in July 1986, when Hopson and her roommate, Susan Newton, were drinking, she told Newton that defendant had murdered Press. In August 1986, the State Bureau of Investigation ("SBI") reopened the case. In October, the SBI interviewed Newton and learned of the July conversation. Hopson eventually told SBI Special Agent Rodney Knowles that defendant murdered his father, Press.

Luminol testing revealed the presence of blood in Press' basement. Additional luminol testing at defendant's trailer showed the presence of blood on the bed, the floor of the bathroom, the commode area, the bathtub, and the sink. On 8 December 1986, defendant was charged with the first-degree murder of his father.

[1] Defendant first contends that the trial court erred by instructing a prospective juror in the presence of other jurors that life imprisonment means imprisonment in the state's prison for life, and that he should not consider what some other arm of the government might do in the future. We disagree.

This Court has determined that a defendant's eligibility for parole is not a proper matter for consideration by a jury in a capital case. *State v. White*, 343 N.C. 378, 389, 471 S.E.2d 593, 599, *cert. denied*, 519 U.S. 936, 136 L. Ed. 2d 229 (1996). Here, the trial court was faced with a prospective juror who asked, in the presence of other prospective jurors during jury selection, whether parole was a possibility if defendant received a life sentence. Because defendant committed the murder of his father prior to the 1 October 1994 change in North Carolina's sentencing laws, he was eligible for parole and was not entitled to an instruction to the jury that a life sentence means a sentence of life without parole. *See State v. Skipper*, 337 N.C. 1, 43, 446 S.E.2d 252, 275 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). Therefore, the trial court appropriately instructed the juror in language set forth in the pattern jury instructions for capital murders committed prior to 1 October 1994, N.C.P.I.—Crim. 150.10 n.2 (1998), and previously approved by this Court in *State v. Robbins*, 319 N.C. 465, 518, 356 S.E.2d 279, 310, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

Although defendant argues that the trial court's instruction amounted to plain error, we have previously decided that plain error analysis applies only to instructions to the jury and evidentiary matters. *See State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). "We decline to

extend application of the plain error doctrine to situations in which the trial court has failed to give an instruction during jury *voir dire* which has not been requested." *Id.* at 81, 505 S.E.2d at 109. Furthermore, defendant failed to object to the trial court's remarks to the jurors about the meaning of a life sentence. Therefore, defendant has waived his right to assign error to the trial court's instructions. *See State v. Anderson*, 350 N.C. 152, 187, 513 S.E.2d 296, 317, —— U.S. ——, 145 L. Ed. 2d 326 (1999).

[2] In his second argument, defendant contends the trial court abused its discretion by excusing for cause a juror who was fit to serve, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 19, 23, and 27 of the North Carolina Constitution; and N.C.G.S. § 15A-1212 (1999). We disagree.

The decision " '[w]hether to allow a challenge for cause in jury selection is . . . ordinarily left to the sound discretion of the trial court which will not be reversed on appeal except for abuse of discretion.' " *State v. Stephens*, 347 N.C. 352, 365, 493 S.E.2d 435, 443 (1997) (quoting *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992)), *cert. denied*, —— U.S. ——, 142 L. Ed. 2d 66 (1998). In the present case, juror Watson, the son of a preacher, told the prosecutor that he had reasonably strong religious beliefs about the death penalty which he had held for a long period of time. He said that, because of those beliefs, it would be hard for him to find the death penalty warranted under any circumstances. He further stated that his religious beliefs would substantially impair his duty as a juror to recommend to the trial court a punishment of death if the evidence warranted it. Upon further questioning, Mr. Watson concluded that he could follow the law and "go by which one I thought was right, whoever proved the most." Thereafter he stated that, if he did that and he thought the death penalty was right, "I'd have [to] vote for that." However, he then said, "and that would be against what I believe." In *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990), this Court, confronted with similar challenges for cause, held:

> The conflicting answers given by these prospective jurors illustrate clearly the United States Supreme Court's conclusion that a prospective juror's bias may, in some instances, not be provable with unmistakable clarity. In such cases, reviewing courts must defer to the trial court's judgment concerning

whether the prospective juror would be able to follow the law impartially.

Id. at 624, 386 S.E.2d at 426.

The record fails to show the trial court abused its discretion in determining that the juror's views on the death penalty would have prevented or substantially impaired the performance of his duties as a juror in accordance with his oath and the court's instructions. The trial court properly removed the challenged juror.

[3] In his third assignment of error, defendant contends that the trial court violated the Eighth and Fourteenth Amendments to the United States Constitution by limiting his cross-examination of State's witness Cindy Hopson as to her criminal record. He contends that he was prevented from attacking the witness' credibility and thus prevented from presenting relevant mitigating evidence. We disagree.

Ordinarily, notice of intent to impeach a witness with a conviction more than ten years old is necessary to provide an adverse party with a fair opportunity to contest the use of such evidence. *See* N.C.G.S. § 8C-1, Rule 609(b) (1999). The Rules of Evidence do not apply in sentencing proceedings; however, they may be helpful as a guide to reliability and relevance. See *State v. Bond*, 345 N.C. 1, 31, 478 S.E.2d 163, 179, (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). The trial judge properly used Rule 609(b) as a guide in this case. Defendant did not give notice of his intent to impeach Hopson, nor did he make an offer of proof as to whether Hopson was actually convicted of the offenses, what the convictions were, the exact nature of the offenses involved, or how long ago the convictions were obtained. Thus, there is nothing in the record which would show this Court that defendant might have been prejudiced by the trial court's excluding impeachment evidence or that such information might have been relevant.

Additionally, defendant has waived appellate review of an alleged constitutional issue because he did not raise the constitutional issue in the trial court. *See State v. Call*, 349 N.C. 382, 424, 508 S.E.2d 496, 513 (1998).

[4] In defendant's fourth assignment of error, defendant contends that the trial court erred in failing to submit to the jury the mitigating circumstance of no significant history of prior criminal activity after defendant requested it. N.C.G.S. § 15A-2000(f)(1) (1999). At the resentencing hearing, evidence before the court of defendant's prior crim-

inal record included the following: For the eighteen years prior to the murder of his father and since attaining the age of nineteen in 1968, he had been convicted of twelve offenses directly involving alcohol, one count of assault on a female, one drug offense, one count of damage to property, one count of burning personal property, and one count of felonious larceny. In addition, there was evidence of recent and recurrent uncharged criminal activity reflecting that, in the two years prior to robbing and murdering his father, defendant habitually went into his father's home and stole money. Hopson testified that

> [w]hen Pressley would work in the garden, he would always put his work clothes on. And he would take his clean clothes, everyday clothes, and lay them in his bedroom. And Gary would go up through the basement and go up and get always even denominations, you know, like a hundred, 200, not an off figure. But this particular day Pressley had his work clothes on, but he had his billfold on him. Because Gary stated to me he said, "Damn, he's got his billfold on him."

Hopson also testified that during her two-year relationship with defendant, he would hit her.

We have previously held:

> In deciding whether to submit this statutory mitigating circumstance, the trial court must determine whether a rational jury could conclude that the defendant had no significant history of prior criminal activity. *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). A defendant's criminal history is considered "significant" if it is likely to affect or have an influence upon the determination by the jury of its recommended sentence. *Id.*

State v. Jones, 339 N.C. 114, 157, 451 S.E.2d 826, 849-50 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995).

We note that there has been some confusion as to the exact type of crime and number of offenses which determine when the (f)(1) mitigator should or should not be given. In an effort to clarify the law, we once again stress that the focus should be on whether the criminal activity is such as to influence the jury's sentencing recommendation. *See State v. Williams*, 343 N.C. 345, 371, 471 S.E.2d 379, 393 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997).

In the present case, much of defendant's prior criminal activity was recurrent, recent, and similar in nature to his conduct the day of

the robbery and murder of his father, and for these reasons significant. Most of the criminal activity which resulted in defendant's prior convictions occurred after defendant was thirty years old and within seven years of the murder of his father. Prior to robbing his father and beating him to death with a shotgun, defendant habitually sneaked into his father's house and stole money while his father was outside working. During that same time, defendant would assault his girlfriend, Cindy Hopson. Thus, defendant had a significant history of recurrent and escalating criminal conduct, much of which was close in time to the robbery-murder. When the trial court is deciding whether a rational juror could find the (f)(1) mitigating circumstance to exist, the nature and age of the prior criminal activities are important, and the mere number of criminal activities is not dispositive. *State v. Walls*, 342 N.C. 1, 56, 463 S.E.2d 738, 767 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). Furthermore, unadjudicated crimes may properly be considered in determining the sufficiency of the evidence under (f)(1). *State v. Ingle*, 336 N.C. 617, 643, 445 S.E.2d 880, 893 (1994), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995).

Defendant's conduct in the robbery-murder was strikingly similar to his lengthy history of prior criminal activity and convictions involving alcohol-related offenses, drugs, damage to property, assault, larceny, and his recent habitual thefts from his father. On the day of the robbery-murder, defendant and his girlfriend had been sharing a twelve-pack of beer. Defendant was upset that his father had his wallet with him because he wanted more beer, and he wanted, as he so often had before, to steal money from his father. The record also shows that he wanted to kill his father to better insure his share of an inheritance. After mercilessly and violently beating his seventy-four-year-old father to death with a shotgun, stealing his money, cleaning up the bloody crime scene, changing his bloodstained clothes, and disposing of the evidence, defendant went to buy more beer with the money he had stolen from his father. In light of these similarities to defendant's repeated, recent, and escalating criminal activities related to substance abuse, stealing, and violence, the trial court correctly determined that no rational juror could have concluded that defendant's prior criminal activity was insignificant and thus that this history would not have influenced or had an effect upon the jury verdict as a mitigating circumstance. The trial court correctly reasoned defendant's past criminal history was significant. *See, e.g.*, *State v. Sexton*, 336 N.C. 321, 375, 444 S.E.2d 879, 910, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994).

Defendant concedes that his next two arguments have been previously decided contrary to his position by this Court: (1) the trial court erred by permitting jurors to reject submitted nonstatutory mitigating circumstances on the basis that they had no mitigating value, and (2) the trial court erred by using the term "may" in its instructions in sentencing Issues Three and Four.

Defendant has raised these issues so that we may reexamine our prior holdings and to preserve these issues for possible further judicial review. We have considered defendant's arguments and find no compelling reason to depart from our prior holdings.

[5] Having concluded that defendant's capital sentencing proceeding was free from prejudicial error, we must now review the record and determine: (1) whether the evidence supports the aggravating circumstances found by the jury; (2) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2). After having reviewed the record, transcript, and briefs in this case, we conclude that they fully support the aggravating circumstances found by the jury. We further conclude that the sentence of death in this case was not imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

In the present case, defendant was found guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. He was also convicted of robbery with a dangerous weapon. Following a capital sentencing proceeding, the jury found two aggravating circumstances: (1) the murder was committed while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5); and (2) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6).

The trial court submitted no statutory mitigating circumstances. At least one juror found only one of the five nonstatutory mitigating circumstances which had been submitted for its consideration, "whether the defendant had a good relationship with his father prior to the murder." No juror found any mitigating circumstances under the statutory catchall, N.C.G.S. § 15A-2000(f)(9).

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). As already noted, the record shows that the jurors deliberated and made their findings as to the aggravating and mitigating circumstances as well as their recommendation of death without undue passion or prejudice. No improper considerations appear in the record.

Neither is the imposition of the death penalty in defendant's case disproportionate or excessive in comparison to similar cases. First, the jury convicted defendant under the theory of premeditation and deliberation. This Court has stated that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Artis*, 325 N.C. at 341, 384 S.E.2d at 506. Second, defendant showed no contrition for the heartless murder of his aging father, a crime he sought to make look like an accident. In our prior consideration of this case on proportionality review, this Court specifically focused on the relationship of defendant to his victim, the victim's position of enhanced vulnerability, the number of blows inflicted, and the attempt to make the murder look like an accident. *Greene*, 324 N.C. at 25-26, 376 S.E.2d at 445. This Court found that defendant's actions "show a meanness on the part of a mature, calculating adult without remorse for his crime or mercy towards his victim." *Id.* at 26, 376 S.E.2d at 445. In especially brutal murders where the victim is particularly vulnerable, where the defendant has shown no remorse for his actions, and where the jury found intent to kill, death sentences have been returned. *See, e.g.*, *State v. Frye*, 341 N.C. 470, 461 S.E.2d 644 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996); *State v. Burr*, 341 N.C. 263, 461 S.E.2d 602 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate. We hold that defendant received a fair capital sentencing proceeding, free of prejudicial error. Accordingly, we leave the judgment of the trial court undisturbed.

NO ERROR.

Justice ORR dissenting.

The majority notes "that there has been some confusion as to the exact type of crime and number of offenses which determine when

the (f)(1) mitigator should or should not be given." The majority then attempts to clarify the law by restating the underlying principle used when analyzing whether the (f)(1) statutory mitigating circumstance should be given: "the focus should be on whether the criminal activity is such as to influence the jury's sentencing recommendation." After a discussion of defendant's criminal history, the majority concludes that

> [i]n light of [the] similarities to defendant's repeated, recent, and escalating criminal activities related to substance abuse, stealing, and violence, the trial court correctly determined that no rational juror could have concluded that defendant's prior criminal activity was insignificant and thus that this history would not have influenced or had an effect upon the jury verdict as a mitigating circumstance.

In recent years, we have examined numerous cases involving submission of the (f)(1) mitigating circumstance and upheld the trial court's submission of that mitigator over the defendants' objections. In *State v. Williams*, 350 N.C. 1, 13, 510 S.E.2d 626, 635, *cert. denied*, — U.S. —, — L. Ed. 2d —, 68 U.S.L.W. 3228 (1999), an opinion written by then-Chief Justice Mitchell for a unanimous Court, we stated:

> Defendant next contends that the trial court erred by submitting the (f)(1) mitigating circumstance to the jury over defendant's objection. Defendant informed the trial court that he would not request submission of the (f)(1) mitigator because his history of beating women was closely related to the manner of death in Ms. Plunkett's murder. Thereafter, over defendant's objection, the trial court submitted the (f)(1) mitigating circumstance. The jury did not find the existence of the (f)(1) mitigator.
>
> Defendant asserts that no reasonable juror could have found that defendant's criminal history was insignificant, and therefore, it was error for the trial court to submit the circumstance. Evidence in the present case tended to show that defendant had been convicted of numerous misdemeanor assaults on females, as well as various other offenses including communicating threats, trespass, and burglary. The most serious of defendant's prior convictions were for assaults on his wife and girlfriends. One of those assaults occurred in 1995, four in 1992, and one in 1989. The trial court concluded from the evidence that a reason-

able juror could find that defendant had "no significant history of prior criminal activity," within the meaning of the statute, and that it was required to submit the (f)(1) statutory mitigating circumstance for the jury's consideration. We agree. A rational juror could have found defendant's history of prior criminal activity, which consisted mostly of misdemeanors, to be insignificant with regard to the jury's capital sentencing recommendation. After determining that a rational juror could find the evidence sufficient to support the (f)(1) mitigating circumstance, the trial court was required to submit it to the jury. This argument is without merit.

See, e.g., State v. Williams, 343 N.C. 345, 372, 471 S.E.2d 379, 394 (1996) (upholding the trial court's decision to submit the (f)(1) mitigating circumstance where the "defendant's record consist[ed] of being convicted of misdemeanor larceny, misdemeanor breaking or entering, and misdemeanor larceny, two counts; misdemeanor possession of stolen property, carrying a concealed weapon—misdemeanor, misdemeanor [breaking and entering], and possession of a weapon of mass destruction, uttering forged papers, misdemeanor assault on a female, and misdemeanor assault with a deadly weapon"), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997); *State v. Walls*, 342 N.C. 1, 56, 463 S.E.2d 738, 767 (1995) (upholding the submission of the (f)(1) mitigating circumstance where the defendant had criminal convictions for "driving while impaired, assault, communicating threats and 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). These cases all noted that the focus of the decision concerning submission of the (f)(1) mitigating circumstance should be placed on whether the criminal history is likely to influence the jury's sentencing recommendation as to life or death.

We have also recently held that the trial court erred when it refused to submit the (f)(1) mitigating circumstance where the defendant's criminal record consisted primarily of nonviolent crimes against property. *See, e.g., State v. Fletcher*, 348 N.C. 292, 326-27, 500 S.E.2d 668, 688 (1998) (holding that the trial court erred by not submitting the (f)(1) mitigating circumstance, even though the defendant did not request it, where the "defendant had a history of stealing since he was a child and . . . 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"), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 113 (1999).

In this case, defendant had a lengthy criminal record primarily consisting of incidents involving alcohol and/or drug abuse, petty theft from his father, driving offenses, and one conviction for assault on a female.

In each case cited above, as well as numerous other cases decided by this Court, we have held that a reasonable juror could, in the face of the evidence, conclude that the defendant's criminal history—although substantial—was not significant to such a degree as to tilt the scale in favor of imposing a death sentence and thus could have mitigating value. However, here, where defendant requested submission of the (f)(1) mitigating circumstance, the majority holds that the trial court did not err in its decision to deny defendant's request to submit the (f)(1) mitigating circumstance. This simply is inconsistent with the Court's long line of cases explaining when the (f)(1) mitigating circumstance should and should not be given to the jury for consideration.

At a minimum, defendant and his counsel felt that defendant's criminal history had the potential for being a mitigating circumstance in the jury's deliberation over life or death. Furthermore, defendant's criminal history was devoid, with one exception for assault, of any crimes of violence toward the person. Defendant's increased substance abuse problems in the years prior to the murder and his practice of stealing money from his father's wallet simply are not the kind of egregious criminal acts that would warrant a refusal to submit the (f)(1) mitigating circumstance, particularly in light of defendant's request for its submission. Therefore, I dissent and would grant defendant a new sentencing hearing.

STATE OF NORTH CAROLINA v. DANNY DEAN FROGGE

No. 413A95-2

(Filed 5 May 2000)

1. **Constitutional Law— self-incrimination—first-degree murder—second trial—introduction of prior testimony—testimony by defendant—defendant's waiver of objection—no prejudice**

Assuming without deciding that there was error in introducing defendant's prior testimony from his first capital sentencing proceeding during the guilt-innocence phase of the second trial for the first-degree murders of his father and stepmother, defendant was not prejudiced because: (1) there was no constitutional violation compelling defendant to testify during the first sentencing proceeding in violation of his right against self-incrimination since the violation in the first trial was based on the admission of hearsay of a jailhouse informant, not wrongfully obtained confessions, and the declarant in defendant's first trial testified and was subject to cross-examination; (2) defendant testified on his own behalf at the second trial after the trial court held the evidence was admissible and the prior testimony was read into evidence, thus losing the benefit of his previous objection and waiving review of this issue; and (3) any error was cured when defendant took the stand and gave testimony similar to the prior testimony read into evidence.

2. **Robbery— dangerous weapon—motion to dismiss—waiver—vindictive prosecution—continuous transaction—sufficiency of evidence**

The trial court did not err in defendant's case for the first-degree murders of his father and stepmother by failing to dismiss the charge of robbery with a dangerous weapon of his father based on vindictive prosecution and insufficient evidence because: (1) defendant waived his right to object to any impropriety in the indictment by failing to make a motion to dismiss the indictment for robbery with a dangerous weapon; and (2) the evidence taken in the light most favorable to the State supports the inference that the robbery was part of a continuous chain of events when the wallet was found lying open in front of the victim-father's body, the wallet contained a driver's license and other papers without any money, there was a drop and a smear of

blood inside the wallet, defendant admitted the blood inside the wallet could have come from his hand, and defendant admitted he removed twenty-five or twenty-six dollars.

3. Sentencing— capital—robbery with a dangerous weapon—aggravating circumstance—sufficiency of evidence

The trial court did not err in defendant's case for the first-degree murders of his father and stepmother by submitting the charge of robbery with a dangerous weapon of his father at the sentencing proceeding as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(5), because: (1) the underlying felony may be submitted as an aggravating factor if a defendant is convicted of first-degree murder based on both premeditation and deliberation and the felony murder rule; and (2) the evidence of the robbery with a dangerous weapon was sufficient.

4. Sentencing— capital—death penalty not disproportionate

The trial court did not err by imposing the death sentence for the murder of defendant's stepmother because: (1) defendant was convicted of two counts of first-degree murder based on premeditation and deliberation and the felony murder rule; and (2) the jury found the submitted aggravating circumstances of N.C.G.S. § 15A-2000(e)(3), § 15A-2000(e)(5), § 15A-2000(e)(9), and § 15A-2000(e)(11), all four of which had been held sufficient standing alone to support a sentence of death.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by McHugh, J., on 27 March 1998 in Superior Court, Forsyth County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments was allowed by the Supreme Court on 31 August 1999. Heard in the Supreme Court 13 September 1999.

Michael F. Easley, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

David B. Freedman, Dudley A. Witt, and Laurie A. Schlossberg for defendant-appellant.

WAINWRIGHT, Justice.

Indictments dated 20 March 1995, and superseding indictments dated 3 July 1995, charged defendant Danny Dean Frogge with the

first-degree murders of his father, Robert Edward Frogge, and his stepmother, Audrey Yvonne Frogge. He was tried capitally at the 28 August 1995 Criminal Session of Superior Court, Forsyth County. The jury found defendant guilty of both murders on the basis of premeditation and deliberation and under the felony murder rule. After a capital sentencing proceeding, the jury recommended and the trial court imposed a sentence of life imprisonment for the murder of Robert Frogge and a sentence of death for the murder of Audrey Frogge. On appeal, this Court found reversible error in the guilt-innocence phase of defendant's first trial and ordered a new trial. *State v. Frogge*, 345 N.C. 614, 481 S.E.2d 278 (1997) (*Frogge I*).

After the remand, on 20 January 1998, defendant also was indicted for robbery with a dangerous weapon of his father on the night the murders took place. Defendant was retried capitally at the 16 March 1998 Criminal Session of Superior Court, Forsyth County. The jury again found defendant guilty on both counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. In addition, the jury found defendant guilty of robbery with a dangerous weapon. As defendant was previously sentenced to life imprisonment for the murder of his father, the trial court imposed the same sentence for the conviction on retrial and imposed a concurrent term of imprisonment for the robbery conviction. A capital sentencing proceeding was conducted for the conviction regarding defendant's stepmother, and the jury again recommended a sentence of death. On 27 March 1998, the trial court sentenced defendant to death. Defendant appeals as of right from his conviction for the first-degree murder of his stepmother. On 31 August 1999, this Court granted defendant's motion to bypass the Court of Appeals as to his remaining convictions.

The State's evidence at defendant's second trial tended to show that defendant stabbed his father and bedridden stepmother to death. At the time of the murders, defendant lived with his father and stepmother at their home in Winston-Salem. Defendant's father did not work, and his stepmother had been confined to her bed for over two years. Defendant worked part-time and helped around the house, but paid no rent.

Between 4:00 and 4:30 a.m. on 5 November 1994, the Winston-Salem Police Department received a 911 call from a person who identified himself as Danny Frogge. Frogge reported that his parents were dead. When Winston-Salem police officers arrived at the scene, they

found the bodies of Robert and Audrey Frogge in their bedroom. Robert Frogge was found on the floor lying on his left side with bloodstains on his shirt and arms. He had sustained ten stab wounds. A leather wallet, containing his driver's license and miscellaneous papers but no money, was found next to his body. The wallet, which was lying open, had a drop and a smear of blood inside. Near the wallet, a white, bloodstained sock was found. An iron bar from a lawnmower was found under Robert Frogge's body. Audrey Frogge was found in her hospital-type bed with bloodstains on her chest and arms. She had sustained eleven stab wounds to her chest. In addition, she suffered defensive knife wounds to her hand. A hospital-type rolling table stood beside the bed. Dr. Patrick Lantz, a forensic pathologist, opined that the angle of the stab wounds indicated the person stabbing Audrey Frogge either stood at the edge of the bed beside the table or climbed on the bed itself to deliver the blows.

Outside the home near the back porch, the officers found a bloodstained butcher knife. Just beyond the edge of the woods behind the house, the officers found men's clothing, including a pair of blue work pants, a pink tee shirt with red stains, a pair of men's underwear, and a white sock which contained bloodstains and blood spatter. The white sock appeared to match the sock found near Robert Frogge's body. The officers also collected several pairs of white underwear and blue work pants from defendant's bedroom which appeared similar to those found in the woods.

While talking further with the officers that night, defendant appeared calm and showed no signs of emotion. In a statement to Winston-Salem Police Detective Sergeant Dennis Scales, defendant claimed that on the day of the murders he had been in and out of the house on numerous occasions taking care of his stepmother and preparing her supper. After a night of drinking and crack cocaine use with friends, he returned to the home at approximately 4:00 a.m. and found his parents murdered.

The State also offered into evidence defendant's testimony from the sentencing proceeding of his first trial. This testimony included the following: On the day of the murders, defendant worked around the house and later met with Earl Autrey, Audrey Frogge's son-in-law, at approximately 2:00 p.m. The two began drinking. Defendant went back to his parents' home to prepare supper for his stepmother and later returned to Autrey's home to continue drinking. Subsequently,

defendant returned to his parents' home. Defendant had consumed almost an entire pint of liquor and several beers. Defendant's father awoke from a nap between 8:00 and 8:30 p.m. and began to argue with defendant about his drinking. Defendant could not recall what he said to his father; however, his father became so upset that he took an iron bar from a lawnmower and jabbed and hit defendant four or five times. Defendant got up, went to the kitchen, and retrieved a butcher knife. He recalled stabbing his father three or four times while his father held the iron bar. Defendant did not remember stabbing his stepmother, but admitted that he must have done it. He then took approximately twenty-five or twenty-six dollars from his father's wallet. Defendant attempted to wash the blood from his hands. He then changed clothes and threw the soiled clothes in the woods behind the house. When asked how blood got inside his father's wallet, defendant stated that he did not know, but admitted it might have dropped from his hand. Defendant left and went to Kim Dunlap's house. He and Dunlap then rode with Dunlap's sister to downtown Winston-Salem. They used the money defendant had taken from his father's wallet to purchase crack cocaine. After smoking the crack, defendant and Dunlap returned to defendant's parents' home in a taxicab around 4:00 or 4:30 a.m. Defendant entered the house, but returned to the taxicab and said that his parents were dead. He then called the police.

Defendant elected to testify on his own behalf at his second trial. His testimony was similar to that given at his first sentencing proceeding. He testified he served over four years in prison for a previous second-degree murder conviction and that he saved $8,000 to purchase a mobile home where he resided for six months after his release. Thereafter he returned to live with his father and stepmother. Defendant again admitted killing his father and stepmother and stated that after the murders, he changed his clothes and washed his hands. His testimony differed somewhat in that defendant claimed he did not take the money from his father's wallet until after he had washed his hands and was preparing to leave the house approximately thirty minutes after the murders. Defendant again admitted purchasing crack cocaine with the money he took from his father's wallet.

[1] In defendant's first assignment of error, he contends the trial court erred in allowing the State to introduce defendant's testimony from the sentencing proceeding of the first trial during the guilt-innocence phase of the second trial on the ground that it

constituted a violation of his Fifth Amendment privilege against self-incrimination.

Prior to the second trial, the State filed a "Notice of Intent to Use and Motion *in Limine*" to admit defendant's sentencing proceeding testimony. The trial court, after hearing testimony on the State's motion, held the prior statements to be admissible in the guilt-innocence phase of the second trial. Specifically, the trial court stated that "defendant . . . has failed to show that he was compelled to testify due to the admission of any unconstitutionally obtained evidence and if there is not compulsion resting on the defendant's testimony in the first trial, . . . there is no violation of any Fifth Amendment rights against self-incrimination."

Defendant contends the introduction of the prior testimony was error because it was compelled by a constitutional violation in the first trial. Defendant primarily relies on two cases: *Harrison v. United States*, 392 U.S. 219, 20 L. Ed. 2d 1047 (1968), where the United States Supreme Court, using the "fruit of the poisonous tree" theory, held that the principle which prohibits the use of wrongfully obtained confessions also prohibits the use of any testimony impelled by the confessions because it violates the Fifth Amendment right against self-incrimination, and *Lilly v. Virginia*, 527 U.S. 116, 144 L. Ed. 2d 117 (1999), where the United States Supreme Court held the defendant's Sixth Amendment Confrontation Clause rights were violated when the trial court admitted the out-of-court, inculpatory statements of an unavailable codefendant because the declarant was not subject to cross-examination. Defendant argues *Harrison* and *Lilly* preclude the State's use of defendant's prior testimony because it was induced by an unconstitutional conviction.

In *Frogge I*, a jailhouse informant's prior inconsistent statement to the police as to what defendant told him about the murders was admitted into evidence. We concluded that defendant was unfairly prejudiced "[b]ecause the evidence of this [inconsistent] statement was hearsay inadmissible for the purposes of corroboration and because the trial court improperly admitted the statement under the guise of corroboration." *Frogge*, 345 N.C. at 618, 481 S.E.2d at 280. Our holding was guided by case law on N.C.G.S. § 8C-1, Rule 613, an evidentiary rule. There was no Confrontation Clause violation in *Frogge I* because the informant was available for cross-examination. This issue is not before the Court in this case (*Frogge II*) because the informant's testimony was not introduced in the second trial.

"Prior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their *hearsay* nature." *State v. Mack*, 282 N.C. 334, 339, 193 S.E.2d 71, 75 (1972) (emphasis added); *see also State v. Bishop*, 346 N.C. 365, 387, 488 S.E.2d 769, 780 (1997). On the issue of violations of the Confrontation Clause because of the admission of hearsay, the United States Supreme Court has stated, "Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements." *Idaho v. Wright*, 497 U.S. 805, 814, 111 L. Ed. 2d 638, 651 (1990).

The cases cited by defendant are distinguishable from the instant case. In *Harrison*, wrongfully obtained confessions were introduced during the first trial; thus, the defendant felt compelled to testify because of the constitutional violation. However, in the instant case, the violation in the first trial was based on the admission of hearsay, not wrongfully obtained confessions. "[I]f defendant's testimony at his first trial was induced by evidence which was inadmissible under the rules of evidence, and not because it was unconstitutionally obtained, the *Harrison* exception to the general rule permitting the testimony to be offered at the second trial would not apply." *State v. Hunt*, 339 N.C. 622, 638, 457 S.E.2d 276, 285 (1994). In *Lilly*, out-of-court, inculpatory statements of an unavailable codefendant were admitted; thus, the defendant could not confront the unavailable declarant. However, unlike the situation in *Lilly*, the declarant in defendant's first trial testified and was subject to cross-examination. Thus, there was no constitutional error in his first trial.

Moreover, there was nothing compelling defendant to testify during the first sentencing proceeding. "[T]he policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt." *McGautha v. California*, 402 U.S. 183, 217, 28 L. Ed. 2d 711, 732 (1971).

However, we need not and do not determine whether it was error to introduce the testimony from the first sentencing proceeding into evidence during the guilt-innocence phase of the second trial because, by testifying, defendant waived review of this issue.

It is well settled that "[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later

admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). As stated in *Hunt*, " '[a] defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives.' " *Hunt*, 339 N.C. at 638, 457 S.E.2d at 285 (quoting *Harrison*, 392 U.S. at 222, 20 L. Ed. 2d at 1051); *accord State v. Terry*, 337 N.C. 615, 624, 447 S.E.2d 720, 725 (1994) (where this Court held "defendant waived his objection to [the admission of his statement to police] when he testified on direct examination that he had made this statement, that the statement was not true, and that he made it because he was afraid of going to jail").

In the instant case, defendant objected to the introduction of his prior testimony from the first sentencing proceeding in the guilt-innocence phase of the second trial. The trial court held the evidence admissible, and the prior testimony was read into evidence at the second trial. However, defendant then testified on his own behalf. As a result, defendant lost the benefit of his previous objection and waived review of this issue. *Hunt*, 339 N.C. at 638, 457 S.E.2d at 285.

Nevertheless, assuming without deciding there was error in introducing the prior testimony, defendant was not prejudiced. " '[T]he admission of evidence as to facts which the defendant admitted in his own testimony, cannot be held prejudicial.' " *State v. Wills*, 293 N.C. 546, 549, 240 S.E.2d 328, 330 (1977) (quoting *State v. Adams*, 245 N.C. 344, 349, 95 S.E.2d 902, 906 (1957)). Moreover, any error was cured when defendant took the stand and gave testimony similar to the prior testimony read into evidence.

> To hold that a defendant in a criminal action, *once evidence has been erroneously admitted over his objection*, may then take the stand, testify to exactly the same facts shown by the erroneously admitted evidence, and from that point embark upon whatever testimonial excursion he may choose to offer as justification for his conduct, without thereby curing the earlier error, gives to the defendant an advantage not contemplated by the constitutional provisions forbidding the State to compel him to testify against himself.

State v. McDaniel, 274 N.C. 574, 584, 164 S.E.2d 469, 475 (1968) (emphasis added).

[2] In defendant's second assignment of error, he contends the trial court erred in failing to dismiss the charge of robbery with a danger-

ous weapon because the charge was a result of vindictive prosecution and the evidence was insufficient as a matter of law to support a conviction. Additionally, defendant argues that because there was insufficient evidence of robbery with a dangerous weapon, the trial court erred in submitting this at the sentencing proceeding as an aggravating circumstance. *See* N.C.G.S. § 15A-2000(e)(5) (1997). We disagree.

We first address defendant's contention that the indictment was improper because of vindictive prosecution. A defendant waives objection to the impropriety of an indictment by not making a motion to dismiss the indictment. *See* N.C.G.S. §§ 15A-952(e), 15A-955(1) (1997); *see also State v. Robinson*, 327 N.C. 346, 361, 395 S.E.2d 402, 411 (1990); *State v. Lynch*, 300 N.C. 534, 542, 268 S.E.2d 161, 166 (1980). "Under the common law of this State a motion to quash the indictment could be made as of right only up to the time the defendant entered his plea. Thereafter, the motion was addressed to the sound discretion of the trial judge." *State v. Phillips*, 297 N.C. 600, 606, 256 S.E.2d 212, 215 (1979).

In the instant case, defendant made no motion to the trial court to dismiss the indictment for robbery with a dangerous weapon. As such, defendant waived his right to object to any impropriety in the indictment. This argument is without merit.

We next address defendant's argument that there was insufficient evidence to support the conviction for robbery with a dangerous weapon. Defendant made a motion to dismiss the robbery charge at the close of the State's evidence. The trial court heard arguments, denied the motion, and concluded "the evidence being taken in the light most favorable to the State at this time could support a finding that the robbery was part of a continuous transaction." Defendant renewed his motion at the close of all the evidence. Again, the trial court denied the motion, stating "the jury can infer that the act of taking property from the body of the victim was part of the continuous chain of events."

It is well settled that to withstand a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). " 'Whether evidence

presented constitutes substantial evidence is a question of law for the court.' " *State v. Stager*, 329 N.C. 278, 322, 406 S.E.2d 876, 901 (1991) (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)).

The essential elements of the offense of robbery with a dangerous weapon are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *Call*, 349 N.C. at 417, 508 S.E.2d at 518; *see also* N.C.G.S. § 14-87(a) (1993); *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991). "[T]he defendant's use or threatened use of a dangerous weapon must precede or be concomitant with the taking, or be so joined with it in a continuous transaction by time and circumstances as to be inseparable." *State v. Hope*, 317 N.C. 302, 306, 345 S.E.2d 361, 364 (1986); *see also State v. Fields*, 315 N.C. 191, 201-02, 337 S.E.2d 518, 525 (1985).

The trial court examines the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Call*, 349 N.C. at 417, 508 S.E.2d at 518. "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); *see also State v. Thomas*, 350 N.C. 315, 343, 514 S.E.2d 486, 503, *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 388 (1999).

In the instant case, the State's evidence tended to show the wallet was found lying open in front of the victim's body. The wallet contained a driver's license and other papers, but no money. Inside the wallet were a drop and a smear of blood. During defendant's testimony at the sentencing phase of his first trial, he admitted that the blood inside the wallet could have come from his hand. While testifying at the second trial, defendant admitted he removed about twenty-five or twenty-six dollars from the wallet and he changed his clothes and cleaned up before leaving. However, on cross-examination at the second trial, defendant could not explain the presence of blood inside the wallet if he did not take the money until after cleaning up and disposing of the murder weapon and bloody clothes. This evidence supports a reasonable inference that the blood was dropped in the wallet when defendant removed the money from the wallet immediately after the murder.

Thus, the jury could reasonably infer there was "one continuous transaction with the element of use or threatened use of a dangerous

weapon so joined in time and circumstances with the taking as to be inseparable." *Hope*, 317 N.C. at 306, 345 S.E.2d at 364. Applying the foregoing principles, we conclude the State introduced sufficient evidence to permit a rational trier of fact to find beyond a reasonable doubt defendant committed the offense of robbery with a dangerous weapon.

[3] Finally, we address defendant's argument that there was insufficient evidence for the trial court to submit robbery with a dangerous weapon as an aggravating circumstance at the sentencing proceeding. *See* N.C.G.S. § 15A-2000(e)(5).

The trial court, in determining the sufficiency of the evidence to support the existence of an aggravating circumstance, must consider the evidence in the light most favorable to the State. *State v. Leary*, 344 N.C. 109, 119, 472 S.E.2d 753, 759 (1996); *State v. Quick*, 329 N.C. 1, 31, 405 S.E.2d 179, 197 (1991). "The State is entitled to every reasonable inference to be drawn from the evidence, contradictions and discrepancies are for the jury to resolve, and all evidence admitted that is favorable to the State is to be considered." *Leary*, 344 N.C. at 119, 472 S.E.2d at 759.

If a defendant is convicted of first-degree murder based on both premeditation and deliberation and the felony murder rule, the underlying felony may be submitted as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(5). *See Thomas*, 350 N.C. at 344, 514 S.E.2d at 504; *State v. McNeill*, 346 N.C. 233, 241, 485 S.E.2d 284, 289 (1997), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998); *State v. Davis*, 340 N.C. 1, 455 S.E.2d 627, *cert. denied*, 516 U.S. 846, 133 L. Ed. 2d 83 (1995).

In the instant case, the jury found defendant guilty of first-degree murder based on both premeditation and deliberation and the felony murder rule for both victims. As discussed previously, the evidence of robbery with a dangerous weapon was sufficient. As a result, the trial court did not err in submitting the (e)(5) aggravating circumstance. *See Thomas*, 350 N.C. at 344, 514 S.E.2d at 504. Thus, defendant's argument is without merit.

PROPORTIONALITY REVIEW

[4] Finally, defendant contends the death sentence imposed for the murder of his stepmother was excessive or disproportionate. Having concluded that defendant's capital sentencing proceeding was free from prejudicial error, it is our statutory duty to ascertain (1)

whether the evidence supports the jury's findings of the aggravating circumstances upon which the sentence of death was based; (2) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

In the instant case, defendant was convicted of two counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. Because defendant had previously received a sentence of life imprisonment for the murder of his father, he could not be sentenced to death at retrial. Following a capital sentencing proceeding for the murder of defendant's stepmother, the jury found the following submitted aggravating circumstances: (1) 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); (2) the murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon of Robert Frogge, N.C.G.S. § 15A-2000(e)(5); (3) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (4) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11).

Three statutory mitigating circumstances were submitted for the jury's consideration, but were not found: (1) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) defendant's capacity 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 (3) 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). Of the ten nonstatutory mitigating circumstances submitted, six were found by the jury to exist and have mitigating value.

After a thorough review of the record, including the transcripts, briefs, and oral arguments, we conclude the evidence fully supports the aggravating circumstances found by the jury. Further, we find no indication the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

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 imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). In conducting proportionality review, we compare the present case with other cases in which this Court has concluded 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). 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, *cert. denied*, 522 U.S. 900, 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).

We conclude this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. Defendant was convicted of two counts of first-degree murder. This Court has never found a sentence of death disproportionate in a case where the jury has found a defendant guilty of murdering more than one victim. *State v. Goode*, 341 N.C. 513, 552, 461 S.E.2d 631, 654 (1995). In addition, the jury convicted defendant under the theory of premeditation and deliberation. This Court has stated "[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, there are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to support a sentence of death. *See State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994) (those circumstances are found in N.C.G.S. § 15A-2000(e)(3), (e)(5), (e)(9), and (e)(11)), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). In this case, the jury found all four.

We also compare this case with the cases in which this Court has found the death penalty to be proportionate. While we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, we reemphasize 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). This 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.

Accordingly, we conclude defendant received a fair trial and capital sentencing proceeding, free from prejudicial error, and the sentence of death recommended by the jury and entered by the trial court is not disproportionate.

NO ERROR.

PAMELA BRISSON AND DALLAS BRISSON v. KATHY A. SANTORIELLO, M.D., P.A., AND KATHY A. SANTORIELLO, M.D.

No. 376PA99

(Filed 5 May 2000)

Medical Malpractice— Rule 9(j) certification—voluntary dismissal under Rule 41—action refiled—statute of limitations extended—one-year saving provision

In a medical malpractice action where plaintiffs failed to include the necessary Rule 9(j) certification in their original complaint, the trial judge denied plaintiffs' motion to amend their complaint, plaintiffs voluntarily dismissed their original complaint without prejudice pursuant to N.C. R. Civ. P. 41(a)(1), and plaintiffs refiled the action after the three-year medical malpractice statute of limitations in N.C.G.S. § 1-15(c) had run, plaintiffs' voluntary dismissal effectively extended the statute of limitations in N.C.G.S. § 1-15(c) by allowing plaintiffs to refile their complaint against defendants within the one-year saving provision of Rule 41(a)(1) since: (1) plaintiffs did not file their initial complaint in bad faith; and (2) the voluntary dismissal was prior to a trial court's ruling dismissing plaintiffs' claim or otherwise ruling

against plaintiffs at any time prior to plaintiffs resting their case at trial.

Justice WAINWRIGHT dissenting.

Justice LAKE 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, 134 N.C. App. 65, 516 S.E.2d 911 (1999), reversing and remanding a 9 February 1998 order for judgment on the pleadings entered by Hudson, J., in Superior Court, Cumberland County, and a 26 February 1998 order entered by Brewer, J., in Superior Court, Cumberland County, denying a motion for relief from the earlier order. Heard in the Supreme Court 15 February 2000.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Charles George, for plaintiff-appellees.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for defendant-appellants.

Fuller, Becton, Slifkin & Bell, P.A., by Charles L. Becton and James C. Fuller, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

Cranfill, Sumner & Hartzog, L.L.P., by Kari R. Johnson, on behalf of North Carolina Association of Defense Attorneys, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, Jr., Michael W. Mitchell, and James Y. Kerr, II, on behalf of North Carolina Medical Society; and Manning, Fulton & Skinner, P.A., by John B. McMillan, on behalf of North Carolina Citizens for Business and Industry, amici curiae.

ORR, Justice.

This case arises out of a medical malpractice action filed in Superior Court, Cumberland County, against Dr. Kathy A. Santoriello (Dr. Santoriello), an obstetrician-gynecologist (OB-GYN) practicing in Fayetteville, North Carolina. Plaintiffs Pamela Brisson and Dallas Brisson alleged negligence and loss of consortium, seeking damages in excess of $10,000, plaintiffs' costs, and attorneys' fees.

The facts relevant to this action are as follows. On 27 July 1994, Dr. Santoriello performed an abdominal hysterectomy on plaintiff

Pamela Brisson. Several months later, it was discovered that plaintiff had an obstruction of her vaginal canal that prevented her from having sexual intercourse. Subsequently, on 3 June 1997, plaintiffs filed a complaint alleging negligence and loss of consortium against defendants Kathy A. Santoriello, M.D., P.A., and Kathy A. Santoriello, M.D., arising out of defendant Santoriello's performance of the 27 July 1994 abdominal hysterectomy. Plaintiffs alleged, "Defendant Physician, through Defendant P.A., performed said surgery negligently, in that Defendant failed to exercise or possess that degree of skill, care, and learning ordinarily exercised or possessed by the average obstetrician/gynecologist, taking into account the existing state of knowledge and practice in the profession." Plaintiffs then claimed that defendants' negligence proximately resulted in various severe and permanent physical injuries in addition to plaintiff Dallas Brisson's loss of consortium from the companionship of his wife, plaintiff Pamela Brisson.

On 22 August 1997, defendants filed a motion to dismiss the case pursuant to Rules 9(j) and 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that plaintiffs' complaint failed to meet the requirements set forth in N.C. R. Civ. P. 9(j) and also failed to state a claim upon which relief can be granted based on N.C. R. Civ. P. 12(b)(6).

Rule 9(j) explicitly sets out several requirements that a party must meet when pleading a medical malpractice cause of action. In pertinent part, this rule provides as follows:

> (j) *Medical malpractice.*—Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> > (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C.G.S. § 1A-1, Rule 9(j)(1) (1999).

Defendants' motion to dismiss was based in part on plaintiffs' failure to include, pursuant to Rule 9(j), a certification in their com-

plaint that plaintiffs had a medical expert who was reasonably expected to qualify as an expert, had reviewed plaintiff's medical care, and was willing to testify that the medical care plaintiff received from defendant Dr. Santoriello did not comply with the applicable standard of care. On 30 September 1997, plaintiffs filed a motion to amend their complaint, along with an attached copy of the proposed amended complaint, claiming that "a physician has reviewed the subject medical care, but it was inadvertently omitted from the pleading (see attached Affidavit of Counsel), and to not grant leave to amend would unduly prejudice plaintiffs, by subjecting her [sic] to a dismissal." Plaintiffs also moved, in the alternative, to voluntarily dismiss their complaint without prejudice pursuant to N.C. R. Civ. P. 41(a)(1).

Following a hearing on defendants' motion to dismiss and plaintiffs' motion to amend the complaint, Judge D.B. Herring denied plaintiffs' motion to amend, but reserved ruling on defendants' motion to dismiss. As a result, on 6 October 1997, plaintiffs voluntarily dismissed their claims against defendants Dr. Santoriello and Kathy Santoriello, M.D., P.A., pursuant to Rule 41(a)(1).

Subsequently, on 9 October 1997, plaintiffs filed another complaint in Superior Court, Cumberland County, that contained essentially the same allegations as the original complaint, except that the new complaint included the appropriate certification required under Rule 9(j). On 20 October 1997, defendants filed an answer and moved for judgment on the pleadings, alleging that plaintiffs' claims were barred by the applicable statutes of limitations and repose pursuant to N.C.G.S. § 1-15(c).

After a hearing in January 1998, Judge Orlando Hudson granted defendants' motion for judgment on the pleadings by order entered 9 February 1998, stating specifically that "the Court holds that the complaint filed on June 3, 1997 does not extend the statute of limitations in this case because it does not comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. The instant complaint, filed on October 9, 1997, is barred by the statute of limitations . . . ."

Plaintiffs then filed two separate motions for relief under N.C. R. Civ. P. 60(b) requesting relief from Judge Herring's order denying plaintiffs' motion to amend their complaint and Judge Hudson's order allowing defendants' motion for judgment on the pleadings. On 26 February 1998, Judge Coy Brewer denied both motions for relief.

Plaintiffs filed notice of appeal with the Court of Appeals, seeking review of the 9 February 1998 order entered by Judge Hudson. The Court of Appeals unanimously reversed Judge Hudson's ruling allowing defendants' motion for judgment on the pleadings and reinstated plaintiffs' causes of action. On 7 October 1999, this Court granted defendants' petition for discretionary review.

We note at the outset that the Court of Appeals, in its opinion, addressed at length the effects of plaintiffs' proposed amended complaint. We find that plaintiffs' motion to amend, which was denied, is neither dispositive nor relevant to the outcome of this case. Whether the proposed amended complaint related back to and superceded the original complaint has no bearing on this case once plaintiffs took their voluntary dismissal on 6 October 1997. It is well settled that "[a] Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d)[,] which authorizes the court to enter specific orders apportioning and taxing costs." *Walker Frames v. Shively*, 123 N.C. App. 643, 646, 473 S.E.2d 776, 778 (1996). " '[T]he effect of a judgment of voluntary [dismissal] is to leave the plaintiff exactly where he [or she] was before the action was commenced.' " *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965) (quoting 17 Am. Jur. *Dismissal, Discontinuance, & Nonsuit* § 89, at 161 (1938)). After a plaintiff takes a Rule 41(a) dismissal, "[t]here is nothing the defendant can do to fan the ashes of that action into life[,] and the court has no role to play." *Universidad Central Del Caribe, Inc. v. Liaison Comm. on Med. Educ.*, 760 F.2d 14, 18 n.4 (1st Cir. 1985).

The only issue for us to review on appeal is whether plaintiffs' voluntary dismissal pursuant to N.C. R. Civ. P. 41(a)(1) effectively extended the statute of limitations by allowing plaintiffs to refile their complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification. We hold that it does.

Rule 41(a) provides, in pertinent part:

> [A]n action or any claim therein may be dismissed by the plaintiff without order of court (1) by filing a notice of dismissal at any time before the plaintiff rests his case . . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . .

N.C.G.S. § 1A-1, Rule 41(a)(1) (1999). "[A] party always has the time limit prescribed by the general statute of limitation and in addition thereto they get the one year provided in Rule 41(a)(1)." *Whitehurst v. Virginia Dare Transport. Co.*, 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973). "If the action was originally commenced within the period of the applicable statute of limitations, it may be recommenced within one year after the dismissal, even though the base period may have expired in the interim." 2 Thomas J. Wilson, II & Jane M. Wilson, *McIntosh North Carolina Practice and Procedure* § 1647, at 69 (Supp. 1970). Thus, it is important to note that under Rule 41, a plaintiff may "dismiss an action that originally was filed within the statute of limitations and then refile the action after the statute of limitations ordinarily would have expired." *Clark v. Visiting Health Prof'ls*, — N.C. App. —, —, 524 S.E.2d 605, 607 (2000).

Defendants argue that plaintiffs' claims were barred by the applicable statute of limitations set out in N.C.G.S. § 1-15(c), which provide that medical malpractice causes of action must be brought within three years of the last allegedly negligent act of the physician. Based on the facts before us, the applicable statute of limitations began to run on 27 July 1994, the date Dr. Santoriello performed Pamela Brisson's abdominal hysterectomy. Plaintiffs filed their original complaint against defendants on 3 June 1997, safely within the time period prescribed by N.C.G.S. § 1-15(c). However, on 6 October 1997, plaintiffs voluntary dismissed this action and, thus, were granted one year within which to refile. Plaintiffs filed a second complaint on 9 October 1997. Defendants contend that the one-year "saving provision" allowed by Rule (41)(a)(1) did not apply to plaintiffs' claims because plaintiffs' first complaint failed to comply with the Rule 9 pleading requirements. Thus, defendants reason, plaintiffs' causes of action were barred by the statute of limitations.

The Court of Appeals held that "plaintiffs were entitled to the benefit of the Rule 41(a)(1) extension. Plaintiffs' second complaint, therefore, was not barred by the statute of limitations, and the trial court erred in entering judgment on the pleadings in favor of defendants." *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 134 N.C. App. 65, 72-73, 516 S.E.2d 911, 916 (1999). However, this decision rests on the erroneous reasoning discussed above that plaintiffs' proposed amended complaint related back to the original complaint. We agree with the Court of Appeals' holding but differ, in part, in our reasoning, finding it unnecessary to rely on the proposed amended complaint.

This Court has repeatedly stated that "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Board of Adjust. v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993). On these facts, we must look to our Rules of Civil Procedure and construe Rule 9(j) along with Rule 41. Although Rule 9(j) clearly requires a complainant of a medical malpractice action to attach to the complaint specific verifications regarding an expert witness, the rule does not expressly preclude such complainant's right to utilize a Rule 41(a)(1) voluntary dismissal. Had the legislature intended to prohibit plaintiffs in medical malpractice actions from taking voluntary dismissals where their complaint did not include a Rule 9(j) certification, then it could have made such intention explicit. In this case, the plain language of Rule 9(j) does not give rise to an interpretation depriving plaintiffs of the one-year extension pursuant to their Rule 41(a)(1) voluntary dismissal merely because they failed to attach a Rule 9(j) certification to the original complaint. "[T]he absence of any express intent and the strained interpretation necessary to reach the result urged upon us by [defendants] indicate that such was not [the legislature's] intent." *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 425, 276 S.E.2d 422, 436 (1981).

Moreover, pursuant to Rule 41(b), a defendant may move for an involuntary dismissal of an action if the plaintiff's complaint fails "to prosecute or to comply with these rules or any order of court." N.C.G.S. § 1A-1, Rule 41(b). Thus, this evidences the legislature's intent, under a different subsection of Rule 41, to subject a plaintiff's claim to an involuntary dismissal based on a failure to comply with the applicable rules. Had the trial court involuntarily dismissed plaintiffs' complaint with prejudice pursuant to defendants' motion *before* plaintiffs had taken the voluntary dismissal, then plaintiffs' claims set forth in the second complaint would be barred by the statute of limitations. Such was not the case here, however.

Defendants rely primarily on *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986), in arguing that Rule 41(a)(1) applies only to a timely filed complaint that conforms to the rules of pleading set forth in the North Carolina Rules of Civil Procedure. In their brief, defendants assert that this case was barred by the statute of limitations unless the "complaint in the first lawsuit complied with Rule 9(j) at the time of its dismissal."

The facts in *Estrada* are distinguishable from the facts of this case. In *Estrada*, the plaintiff filed a medical malpractice action the

day before the expiration of the statute of limitation; however, the complaint lacked allegations describing the specific manner in which defendant was purportedly negligent. Two minutes after the plaintiff filed the original complaint, the plaintiff took a voluntary dismissal of the action under Rule 41(a)(1) and, almost one year later, filed a second complaint against the same defendant alleging medical malpractice arising out of the same surgery as the original complaint. The defendant then filed a motion to dismiss based, in part, on the grounds that the plaintiff's action was barred by the applicable statute of limitations. In *Estrada*, the plaintiff's counsel admitted in his briefs before the Court of Appeals and this Court that the original " 'lawsuit was filed with the intention of dismissing it in order to avoid the lapse of the statute of limitations.' " *Id.* at 322, 341 S.E.2d at 541. This Court determined the issue before it as follows:

> The dispositive question is whether a plaintiff may file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to Rule 41(a)(1).

Id. at 323, 341 S.E.2d at 542. We held that the plaintiff's complaint was filed in bad faith, in violation of Rule 11(a) of the North Carolina Rules of Civil Procedure, and thus, that the complaint could not be used to extend the statute of limitations pursuant to the one-year "saving provision" of Rule 41(a)(1). *Id.*

In the case at bar, defendants cite as support this Court's dicta in *Estrada* wherein we stated, "[I]n order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year 'extension' by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading." *Id.* However, defendants here admit that plaintiffs did not file their initial complaint in "bad faith." Nonetheless, they contend that the dicta in *Estrada* should extend to the facts of this case, and thus, defendants argue, plaintiffs' second complaint should be barred by the statute of limitations because of the initial complaint's failure to comply with the 9(j) pleading requirements. We find no merit to defendants' argument and hold that plaintiffs were entitled to voluntarily dismiss their action without prejudice.

We note that the language in *Estrada* upon which defendants rely is mere dicta and not controlling in the disposition of the case at bar.

Further, *Estrada* cited no authority in support of the proposition that "the complaint must conform in all respects to the rules of pleading" in order to benefit from the one-year extension. The literal interpretation of such a comprehensive and unlimited statement could essentially eviscerate the legislature's intent in creating the long-standing benefit of a Rule 41(a)(1) voluntary dismissal one-year extension.

The Rule 41(a) voluntary dismissal "has salvaged more lawsuits than any other procedural device, giving the plaintiff a second chance to present a viable case at trial." 2 G. Gray Wilson, *North Carolina Civil Procedure* § 41-1, at 32 (2d ed. 1995). Many plaintiffs have used "this rule to cure an unforeseen defect in a claim that did not become apparent until trial . . . . The rule also offers a safety net to plaintiff or his counsel who are either unprepared or unwilling to proceed with trial the first time the case is called." *Id.* at 33. The purpose of our long-standing rule allowing a plaintiff to take a voluntary dismissal and refile the claim within one year even though the statute of limitations has run subsequent to a plaintiff's filing of the original complaint is to provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit. The range of reasons clearly includes those circumstances in which the plaintiff fears dismissal of the case for rule violations, shortcomings in the pleadings, evidentiary failures, or any other of the myriad reasons for which the cause of action might fail. The only limitations are that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial.

Therefore, we conclude that plaintiffs properly filed their 9 October 1997 complaint within the statute of limitations pursuant to the Rule 41(a)(1) voluntary dismissal one-year extension. Accordingly, the decision of the Court of Appeals, as modified herein, is affirmed.

As to defendants' third issue on appeal, "Does an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfy the requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure?" we hold that discretionary review was improvidently allowed.

The dissent categorizes this decision as "repugnant" and a "complete evisceration" of the malpractice statute of limitations. This

greatly overstates the practical ramifications of the decision which merely harmonizes the provisions of Rules 9(j) and 41(a). A frivolous malpractice claim with no expert witness pursuant to Rule 9(j) still meets the ultimate fate of dismissal. Likewise, a meritorious complaint will not be summarily dismissed without benefit of Rule 41(a)(1), simply because of an error by plaintiffs' attorney in failing to attach the required certificate to the complaint pursuant to Rule 9(j).

MODIFIED AND AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice WAINWRIGHT dissenting.

I respectfully dissent. I believe the majority's interpretation of Rule 9(j) and its relationship to a voluntary dismissal pursuant to Rule 41(a) misconstrues both the General Assembly's intent in enacting Rule 9(j) and our rules regarding statutory construction.

At the outset, a complete recitation of the provisions of Rule 9(j) is in order. It provides:

> (j) *Medical Malpractice.*—Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 20-21.12 *shall* be dismissed unless:
>
> (1) The pleading *specifically asserts* that the medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading *specifically asserts* that the medical care *has been reviewed* by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the *motion is filed with the complaint*; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court of the county in which the cause of action arose may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension. The plaintiff shall provide, at the request of the defendant, *proof of compliance* with this subsection through up to ten written interrogatories, the answers to which *shall be verified* by the expert required under this subsection. These interrogatories do not count against the interrogatory limit under Rule 33.

N.C.G.S. § 1A-1, Rule 9(j) (1999) (emphasis added). The official commentary to Rule 9 explains the rule's general purpose: "This rule is designed to lay down some special rules for pleading in typically recurring contexts which have traditionally caused trouble when no codified directive existed." N.C.G.S. § 1A-1, Rule 9 official commentary (1999). The General Assembly's purpose in amending Rule 9 by adding subsection (j) is gleaned from the title of that legislation: "An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Actions have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action." Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611. It is apparent that Rule 9(j) was specifically drafted to govern the initiation of medical malpractice actions and to require physician review as a condition for filing the action. To aid in accomplishing these goals, the General Assembly included a means by which a plaintiff could obtain a 120-day extension of the three-year statute of limitations in order to comply with the prefiling physician-review requirement. Thus, the General Assembly recognized the additional burden placed on prospective medical malpractice plaintiffs by the physician-review requirement and allowed them additional time to comply.

The General Assembly did not specifically address the effect of the Rule 41(a) one-year "savings" provision in relation to the 120-day extension of the statute of limitations. However, I believe that in taking the extraordinary step of providing for an extension of the statute of limitations in the rule, the General Assembly has implicitly revealed its intention for the 120-day extension to take the place of

the one-year "savings" provision. Further evidence of the legislature's intent may be derived from its use of the phrase "shall be dismissed" for actions which do not comply with the requirements of the rule. N.C.G.S. § 1A-1, Rule 9(j). The General Assembly, I think it reasonable to assume, did not contemplate a situation where a Rule 41(a) voluntary dismissal would be available in a case if the Rule 9(j) allegations had not been made, because the action was to have been mandatorily dismissed at its outset for failure to comply. This consequence of filing a noncompliant pleading prompted the legislature to provide an opportunity to extend the statute of limitations.

The majority's analysis would effectively extend the medical malpractice statute of limitations from three years, *see* N.C.G.S. § 1-15(c) (1999), to four years and 120 days. "The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957). A defendant has the right to rely on the statute of limitations as an absolute bar against "stale" claims. *See id.*; *see also Wilkes County v. Forester*, 204 N.C. 163, 167 S.E. 691 (1933). With all due respect, I decline to join in a decision approving such an extension. The result of the majority's interpretation is a complete evisceration of the medical malpractice statute of limitations. I do not believe the General Assembly intended such a result when it set out to prevent "frivolous" medical malpractice actions.

In addition, a principle of statutory construction leads me to reach a different conclusion than the majority:

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definitive way, the two should be read together and harmonized . . . ; but, to the extent of any necessary repugnancy between them, the special statute . . . will prevail over the general statute . . . ."

McIntyre v. McIntyre, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (quoting *National Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)); *accord Krauss v. Wayne County DSS*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997). In the instant case, the General Assembly has enacted a specific statute which provides for an extension of the statute of limitations in medical malpractice actions. Rule 41(a)(1) is a general statute affecting many types of civil actions. While I acknowledge the majority's attempt to harmonize the provisions as we are bound to do, I believe

the result the majority has reached is "repugnant" because of its extension of the statute of limitations beyond that for which the General Assembly has already provided.

For the reasons stated, I dissent.

Justice LAKE joins in this dissenting opinion.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 238 CRAIG B. BROWN, RESPONDENT

No. 18A00

(Filed 5 May 2000)

Judges— censure—conducting business outside of court

A district court judge was censured for knowingly convicting a defendant of careless and reckless driving even though defendant had not been charged with that offense and for taking a guilty plea in a hallway. The judge should have known that careless and reckless driving is not a lesser included offense of DWI and conducting business outside of open court will not be condoned. Respondent overstepped his authority, engaged in misconduct, and brought disrepute to the judiciary.

This matter is before the Court upon a recommendation by the Judicial Standards Commission, entered 28 December 1999, that respondent, Judge Craig B. Brown, a Judge of the General Court of Justice, District Court Division, Fourteenth Judicial District of the State of North Carolina, be censured for willful misconduct and 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 17 April 2000.

William N. Farrell, Jr., Special Counsel, for the Judicial Standards Commission.

Robert A. Hassell and Brian Michael Aus for respondent-appellant.

IN RE BROWN

[351 N.C. 601 (2000)]

ORDER OF CENSURE

The Judicial Standards Commission (Commission) notified Judge Craig B. Brown (respondent) on 16 December 1998 that it had ordered a preliminary investigation to determine whether formal proceedings under Commission Rule 9 should be instituted against him. The subject matter of the investigation included an allegation that respondent had engaged in the improper practice of convicting a defendant of careless and reckless driving when he was charged with driving while impaired (DWI). There were further allegations that the conviction was rendered out of court at a time when the case was not calendared and after discussing the case *ex parte* with defense counsel a few days earlier.

On 15 July 1999, special counsel for the Commission filed a complaint alleging, *inter alia*, as follows:

> 3. The respondent has engaged in conduct inappropriate to his judicial office on the following occasions:
>
> a. The respondent presided over the July 30, 1998, traffic court session of Durham County District Court and tried the case of *State v. Ludwig Charles Debraeckeleer*, Durham County file no. 97 CR 32970, in which the defendant was charged with driving while impaired (DWI) in violation of G.S. 20-138.1. The respondent granted defense counsel's motion to dismiss the DWI charge made at the conclusion of the State's evidence. The respondent then declared the defendant guilty of careless and reckless driving, a violation of G.S. 20-140 which was neither a lesser included offense of DWI nor an offense with which the defendant had been charged and to which the defendant had pleaded. The respondent rendered this guilty verdict and entered judgment on it over the objection of defense counsel and knowing or having reason to know such a disposition was improper in these circumstances.
>
> b. On September 1, 1998, the respondent met *ex parte* with J. Wesley Covington, attorney for the defendant in *State v. Kenneth Arthur Podger, Jr.*, Durham County file no. 98 CR 05350, in which the defendant was charged with driving while impaired (DWI) in violation of G.S. 20-138.1 and had a [B]reathalyzer reading of .15. During this meeting, the respondent agreed to counsel's request that the respondent hear the case on September 3, 1998. In addition, after discussing the facts of the case and the defendant's driving record, the respondent agreed to convict the

defendant of careless and reckless driving, a violation of G.S. 20-140 which was not a lesser included offense of DWI nor an offense with which the defendant had been charged. About noon on September 3, 1998, while the respondent was presiding over a session of domestic violence court, attorney Covington appeared in the respondent's courtroom along with Covington's associate William C. Fleming, Jr., defendant Podger, charging officer T.P. Cullinan, and assistant district attorney Brian T. Beasley. Upon their arrival and after Covington reminded the respondent about the *Podger* case, the respondent invited them all to step out of the courtroom into the hallway and then disposed of the *Podger* case as he had agreed to do two (2) days earlier by finding the defendant guilty of careless and reckless driving and entering judgment thereon. The respondent disposed of the case out-of-court, when the case was not calendared and neither the case file nor a courtroom clerk were present, and when the respondent knew or should have known that finding the defendant guilty of careless and reckless driving and entering judgment thereon was improper in these circumstances.

4. The actions of the respondent constitute willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute and are in violation of Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct.

On 10 August 1999, respondent answered the complaint, admitting the facts as alleged in paragraph 3(a), except as to (1) the guilty verdict to careless and reckless driving being willfully improper, and (2) erroneously believing under the circumstances that he was entitled to enter a verdict of guilty to careless and reckless driving in the case. As to paragraph 3(b), respondent admitted in part and denied in part. In his answer, respondent stated that when Covington approached him, Covington informed respondent that the district attorney was aware of and consented to the *ex parte* meeting. Respondent specifically denied that he knew or should have known at the time that the *Podger* matter was not duly calendared. Respondent denied that finding the defendant guilty of careless and reckless driving and entering judgment thereon was improper in the circumstances of the *Podger* case. As to paragraph 4, respondent denied that his actions constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

On 17 September 1999, respondent was served with a notice of formal hearing concerning the charges alleged. The Commission conducted the hearing on 4 and 5 November 1999, at which time both parties presented evidence and arguments. Evidence was presented tending to support the allegations in the complaint. After hearing the evidence, the Commission concluded that respondent's actions constituted:

a. conduct in violation of Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct with respect to the facts found in paragraphs 9 and 10 [of the Commission's recommendation];

b. conduct prejudicial to the administration of justice that brings the judicial office into disrepute as defined in *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976); and

c. willful misconduct in office as defined in *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977), and in light of *In re Martin*, 333 N.C. 242, 424 S.E.2d 118 (1993).

The Commission recommended that this Court censure respondent.

In proceedings pursuant to N.C.G.S. § 7A-376, this Court acts as a court of original jurisdiction, rather than in its usual capacity as an appellate court. *See In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). In reviewing the recommendations of the Commission, the recommendations are not binding upon this Court. We consider the evidence on both sides and then exercise independent judgment as to whether to censure, to remove, or to decline to do either. *See In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977).

The quantum of proof in proceedings before the Commission is proof by clear and convincing evidence. *See id.* at 247, 237 S.E.2d at 254. Such proceedings are not meant "to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *Nowell*, 293 N.C. at 241, 237 S.E.2d at 250. After thoroughly examining the evidence presented to the Commission, we conclude the Commission's findings of fact are supported by clear and convincing evidence and adopt them as our own. *See In re Harrell*, 331 N.C. 105, 110, 414 S.E.2d 36, 38 (1992). A thorough review of the record, transcript, briefs, and oral arguments revealed the following:

IN RE BROWN

[351 N.C. 601 (2000)]

State v. Debraeckeleer

Respondent presided over the 30 July 1998 trial of *State v. Ludwig Charles Debraeckeleer*, Durham County file number 97 CR 32970, in which the defendant was charged with DWI in violation of N.C.G.S. § 20-138.1. The district attorney had moved to continue the case because the arresting officer was not present. Defense counsel, Michael Allan Jordan, objected to the continuance on the grounds the case was somewhat old and had been previously continued specifically to get witnesses to trial. The case was called for trial later that same day. After the State presented its evidence, Jordan moved to dismiss the DWI charge for insufficient evidence because there was no evidence of an arrest, an assessment of the defendant's condition, or an assessment of the Intoxilyzer results. Respondent subsequently allowed Jordan's motion to dismiss. However, respondent then pronounced a verdict of guilty of careless and reckless driving. In making this ruling, respondent indicated that the State had clearly not met its burden of proof but that there was sufficient evidence to convict of careless and reckless driving. Jordan objected in open court to the guilty verdict and informed respondent that the defendant had not been charged with careless and reckless driving. Respondent indicated that he understood Jordan's position, but believed it to be reasonable and proper to convict the defendant of careless and reckless driving based on evidence of the accident, an odor of alcohol on the defendant's breath, and his physical appearance. Jordan later spoke with respondent in chambers regarding certain conditions of the order and reiterated his position that a finding of careless and reckless driving was improper. Respondent replied that he "thought [he] had [Jordan] over a barrel," meaning to Jordan that respondent understood that he should not have entered the ruling. Respondent also indicated to Jordan that he did not think it was wise for Jordan to appeal the case because the State would probably get the missing trooper to court and Jordan would have less of a chance of winning on the DWI charge. At the hearing before the Commission, Jordan opined that respondent was aware that careless and reckless driving was not a lesser included offense of DWI and that this was common knowledge for those who practice in criminal courts in Durham County.

Brian Beasley was the assistant district attorney for Durham County who called the *Debraeckeleer* case for trial before respondent. At the hearing before the Commission, he indicated that careless and reckless driving is not a lesser included offense of

DWI and that he did not ask respondent to convict the defendant of careless and reckless driving. Beasley testified that he was shocked when respondent found the defendant guilty of careless and reckless driving. It was his opinion that the verdict was legally improper. Beasley also believed that respondent knew the verdict was not proper, as it was common knowledge that careless and reckless driving was not a lesser included offense to DWI. He believed it was common knowledge because the case of *In re Martin* had been discussed in the news media's coverage of the 1998 race for the North Carolina Supreme Court. Beasley further indicated that he understood from *In re Martin* that a judge could not enter a verdict of careless and reckless driving for a DWI charge. In addition, Beasley heard respondent say he thought he had Jordan "over a barrel" with his verdict.

Respondent testified that he found the defendant guilty of careless and reckless driving because he felt it was a "horrible DWI" and he was following the evidence that the defendant crossed the center line twice before the head-on collision. Respondent agreed that careless and reckless driving was not a lesser included offense of DWI but testified that the evidence was so compelling that he did not even think of that when he made his ruling.

Durham County Chief District Court Judge Kenneth Titus testified that respondent knew careless and reckless was not a lesser included offense of DWI because of a conversation they had involving the *Debraeckeleer* case.

State v. Podger

On 1 September 1998, respondent had an *ex parte* meeting with Jay Wesley Covington and William Charles Fleming, Jr., attorneys for the defendant, concerning *State v. Kenneth Arthur Podger*, Durham County file no. 98 CR 05350, in which the defendant was charged with DWI in violation of N.C.G.S. § 20-138.1. At the hearing before the Commission, Fleming testified that after explaining the facts of the *Podger* case to respondent, Covington asked respondent if he would be willing to hear the DWI trial two days later. Covington then told respondent that he wanted to obtain a careless and reckless plea for the defendant. Fleming testified that Covington said "he was charging [the defendant] a huge fee in the case, and that if [respondent] found [the defendant] guilty of careless and reckless, that a substantial portion of that fee would flow through to the appropriate political campaigns." Respondent then agreed to reduce the charge and find the

defendant guilty of careless and reckless driving, indicating to Fleming there was a predetermined outcome.

On 3 September 1998, while respondent was presiding over domestic violence court, Covington appeared in respondent's courtroom with his associate, Fleming; the defendant; and the charging officer, Terry P. Cullinan. Fleming testified that Covington asked to approach the bench and then said, "I just wanted to remind you that we're to do the Podger trial today, and you're going to find him guilty of careless and reckless. You're going to fine him $1,000. You're going to give him community service and probation." Assistant District Attorney Brian T. Beasley then arrived in the courtroom. Subsequently, respondent, Covington, Fleming, the defendant, Beasley, and Cullinan left the courtroom and moved into the hallway. Once in the hallway, with no court clerk present, Covington recited the facts of the case, as he had two days prior, and then asked respondent for a conviction of careless and reckless driving. Fleming testified that respondent then asked Beasley if the State agreed with the facts recited by Covington. When Beasley responded affirmatively, respondent stated, "Well, in that case, I'll find [the defendant] guilty of careless and reckless, fine him $1,000, give him probation, community service."

Respondent testified before the Commission that Covington approached him in the hallway on 1 September 1998 and indicated he needed some help in a DWI case. Covington was looking to obtain a careless and reckless driving plea. Respondent indicated that he did not take Covington seriously and that he did not remember Covington mentioning a huge fee. However, respondent agreed to hear the *Podger* matter on 3 September 1998, as he was the resident traffic court judge that week. Respondent testified that on 3 September 1998 Covington approached respondent during a mid-morning break. Respondent asked Covington some questions about the *Podger* case and about the defendant's record. Covington stated that the defendant had a prior DWI conviction from 1994 in which the defendant had blown a .08. Respondent indicated that he would agree to careless and reckless driving only with consent of the State. Around noon on 3 September, Beasley and Covington approached respondent, and Covington indicated that there was a plea agreement. Respondent asked them to step into the hallway so he could assess the plea because there was noise in the courtroom. Respondent did not believe the court clerk's presence was required. Once in the hallway, Covington informed respondent that the defend-

ant had blown a .15 in the case at issue. When respondent asked Beasley and Cullinan if they consented to the plea, both responded in the affirmative. Respondent then imposed a standard careless and reckless judgment. Respondent subsequently learned that the defendant had another prior DWI conviction in addition to the one Covington mentioned and that the prior DWI mentioned by Covington was actually in 1993 when the legal limit was .10. Thereafter, respondent testified that he filed a *sua sponte* motion pursuant to N.C.G.S. § 15A-1021(c) to vacate the judgment because he felt critical facts had been misrepresented to him or omitted. Although respondent believed that he had the authority to enter the plea out of court pursuant to N.C.G.S. § 7A-191, he apologized for taking the plea in the hallway, acknowledged there was a pall cast on the administration of justice, and stated he would never do anything other than bond reductions outside of the courtroom.

The Commission alleges respondent violated Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct. Canon 2A provides: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Code of Judicial Conduct Canon 2A, 2000 Ann. R. 274 (Lexis). Canon 3A(1) provides: "A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism." Code of Judicial Conduct Canon 3A(1), 2000 Ann. R. 276 (Lexis). Lastly, Canon 3A(4) provides:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.

Code of Judicial Conduct Canon 3A(4), 2000 Ann. R. 276 (Lexis).

Censure or removal of a judge is governed by N.C.G.S. § 7A-376, which provides:

> Upon recommendation of the Commission, the Supreme Court may censure or remove any judge for willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpi-

tude, or *conduct prejudicial to the administration of justice that brings the judicial office into disrepute.*

N.C.G.S. § 7A-376 (1999) (emphasis added); *see also In re Renfer*, 347 N.C. 382, 384, 493 S.E.2d 434, 435 (1997). Section 7A-377 of the North Carolina General Statutes provides the procedure the Commission utilizes in recommending censure or removal of a justice or judge. N.C.G.S. § 7A-377 (1999).

In the instant case, the Commission found that respondent's actions constituted willful misconduct and were prejudicial to the administration of justice such that they brought the judicial office into disrepute. We have stated that "[w]ilful misconduct in office is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence." *In re Edens*, 290 N.C. 299, 305, 226 S.E.2d 5, 9 (1976). "A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith." *Nowell*, 293 N.C. at 248, 237 S.E.2d at 255.

In addition, we have defined "[c]onduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . as 'conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.' " *Edens*, 290 N.C. at 305, 226 S.E.2d at 9 (quoting *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 284, 515 P.2d 1, 9, 110 Cal. Rptr. 201, 209 (1973), *cert. denied*, 417 U.S. 932, 41 L. Ed. 2d 235 (1974)). "Wilful misconduct in office of necessity is conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *Nowell*, 293 N.C. at 248, 237 S.E.2d at 255 (emphasis omitted).

After carefully reviewing the evidence in this case, we conclude that respondent's actions in both the *Debraeckeleer* and *Podger* cases constituted willful misconduct and were prejudicial to the administration of justice such that they brought the judicial office into disrepute. As to the *Debraeckeleer* matter, it is clear that respondent knowingly convicted the defendant of careless and reckless driving when the defendant had not been charged with that offense. The evidence provided by Beasley, along with the testimony of Chief Judge Titus, also convinces us that respondent should have

known that careless and reckless driving is not a lesser included offense of DWI. Additional support for this conclusion is garnered from our recent pronouncement on this very issue. *See In re Martin*, 333 N.C. 242, 245, 424 S.E.2d 118, 119-20 (1993) (where this Court held, "[c]onvicting defendants of reckless driving when they were charged with [DWI] were acts which respondent knew to be improper and *ultra vires*, or beyond the powers of his office"). As respondent's conduct in the *Debraeckeleer* case was unquestionably "wilful misconduct," we must also conclude that his action was prejudicial to the administration of justice such that the judicial office was brought into disrepute. *Nowell*, 293 N.C. at 248, 237 S.E.2d at 255.

Regarding the *Podger* incident, it is important to note that criminal cases should be heard in open court, as they are the public's business. *See id.* at 249, 237 S.E.2d at 255; *Edens*, 290 N.C. at 306, 226 S.E.2d at 9-10. In *Edens*, this Court determined that the respondent's removal of a criminal case "outside the courtroom when court was not in session improperly removed the proceeding from the public domain where it belonged and made it instead a private matter." *Edens*, 290 N.C. at 306, 226 S.E.2d at 10. In the *Podger* case, respondent acknowledges that taking the guilty plea in the hallway "cast [a] pall" upon the administration of justice. We agree. At least since the *Nowell* case was published over twenty years ago, members of our judiciary have been on notice that conducting court business outside of open court will not be condoned. We are convinced that respondent should have known his action in taking the disposition of this case outside of the courtroom was improper and amounted to willful misconduct and conduct prejudicial to the judicial office. Moreover, respondent knew or had reason to know that it was improper to dispose of a DWI charge by convicting the defendant of careless and reckless driving. *See Martin*, 333 N.C. at 245, 424 S.E.2d at 119-20.

"Judges especially must be vigilant to act within the bounds of their judicial power." *Id.* at 245, 424 S.E.2d at 120. We have previously stated that "[e]ach 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." *In re Tucker*, 348 N.C. 677, 681, 501 S.E.2d 67, 70 (1998). As we recognized in *Nowell*, "[t]he power of the district court over the lives and everyday affairs of our citizens makes it imperative that the district court judges of the State not only be fully capable but also dedicated to carrying out their official responsibilities in accordance with the law and estab-

lished standards of judicial conduct." *Nowell*, 293 N.C. at 252, 237 S.E.2d at 257.

The conduct of respondent unquestionably warrants censure. Respondent overstepped his authority, engaged in misconduct, and brought disrepute to the judiciary of our State. We will not condone this conduct. It is deserving of our harshest criticism.

In light of the foregoing, we conclude that respondent's actions constitute conduct in violation of Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct. Therefore, pursuant to N.C.G.S. §§ 7A-376 and 7A-377 and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that respondent, Craig B. Brown, be and he is hereby, censured for willful misconduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Done by Order of the Court in Conference, this the 4th day of May, 2000.

Freeman, J.
For the Court

STATE OF NORTH CAROLINA v. ALLEN TERRELL ANTHONY

No. 342PA99

(Filed 5 May 2000)

Rape— statutory—consent not a defense

Statutory construction of N.C.G.S. § 14-27.7A(b) reveals that consent is not a defense to a charge of vaginal intercourse or a sexual act with a person who is thirteen, fourteen, or fifteen years old by a defendant who is more than four but less than six years older than the victim because: (1) the designation of marriage in this statute as the single defense is an implicit rejection of all other defenses under the doctrine of inclusio unius est exclusio alterius; (2) the purpose of the statute, when viewed in the context of the historical development of this area of law, is to protect children aged thirteen, fourteen, and fifteen years old

from sexual acts; (3) the legislature identified the difference in age between the defendant and the victim as an essential element of the crime, reflecting a legitimate legislative decision that sexual intercourse or sexual acts with children deserve more severe punishment if the victim is younger or based on a greater difference in age between the victim and the older defendant; (4) the fact the legislature did not chose to amend an existing statute does not mean that it intended to depart from well-established precedent and allow consent as a defense to a charge of violating the new statutory rape statute; and (5) the use of the term "statutory rape" in the title of the legislative act presumes the legislature intended to impart that term's well-understood meaning of an offense committed against a victim legally incapable of giving consent to sexual intercourse because of age or other incapacity.

Justice WAINWRIGHT dissenting.

Justice ORR joins in the dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 133 N.C. App. 573, 516 S.E.2d 195 (1999), finding no error in a judgment entered 25 March 1998 by Martin (Lester P., Jr.), J., in Superior Court, Davie County. Heard in the Supreme Court 17 February 2000.

Michael F. Easley, Attorney General, by Elizabeth L. Oxley, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Bobbi Jo Markert, Assistant Appellate Defender, for defendant-appellant.

FRYE, Chief Justice.

The sole issue in this case is the construction of N.C.G.S. § 14-27.7A(b), which provides:

> A defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person, except when the defendant is lawfully married to the person.

N.C.G.S. § 14-27.7A(b) (1999). The question raised by defendant's petition for discretionary review is whether the statute permits a defense of consent. We conclude that it does not.

The relevant facts are not in dispute and need not be elaborated in great detail. Defendant, aged twenty, spent the evening of 6 January 1997 with the victim, aged fourteen, and two other teenagers. At approximately 11:00 p.m., defendant began driving his three companions home. Defendant first dropped off the other teenagers. At some time between 11:15 and 11:45 p.m., while defendant and the victim were alone in the car, defendant drove the car off the main road and engaged in sexual intercourse with the victim in the front seat. Defendant then drove the victim home.

The victim's mother took her to the Davie County Hospital emergency room, where she was examined in the early morning hours of 7 January 1997. The victim told hospital personnel that she had been raped. The examining physician noted that the victim's condition was consistent with sexual intercourse. When law enforcement officers arrived at the hospital, the victim told them that defendant had forced himself on her.

Later that morning, defendant was arrested on a warrant charging him with second-degree rape. Defendant gave a statement to law enforcement officers in which he admitted having sex with the victim but contended that it was consensual.

On 27 May 1997, defendant was indicted on a charge of violating N.C.G.S. § 14-27.7A(b), specifically that he

> unlawfully, willfully and feloniously did engage in vaginal intercourse with [the victim], a person of 14 years of age. At the time of the offense, the defendant was more than four but less than six years older than the victim, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

Defendant was tried before a jury at the 2 March 1998 Criminal Session of Superior Court, Davie County. At the close of all the evidence, the prosecutor requested that the trial court give an additional instruction that "consent is not a defense to the charge of statutory rape." The trial court agreed and, after instructing the jury as to the elements of the charged offense, instructed the jury as follows:

> I also instruct you that the forbidden conduct under this statutory rape charge is the act of intercourse itself. Any force used in the act or apparent lack of consent of the child or not are not essential elements. This is so because this statutory rape law was designed to protect children.

The jury returned a verdict of guilty "of statutory rape of a victim who was 14 years old at the time of the offense and the defendant was more than four but less than six years older." The trial court sentenced defendant to a minimum of fifty-eight months' and a maximum of seventy-nine months' imprisonment. The Court of Appeals found no error in defendant's trial.

The single issue presented to this Court by defendant's petition for discretionary review is whether consent is a defense to a charged violation of N.C.G.S. § 14-27.7A(b) and, thus, whether the trial court's instruction constituted plain error. Section 14-27.7A was enacted in 1995 and, prior to the instant case, had not been interpreted by our appellate courts. In this respect, therefore, this case presents an issue of first impression. However, to the extent that the legislature has historically defined statutory rape and statutory sex offenses and the Court has conducted ample review and interpretation of those statutes, the decision announced today does not depart from the established jurisprudence of the state.

We begin by examining the plain language of N.C.G.S. § 14-27.7A(b). "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute." *Electric Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citation omitted). In this case, the language of the statute is clear and unambiguous as to the conduct prohibited. The statute prohibits vaginal intercourse or sexual acts with a person thirteen, fourteen, or fifteen years old by a defendant who is "more than four but less than six years older." N.C.G.S. § 14-27.7A(b).

While the crime is unambiguously defined, however, whether consent is or is not a defense to the crime is not expressly addressed by the plain language of N.C.G.S. § 14-27.7A(b). Defendant contends that, because the legislature could have specifically prohibited consent as a defense to a charge under this section and did not, the legislature must have intended consent to be a defense. However, the legislature did specifically identify marriage as a defense in both subsections (a) and (b) of N.C.G.S. § 14-27.7A. While not dispositive, under the doctrine *inclusio unius est exclusio alterius* ("The inclusion of one is the exclusion of another." *Black's Law Dictionary* 763 (6th ed. 1990)), the designation of this single defense is an implicit rejection of all others.

In addition to the language of a statute, we also look to "the spirit of the act[] and what the act seeks to accomplish" when discerning legislative intent. *Taylor v. Taylor*, 343 N.C. 50, 56, 468 S.E.2d 33, 37 (1996). In this case, an analysis of the development of North Carolina's law shows that the new statute, N.C.G.S. § 14-27.7A, embodies the spirit and purpose of earlier statutes dealing with the same general subject.

As early as 1837, North Carolina had codified the crime of rape as follows:

> Any person, who shall ravish and carnally know any female, of the age of ten years or more, by force or against her will, *or who shall unlawfully and carnally know and abuse any female child under the age of ten years*, shall be adjudged guilty of felony, and shall suffer death . . . .

1837 Rev. Code ch. 34, § 5 (emphasis added). In describing the origin of our state's "statutory rape" law, the Court in *State v. Johnston*, 76 N.C. 209 (1877), noted:

> Rape is the carnal knowledge of a female forcibly and against her will. This definition leaves out the elements of age altogether. And it seems to be left in some obscurity how and why that element came to be considered. Probably it was in this way; there were instances where children below the age of discretion were enticed to yield, without a full knowledge of the nature of the act and of the consequences; and *therefore, it became necessary to fix an age under which it should be presumed, not that the act could not be consummated, but that consent could not be given.* And so it came to be provided, that the consummation of the act upon a female under ten years of age, with or without her consent, shall be the same as if consummated upon a female over ten years of age without her consent or against her will.

Id. at 210 (citations omitted) (emphasis added). The legislature later raised to twelve the age under which it was presumed that consent could not be given. *See* N.C.G.S. § 14-21 (Supp. 1977) (repealed 1979). The present-day successor to this line of statutes is N.C.G.S. § 14-27.2(a)(1), which provides:

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C.G.S. § 14-27.2(a)(1) (1999); *see also* N.C.G.S. § 14-27.4(a)(1) (1999) (first-degree sexual offense).

This Court has consistently recognized that consent of the victim is not a defense under N.C.G.S. § 14-27.2(a)(1) or its predecessor statutes. *See, e.g., State v. Rose*, 312 N.C. 441, 445, 323 S.E.2d 339, 342 (1984); *State v. Temple*, 269 N.C. 57, 68, 152 S.E.2d 206, 214 (1967); *Johnston*, 76 N.C. at 210. Where the age of the victim is an essential element of the crime of rape, as in N.C.G.S. § 14-27.2(a)(1) and its predecessor statute N.C.G.S. § 14-21, the result is a strict liability offense. As we said in *State v. Temple*, "Consent is no defense, and this is true by virtue of the language of the statute." 269 N.C. at 68, 152 S.E.2d at 214 (reviewing a prosecution under N.C.G.S. § 14-21, where the defendant was charged with feloniously and carnally knowing and abusing a female child under the age of twelve years).

The purpose of the statutory rape law is to protect children under a certain age from sexual acts. *See State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993). In *Weaver*, we said:

> [The] lack of an assault requirement under the statutory rape law, G.S. 14-27.2(a)(1), is understandable given the purpose of the statute. Unlike the provision of the first-degree rape statute that applies if the victim is an adult, *the forbidden conduct under the statutory rape provision is the act of intercourse itself*; any force used in the act, any injury inflicted in the course of the act, or *the apparent lack of consent of the child are not essential elements. This is so because the statutory rape law, G.S. 14-27.2(a)(1), was designed to protect children under twelve from sexual acts.*

Weaver, 306 N.C. at 637, 295 S.E.2d at 380 (citations omitted) (emphasis added) (explaining an earlier version of N.C.G.S. § 14-27.2(a)(1)).

Defendant contends that because the legislature created N.C.G.S. § 14-27.7A as a separate statute, rather than amending N.C.G.S. § 14-27.2(a)(1), it intended the two statutes to be construed differently and that prior case law interpreting N.C.G.S. § 14-27.2(a)(1) should not be used to construe N.C.G.S. § 14-27.7A(b). We disagree.

We conclude that the purpose of N.C.G.S. § 14-27.7A, by its plain language and when viewed in the context of the historical development of this area of the law, is to protect children aged thirteen, fourteen, and fifteen years old from sexual acts. It would undermine this purpose to allow a defendant to claim that the thirteen-, fourteen-, or fifteen-year-old victim consented to the very acts that the statute is designed to prevent. This Court will avoid a construction that works to " 'defeat or impair the object of the statute . . . if that can reasonably be done without violence to the legislative language.' " *Electric Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294 (quoting *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975)).

We also note that the legislature identified the defendant's age, or more specifically the difference in age between the defendant and the victim, as an essential element of the crime at issue here. This is consistent with N.C.G.S. § 14-27.2(a)(1), which requires that the defendant be "at least 12 years old and . . . at least four years older than the victim." N.C.G.S. § 14-27.2(a)(1); *see also* N.C.G.S. § 14-27.4(a)(1) (first-degree sexual offense). N.C.G.S. § 14-27.7A is a logical extension of the existing statutory rape and statutory sexual offense laws in this respect, particularly when the statute is read as a whole. Subsection (a) prohibits vaginal intercourse or sexual acts with a person who is thirteen, fourteen, or fifteen years old by a defendant who is at least six years older than the victim and punishes this offense as a Class B1 felony. The same conduct is forbidden by subsection (b) where the defendant is more than four but less than six years older than the victim but is punishable as a Class C felony. The structure of N.C.G.S. § 14-27.7A is consistent with N.C.G.S. § 14-27.2(a)(1) in reflecting a legitimate legislative decision that sexual intercourse or sexual acts with children deserve more severe punishment if the victim is younger or based on a greater difference in age between the victim and the older defendant. The fact that the legislature did not choose to amend an existing statute does not mean that it intended to depart from well-established precedent and allow consent as a defense to a charge of violating the new statutory rape statute.

Finally, we may consider the title of an Act as a " 'legislative declaration of the tenor and object of the Act.' " *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992) (quoting *State v. Woolard*, 119 N.C. 779, 780, 25 S.E. 719, 719 (1896)). The statute at issue here was passed under the title "An Act to Create Offenses of Statutory Rape and Statutory Sexual Offense Against Victims Who Are Thirteen, Fourteen, or Fifteen Years Old." Act of 19 June, 1995,

ch. 281, 1995 N.C. Sess. Laws 565, 565-66. The term "statutory rape" has a particularized meaning as an offense committed against a victim legally incapable of giving consent to sexual intercourse because of age or other incapacity. *See, e.g., State v. Browder*, 252 N.C. 35, 38, 112 S.E.2d 728, 730 (1960). "[W]e presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts." *State ex rel. Cobey*, 333 N.C. at 90, 423 S.E.2d at 763. Therefore, by using the term "statutory rape" in the title of this Act, we presume that the legislature intended to impart that term's well-understood meaning to the offenses defined by N.C.G.S. § 14-27.7A.

We note that defendant makes numerous public policy arguments why thirteen-, fourteen-, and fifteen-year-old persons should be considered capable of giving meaningful consent to sexual acts. However, these arguments are more properly directed to the legislature. The sole issue before this Court is one of statutory construction, and for the foregoing reasons, we hold that consent is not a defense to a charge of violating N.C.G.S. § 14-27.7A(b). Accordingly, the trial court's instruction to the jury was a correct statement of the law, and we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice WAINWRIGHT dissenting.

I respectfully dissent. This is a case of statutory construction. I agree with the majority that the statute at issue in the instant case is clear and unambiguous; however, because there is no clear mandate from the legislature, I do not agree with the majority's conclusion that the statute does not include a consent defense. "[W]hen the language of a statute is clear and unambiguous there is no room for judicial construction and the court must give the statute its plain and definite meaning without superimposing provisions or limitations not contained within the statute." *State v. Williams*, 291 N.C. 442, 446, 230 S.E.2d 515, 517 (1976); *accord State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979); *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974).

In other statutes within chapter 14, article 7A, the legislature included consent language: (1) section 14-27.2, the first-degree rape statute, refers to vaginal intercourse with a child under the age of thirteen years or with another person *by force and against the will of that person*, N.C.G.S. § 14-27.2 (1999); (2) section 14-27.3, the

second-degree rape statute, refers to vaginal intercourse with another person *by force and against the will of that person* or with someone who is mentally defective, mentally incapacitated or physically helpless, N.C.G.S. § 14-27.3 (1999); (3) section 14-27.4, the first-degree sexual offense statute, refers to engaging in a sexual act with a child under the age of thirteen years or with another person *by force and against the will of that person*, N.C.G.S. § 14-27.4 (1999); (4) section 14-27.5, the second-degree sexual offense statute, refers to engaging in a sexual act with a person *by force and against the will of that person* or with someone who is mentally defective, mentally incapacitated, or physically helpless, N.C.G.S. § 14-27.5 (1999); and (5) section 14-27.7, titled "Intercourse and sexual offenses with certain victims; consent no defense," explicitly states "[c]onsent is not a defense to a charge under this section," N.C.G.S. § 14-27.7 (1999).

In contrast, the statute at issue, N.C.G.S. § 14-27.7A, refers to vaginal intercourse or a sexual act with a person who is thirteen, fourteen, or fifteen years old. N.C.G.S. § 14-27.7A (1999). In the other statutes in this article, the legislature included the phrase "by force and against the will of the other person" or "[c]onsent is not a defense" to specify its intention. Therefore, it is clear the legislature knew how to indicate consent was not a defense if that was its intention.

N.C.G.S. § 14-27.7A is neither unclear nor ambiguous as to whether consent is a defense. It is silent. We have previously stated that this Court, "even if persuaded by the State's concerns, may not substitute its judgment for that of the General Assembly." *State v. Bates*, 348 N.C. 29, 37, 497 S.E.2d 276, 280 (1998). While the majority focuses on the specific inclusion of a marriage defense and the "spirit" of the Act to protect children, I cannot overlook the legislature's clear distinction between the use of the phrase "by force and against the will of the other person" or the inclusion of the specific language that "[c]onsent is not a defense" in the other statutes of the same article. Without a clear mandate that consent is not a defense, the majority is substituting its judgment for the legislature's and creating a limitation which is not in the statute.

Justice ORR joins in the dissenting opinion.

STATE OF NORTH CAROLINA v. ALLEN T. SUMMERS, JR.

No. 195PA99

(Filed 5 May 2000)

Motor Vehicles— driving while impaired—refusal to submit to Intoxilyzer—civil and criminal cases—collateral estoppel

The Court of Appeals did not err in defendant's criminal prosecution for DWI by applying the doctrine of collateral estoppel to prevent relitigation of whether defendant willfully refused to submit to an Intoxilyzer test because: (1) that exact issue had been conclusively decided on appeal to civil superior court from defendant's driver's license revocation from the Division of Motor Vehicles (DMV) with the Attorney General representing DMV in superior court; (2) there is privity between the district attorney, representing the State in defendant's criminal prosecution for DWI, and the Attorney General, representing the State in defendant's appeal to civil superior court from his license revocation, since they both represent the interest of protecting the citizens of North Carolina from drunk drivers in judicial actions involving the determination of whether there was a willful refusal to submit to an Intoxilyzer test; and (3) N.C.G.S. § 20-16.2 and § 20-139.1, the primary sections prescribing the procedures for conducting chemical analysis and the civil and criminal consequences of the analysis, indicate a commonality of purpose and reflects direct cross-reference and reliance between the two.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 132 N.C. App. 636, 513 S.E.2d 575 (1999), reversing a judgment entered by Read, J., on 9 October 1997 in Superior Court, Durham County, and remanding for a new trial. Heard in the Supreme Court 16 February 2000.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State-appellant.

The Law Offices of James D. Williams, Jr., P.A., by James D. Williams, Jr., for defendant-appellee.

LAKE, Justice.

Defendant was stopped on 23 March 1996 for passing another vehicle in a no-passing zone and was subsequently arrested for dri-

ving while impaired (DWI) in violation of N.C.G.S. § 20-138.1. He was taken to the magistrate's office, where the charging officer recorded that defendant willfully refused to submit to an Intoxilyzer breath-alcohol test. Defendant's refusal was reported to the Division of Motor Vehicles (DMV), which notified defendant that his driver's license was being revoked for one year, pursuant to N.C.G.S. § 16.2(d). Defendant appealed for a hearing before DMV, at which time the revocation was upheld. He then appealed to civil superior court, and on 17 April 1996, Superior Court Judge David Q. LaBarre overturned the revocation upon finding that defendant did not willfully refuse to submit to the Intoxilyzer test.

Defendant was found guilty of DWI in criminal district court on 7 October 1996 and appealed to superior court for a trial *de novo*. The trial court denied his motion *in limine* to exclude evidence relating to his alleged refusal to submit to the breath-alcohol test. Defendant was tried before a jury at the 7 October 1997 Criminal Session of Superior Court, Durham County. The jury found defendant guilty of DWI, and he appealed to the Court of Appeals.

The Court of Appeals issued a unanimous decision granting defendant a new trial. The court held the doctrine of collateral estoppel prevented relitigation of the question of whether defendant willfully refused to submit to an Intoxilyzer test because that issue had been conclusively decided on appeal to civil superior court from defendant's driver's license revocation by DMV. *State v. Summers*, 132 N.C. App. 636, 645, 513 S.E.2d 575, 581 (1999). On appeal to this Court, the State contends the Court of Appeals erred in applying the doctrine of collateral estoppel. We disagree.

The question of whether defendant did, in fact, willfully refuse to submit to an Intoxilyzer test is irrelevant to the determination of this appeal. The only issue before this Court is whether a civil superior court determination, on appeal from an administrative hearing, pursuant to N.C.G.S. § 20-16.2(e), regarding an allegation of willful refusal, estops the relitigation of that same issue in a defendant's criminal prosecution for DWI.

Under North Carolina law, "[a]ny person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense," which includes an offense involving impaired driving. N.C.G.S. § 20-16.2(a) (1999). If an individual charged with an implied-consent offense willfully refuses to submit to chemical analysis, after being informed of

the consequences of willful refusal, in accord with N.C.G.S. § 20-16.2, the charging officer must execute an affidavit to that effect, pursuant to N.C.G.S. § 20-16.2(c). Upon receipt of the affidavit, DMV must expeditiously notify the person charged that his or her license to drive is revoked for twelve months. N.C.G.S. § 20-16.2(d). The person charged may request a hearing by a DMV hearing officer, pursuant to N.C.G.S. § 20-16.2(d), and, if the revocation is sustained, he or she has the right to a hearing *de novo* in superior court. N.C.G.S. § 20-16.2(e).

In the case *sub judice*, DMV revoked defendant's license on the basis of an alleged willful refusal to submit to an Intoxilyzer test. Defendant's revocation was sustained through all stages of administrative review, and defendant filed a petition for a hearing *de novo* in superior court. At the civil court hearing, with the State Attorney General's office representing DMV, Judge LaBarre made findings of fact supporting the conclusion of law that defendant "did not willfully refuse to submit to a chemical analysis upon the request of the charging officer" and, on that basis, dismissed the revocation order. The State did not appeal the trial court's ruling, which accordingly became the law of the case. This Court must now determine whether the trial court's ruling became conclusive in defendant's criminal trial for DWI.

> The companion doctrines of *res judicata* and collateral estoppel have been developed by the courts of our legal system during their march down the corridors of time to serve the present-day dual purpose of protecting litigants from the burden of relitigating previously decided matters and of promoting judicial economy by preventing needless litigation.

Thomas M. McInnis & Assocs. v. Hall, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986). The doctrine of collateral estoppel, also referred to as "issue preclusion" or "estoppel by judgment," precludes relitigation of a fact, question or right in issue

> "when there has been a final judgment or decree, necessarily determining [the] fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit."

King v. Grindstaff, 284 N.C. 348, 355, 200 S.E.2d 799, 805 (1973) (quoting *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 576

(1962)). The doctrine of collateral estoppel " 'is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally.' " *Id.* at 356, 200 S.E.2d at 805 (quoting *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599, 92 L. Ed. 898, 907 (1948)). " '[W]hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.' " *Id.* at 355, 200 S.E.2d at 804 (quoting *Dunstan*, 256 N.C. at 523-24, 124 S.E.2d at 576).

The requirements for the identity of issues to which collateral estoppel may be applied have been established by this Court as follows: (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment. *Id.* at 358, 200 S.E.2d at 806. Here, there is no dispute as to "the issue" element of collateral estoppel. The State does not contest that "the issue" is whether there was willful refusal, that it was raised and litigated and that it was material and necessary to the resulting judgment in defendant's appeal of his license revocation. Therefore, it is unnecessary to further analyze the collateral estoppel element of issue identity.

Unlike issue identity, the rules for determining whether the parties in question are or were in privity with parties in the prior action are not as well defined. Except in cases where the parties in each claim are identical, the meaning of "privity" for the purpose of collateral estoppel is "somewhat elusive . . . [and] '[t]here is no definition of the word "privity" which can be applied in all cases.' " *Hales v. N.C. Ins. Guar. Ass'n*, 337 N.C. 329, 333-34, 445 S.E.2d 590, 594 (1994) (quoting *Dunstan*, 256 N.C. at 524, 124 S.E.2d at 577). "In general, 'privity involves a person so identified in interest with another that he represents the same legal right' " previously represented at trial. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 417, 474 S.E.2d 127, 130 (1996) (quoting 47 Am. Jur. 2d *Judgments* § 663 (1995)). "Whether or not a person was a party to a prior suit 'must be determined as a matter of substance and not of mere form.' " *Grindstaff*, 284 N.C. at 357, 200 S.E.2d at 806 (quoting *Chicago, Rock Island & Pac. Ry. v. Schendel*, 270 U.S. 611, 618, 70 L. Ed. 757, 763 (1926)). " 'The courts will look beyond the nominal party whose name appears on the record as

plaintiff and consider the legal questions raised as they may affect the real party or parties in interest.' " *Id.* (quoting *Davenport v. Patrick*, 227 N.C. 686, 688, 44 S.E.2d 203, 205 (1947)).

This Court previously determined the question of privity between an attorney general in a civil action and a district attorney in a criminal action in *State ex rel. Lewis v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984). In *Lewis*, there was privity and commonality of interest between the State in its criminal prosecution for nonsupport and the State in its civil action for indemnification of its payments of support to defendant's children. This Court concluded that the State was not a nominal party in either action, and that the defendant was collaterally estopped from litigating the underlying issue of paternity in a civil action after the issue had been fully litigated in the criminal action. *Id.* at 734, 319 S.E.2d at 150.

In the instant case, the State contends the district attorney, representing the State in defendant's criminal prosecution for DWI, was not in privity with the Attorney General, representing the State in defendant's appeal to civil superior court from his license revocation. However, there can be no question that the district attorney and the Attorney General both represent the interests of the people of North Carolina, regardless of whether it be the district attorney in a criminal trial court or the Attorney General in a civil or criminal appeal. See N.C.G.S. § 114-2(1), (2), (4) (1999); N.C.G.S. § 7A-61 (1999); *Simeon v. Hardin*, 339 N.C. 358, 368, 451 S.E.2d 858, 865 (1994).

The State also contends the Attorney General's interest in the revocation proceeding, "to remove from the highway one who is a potential danger to himself and other travelers," *State v. Carlisle*, 285 N.C. 229, 232, 204 S.E.2d 15, 16 (1974), is significantly different from a district attorney's interest in criminally prosecuting an individual for DWI, which is to seek justice and punish offenders. We find this argument unconvincing. The State's "interest" in this case is not the consequence of the outcome of the civil appeal or criminal action, i.e., license revocation or criminal punishment. It is the common interest in protecting the citizens of North Carolina from drunk drivers which supports a finding of privity between the Attorney General and a district attorney in judicial actions involving the determination of whether there was a willful refusal to submit to an Intoxilyzer test. Accordingly, as in *Lewis*, we conclude the State's interest was fully represented in the civil action and, therefore, the privity element of collateral estoppel was met.

Finally, the State argues that even if the requirements for collateral estoppel are met, the application of the judicially created doctrine in this case is inconsistent with the legislative intent to independently regulate DWI prosecution and driver's license revocation. The State contends the General Assembly could not have intended the outcome of one to offset the admissibility of evidence in the other. However, a review of the statutory language of sections 20-16.2 and 20-139.1, the primary sections prescribing the procedures for conducting chemical analysis and the civil and criminal consequences of the analysis, indicates a commonality of purpose and reflects direct cross-reference and reliance between the two. Section 20-16.2 requires that an individual obtaining blood samples for analysis meet the qualification outlined in section 20-139.1, and that a person requesting administration of a chemical analysis of his or her breath be given chemical analysis in accordance with the procedures of section 20-139.1(b). N.C.G.S. § 20-16.2(b), (i). Likewise, section 20-139.1 specifically states that a chemical analysis performed by an arresting officer or by a charging officer under the terms of section 20-16.2 is not valid unless it is performed in accordance with the provisions of section 20-139.1(b). N.C.G.S. § 20-139.1(b) (1999). Section 20-139.1(b3) also establishes the need for sequential breath tests in chemical analysis and provides that a person's willful refusal to give sequential breath samples constitutes a willful refusal under section 20-16.2. N.C.G.S. § 20-139.1(b3). These are only a few of the reciprocal references outlined in sections 20-16.2 and 20-139.1; however, they establish the State's common interest, from both a civil and criminal perspective, in the proper administration of chemical analysis and in the outcome of that analysis.

In appealing from the opinion of the Court of Appeals, the State urges this Court to reinstate the precedent established in *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971). In *Joyner*, this Court stated:

> "It is well established that the same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other, and the outcome of one is of no consequence to the other."

Id. at 238, 182 S.E.2d at 562 (quoting *Ziemba v. Johns*, 183 Neb. 644, 646, 163 N.W.2d 780, 781 (1968)). We stand by *Joyner* and do not perceive that our analysis of the issue at hand has any bearing on its rationale or holding. The instant case is not one, as it was in *Joyner*, where the outcome of a civil *administrative* proceeding, in which the Attorney General did not participate, is being submitted as determinative in a *judicial* proceeding. To the contrary, this case is focused on a prior civil *judicial* determination of one specific issue, in which the Attorney General did participate, and how that prior determination impacts a *judicial* criminal prosecution involving that very same issue. *Cf. Brower v. Killens*, 122 N.C. App. 685, 472 S.E.2d 33 (1996) (finding of no probable cause in judicial criminal proceeding given preclusive effect within subsequent judicial civil proceeding involving same issue), *disc. rev. improvidently allowed per curiam*, 345 N.C. 625, 481 S.E.2d 86 (1997). The holding of this Court in *Joyner*, that the civil administrative license revocation process and the criminal judicial proceedings in a DWI case are separate actions, does not relate to the issue involved here.

In the case *sub judice*, all of the elements of collateral estoppel were satisfied: the interests of the State were represented in the civil appeal by the Attorney General, the district attorney is in privity with the Attorney General, and the issue in interest between the Attorney General in the civil action and the district attorney in the criminal action was material and relevant to the disposition of the civil action and was fully litigated. Therefore, we affirm the Court of Appeals' holding that the State was collaterally estopped from relitigating the issue of willful refusal when the prior court had determined as a matter of law that a refusal, in fact, did not exist. *Summers*, 132 N.C. App. at 645, 513 S.E.2d at 581. We also affirm the Court of Appeals' determination that the holding in this case is "limited to collaterally estopping the relitigation of issues in a criminal DWI case when those exact issues have been litigated in a civil license revocation hearing with the Attorney General representing DMV in superior court." *Id.*

AFFIRMED.

STATE OF NORTH CAROLINA v. KAREN SEAGLE FOREMAN

No. 291PA99

(Filed 5 May 2000)

1. Search and Seizure— driving while impaired—checkpoint avoidance—criminal activity—reasonable and articulable suspicion

The Court of Appeals did not err in upholding defendant's DWI conviction based on the conclusion that under the totality of the circumstances, the arresting officer had a reasonable, articulable suspicion that defendant was engaged in criminal activity prior to any seizure because: (1) the officer observed a quick left turn away from the DWI checkpoint at the precise point where the driver of the vehicle would have first become aware of its presence; (2) the officer did not stop defendant's vehicle once it turned away from the checkpoint, or at any point; and (3) after making a quick turn away from the checkpoint, defendant voluntarily parked in a residential driveway and remained hidden in the car until the officer approached the vehicle.

2. Search and Seizure— driving while impaired—checkpoint avoidance—investigatory stop—minimal intrusion

Even though the Court of Appeals incorrectly concluded that a legal turn away from a DWI checkpoint upon entering the checkpoint's perimeters cannot justify an investigatory stop, the Court of Appeals did not err in upholding defendant's DWI conviction based on the evidence derived from the police officer's observations because: (1) it is reasonable and permissible for an officer to monitor a checkpoint's entrance for vehicles whose drivers may be attempting to avoid the checkpoint; (2) it necessarily follows that an officer, in light of and pursuant to the totality of circumstances or the checkpoint plan, may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away; and (3) our state's interest in combating intoxicated drivers outweighs the minimal intrusion that an investigatory stop may impose upon a motorist under these circumstances. N.C.G.S. § 20-16.3A.

Chief Justice FRYE concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, 133 N.C. App. 292, 515 S.E.2d 488 (1999), finding no error in a judgment entered by Ragan, J., on 25 February 1998 in Superior Court, Craven County. On 19 August 1999, the Supreme Court allowed the State's petition for discretionary review as to additional issues. Heard in the Supreme Court 16 February 2000.

Michael F. Easley, Attorney General, by Jonathan P. Babb, Assistant Attorney General, for the State-appellant and -appellee.

Ward, Potter & Brown, P.A., by William F. Ward, III, for defendant-appellant and -appellee.

LAKE, Justice.

On 16 November 1996, defendant was arrested for driving while impaired (DWI), possession of drug paraphernalia and possession of cocaine. Defendant was subsequently indicted for the DWI charge. On 16 September 1997, defendant was found guilty of DWI in District Court, Craven County, and gave notice of appeal to the superior court. On 12 February 1997, defendant filed a motion to dismiss the charge because there was no probable cause sufficient to justify the stop of her vehicle or, in the alternative, to suppress any evidence obtained from the stop of defendant's vehicle. The trial court denied defendant's motion to dismiss or to suppress, and defendant was tried before a jury at the 23 February 1998 Criminal Session of Superior Court, Craven County. The jury found defendant guilty of DWI. On 25 February 1998, the trial court, *inter alia*, sentenced defendant to a suspended sentence of sixty days in jail with unsupervised probation for two years and revoked her license for one year. Defendant appealed to the North Carolina Court of Appeals.

On appeal, the Court of Appeals found no error. *State v. Foreman*, 133 N.C. App. 292, 515 S.E.2d 488 (1999). In support of its decision, the Court of Appeals concluded that it was not constitutionally permissible for an officer to stop a vehicle which had made a legal turn away from a posted DWI checkpoint. Although we disapprove of the Court of Appeals' conclusion that a legal turn away from a DWI checkpoint, upon entering the checkpoint's perimeters, cannot justify an investigatory stop, we find no error in defendant's conviction. Accordingly, we affirm the decision of the Court of Appeals as modified herein.

The State's evidence tended to show that during the early morning hours of 16 November 1996, officers from the New Bern Police Department were conducting a "DWI Checkpoint" on Neuse Boulevard in New Bern, North Carolina. Notice signs stating that there was a "DWI Checkpoint Ahead" were posted approximately one-tenth of a mile prior to the stop. Officer Doug Ipock was in a police cruiser parked close to the checkpoint's perimeter. His assigned task was to pursue any and all vehicles which appeared to attempt to avoid the checkpoint by turning around or away from it and to determine the basis for such avoidance.

At approximately 2:00 a.m., Officer Ipock observed a small red vehicle traveling on Neuse Boulevard towards the checkpoint. Immediately prior to passing the checkpoint's sign giving notice of the checkpoint, the vehicle made a quick left turn onto Midgette Avenue. Officer Ipock then followed this vehicle and remained approximately thirty to forty yards behind it. Officer Ipock continued to observe the vehicle until it made a second abrupt left turn onto Taylor Street. At this point, Officer Ipock lost sight of the vehicle. After continuing a short distance up and then back down Taylor Street, Officer Ipock ultimately found the vehicle parked in a residential driveway on Taylor Street. The car's lights and ignition were off, and its doors were closed. Officer Ipock directed his bright lights onto the vehicle and also turned on his "take-down lights," thereby enabling the officer to see that people were bent or crouched down inside the car. At this point, the officer radioed for backup and remained in his vehicle until backup arrived, approximately two minutes later. The officer observed that the occupants remained bent or crouched down and that they did not change positions in the vehicle.

Once backup arrived, Officer Ipock approached the vehicle and saw that defendant was sitting in the driver's seat, with the keys still in the ignition. Officer Ipock testified that there were several open containers of alcohol in the vehicle and that the vehicle emitted a "strong odor of alcohol." Additionally, the officer testified that defendant had a strong to moderate odor of alcohol about her person once she exited the vehicle and that she was unsteady on her feet. The officer's observations were admitted into evidence.

[1] Defendant contends that the Court of Appeals erroneously upheld her DWI conviction because the evidence derived from Officer Ipock's observations was inadmissible since his observations were the result of an invalid stop and seizure. Specifically, defendant

argues that at the time she made the legal left turn, just prior to entering the DWI checkpoint, Officer Ipock did not have a reasonable or articulable suspicion of criminal activity, and therefore he had no legal basis to stop her. For the reasons discussed herein, we conclude that the Court of Appeals correctly determined that the arresting officer, under the totality of the circumstances, had a reasonable, articulable suspicion that defendant was engaged in criminal activity prior to any seizure.

This Court has recently reaffirmed the long-standing rule that "[w]hen 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." *State v. Pearson*, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998). " '[T]he police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion.' " *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968)), *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). In the instant case, the officer observed a "quick left turn" away from the checkpoint at the precise point where the driver of the vehicle would have first become aware of its presence. However, Officer Ipock did not stop defendant's vehicle once it turned away from the checkpoint. In fact, we cannot conclude that Officer Ipock "stopped" defendant's vehicle at any point. Defendant voluntarily parked in a residential driveway and remained hidden in the car until Officer Ipock approached the vehicle. Therefore, defendant was not "seized" by the police officer until at least that point. Based upon that series of incriminating circumstances, we conclude that the Court of Appeals correctly determined that Officer Ipock observed sufficient activity to raise a "reasonable and articulable suspicion of criminal activity." *Foreman*, 133 N.C. App. at 298, 515 S.E.2d at 493.

[2] Although defendant in the case *sub judice* was not stopped because of her legal turn, or at all by the arresting officer, the Court of Appeals stated:

> [A] legal left turn at the intersection immediately preceding a posted DWI checkpoint, without more, does not justify an investigatory stop. We emphasize, however, that it is constitutionally permissible, and undoubtedly prudent, for officers to follow vehicles that legally avoid DWI checkpoints, in order to ascertain whether other factors exist which raise a reasonable and articu-

> lable suspicion that an occupant of the vehicle is engaged in criminal activity. . . . Thus, if [d]efendant was seized solely based on a legal left turn preceding the DWI checkpoint, that seizure was unconstitutional.

Id. at 296, 515 S.E.2d at 492. For the reasons discussed herein, we disagree and clarify this language.

Although a legal turn, by itself, is *not* sufficient to establish a reasonable, articulable suspicion, a legal turn in conjunction with other circumstances, such as the time, place and manner in which it is made, *may* constitute a reasonable, articulable suspicion which could justify an investigatory stop. As the United States Supreme Court recently stated in *Illinois v. Wardlow*, —— U.S. ——, 145 L. Ed. 2d 570 (2000), "flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* at ——, 145 L. Ed. 2d at 576.

Further, the United States Supreme Court has stated:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. . . .
>
> Conversely, the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight.

Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451, 110 L. Ed. 2d 412, 420-21 (1990). Therefore, the United States Supreme Court held that DWI checkpoints are constitutional if vehicles are stopped according to a neutral, articulable standard (e.g., every vehicle) and if the government interest in conducting the checkpoint outweighs the degree of the intrusion. *Sitz*, 496 U.S. 444, 110 L. Ed. 2d 412.

Section 20-16.3A of our General Statutes governs the establishment, organization and management of impaired driving checkpoints and sets forth the bases for "stopping vehicles" at any such checkpoint. That section provides:

> A law-enforcement agency may make impaired driving checks of drivers of vehicles on highways and public vehicular areas if the agency:

(1) Develops a systematic plan in advance that takes into account the likelihood of detecting impaired drivers, traffic conditions, number of vehicles to be stopped, and the convenience of the motoring public.

(2) Designates in advance the pattern both for stopping vehicles and for requesting drivers that are stopped to submit to alcohol screening tests. The plan may include contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated, but no individual officer may be given discretion as to which vehicle is stopped or, of the vehicles stopped, which driver is requested to submit to an alcohol screening test.

(3) Marks the area in which checks are conducted to advise the public that an authorized impaired driving check is being made.

N.C.G.S. § 20-16.3A (1999).

There is no dispute that the DWI checkpoint in the case *sub judice* met all the statutory requirements for an impaired driving checkpoint. The perimeters of the checkpoint were marked with signs stating that there was a DWI checkpoint ahead, and the signs were posted approximately one-tenth of a mile prior to the actual stop. The checkpoint was established with the intent to stop every vehicle briefly and to check for impaired drivers traveling on Neuse Boulevard within the vicinity of the checkpoint. It is obvious that a law-enforcement agency cannot "make impaired driving checks of drivers of vehicles on highways" unless such vehicles can be stopped. Certainly, the purpose of any checkpoint and the above statute would be defeated if drivers had the option to "legally avoid," ignore or circumvent the checkpoint by either electing to drive through without stopping or by turning away upon entering the checkpoint's perimeters. Further, it is clear that the perimeters of the checkpoint or "the area in which checks are conducted" would include the area within which drivers may become aware of its presence by observation of any sign marking or giving notice of the checkpoint. Therefore, we hold that it is reasonable and permissible for an officer to monitor a checkpoint's entrance for vehicles whose drivers may be attempting to avoid the checkpoint, and it necessarily follows that an officer, in light of and pursuant to the totality of the circumstances or the checkpoint plan, may pursue and stop a vehicle which has turned

away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away.

Our state's interest in combating intoxicated drivers outweighs the minimal intrusion that an investigatory stop may impose upon a motorist under these circumstances. We therefore conclude that the Court of Appeals correctly found no error in defendant's conviction, and we affirm the decision of the Court of Appeals as modified herein.

MODIFIED AND AFFIRMED.

Chief Justice FRYE concurring.

In this case, the Court of Appeals held that the facts available to Officer Ipock before defendant was seized were sufficient to raise a reasonable and articulable suspicion of criminal activity and that the trial court did not err by denying defendant's motion to suppress. I agree. The majority modifies the Court of Appeals' opinion in order to "disagree [with] and clarify" the Court of Appeals' statement that a legal left turn at the intersection immediately preceding a posted DWI checkpoint does not, without more, justify an investigatory stop. I would affirm the decision of the Court of Appeals without modification.

The key in the Court of Appeals' language is the phrase "without more." Here, as the Court of Appeals indicated, there was more than the left turn which justified the seizure. When Officer Ipock located the vehicle within seconds after it turned onto Taylor Street, the vehicle's engine was not running, the lights were off, and the occupants were crouched down in the dark. These additional factors wer sufficient to raise a reasonable and articulable suspicion of criminal activity before defendant was seized by Officer Ipock.

The Court of Appeals emphasized that it was not only constitutionally permissible, but prudent, for officers to follow vehicles that avoided the DWI checkpoint in order to ascertain whether other factors raised a reasonable and articulable suspicion of criminal activity. However, there is a difference between stopping a vehicle and simply following it. Reasonable and articulable suspicion is necessary for an investigatory stop, but unnecessary to justify following a vehicle. While mere avoidance of a DWI checkpoint may prompt law enforcement officers to follow a vehicle, it does not, alone, give rise to a reasonable and articulable suspicion of criminal activity.

I would add that if a systematic plan for an impaired driving checkpoint pursuant to N.C.G.S. § 20-16.3A provides for stopping every car that turns off the highway within the perimeters of the checkpoint, then it is unnecessary to justify such a stop on the basis of reasonable and articulable suspicion. In such case, the stop is based on the systematic plan rather than the discretion of the officer or an articulable suspicion of criminal activity. However, as the Court of Appeals stated, avoidance of a posted DWI checkpoint, "without more, does not justify an investigatory stop."

CARL L. PERKINS, EMPLOYEE v. ARKANSAS TRUCKING SERVICES, INC., EMPLOYER; SELF-INSURED (GUARDIAN NATIONAL INSURANCE COMPANY)

No. 422PA99

(Filed 5 May 2000)

1. Workers' Compensation— jurisdiction—standard of review—independent findings

The Court of Appeals erred by applying the "any competent evidence" standard in its review of the Industrial Commission's jurisdictional determination under N.C.G.S. § 97-36(iii) for a workers' compensation case because the proper standard for a reviewing court on a jurisdictional issue is to make its own independent findings from its consideration of all the evidence in the record.

2. Workers' Compensation— jurisdiction—principal place of employment

The Court of Appeals did not err in concluding the Industrial Commission had jurisdiction over this workers' compensation case because plaintiff-truck driver's principal place of employment was within North Carolina under N.C.G.S. § 97-36(iii) since no other state, standing alone, had the same degree of significant contacts to plaintiff's employment, as evidenced by the facts that: (1) plaintiff was assigned to operate a tractor-trailer in Arkansas Trucking's southeastern territory, an area consisting of twelve to thirteen southern states including North Carolina; (2) Arkansas Trucking employs more than three but less than ten truck drivers in North Carolina; (3) plaintiff was dispatched from his residence in North Carolina by a dispatcher in the employer's Georgia ter-

minal since Arkansas Trucking does not maintain a terminal in North Carolina; (4) plaintiff's first pick-ups and last deliveries were scheduled as close to his residence in North Carolina as possible to prevent plaintiff from driving with an empty truck; (5) approximately eighteen to twenty percent of plaintiff's stops were in North Carolina; (6) plaintiff kept his employer's vehicle at his residence in North Carolina when he was off the road; and (7) plaintiff received his paychecks at his residence in North Carolina.

3. Workers' Compensation— employment form—invalid attempt to limit workers' compensation rights

The Court of Appeals did not err in its determination that the "Policies, Procedures, and Agreement" form signed by plaintiff-truck driver upon being hired by Arkansas Trucking was an invalid attempt by the employer to limit plaintiff's rights to Arkansas workers' compensation law because the agreement conflicts with N.C.G.S. § 97-36 and specifically violates § 97-6, which invalidates agreements that operate to relieve an employer of any obligation under the North Carolina Workers' Compensation Act.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 134 N.C. App. 490, 518 S.E.2d 36 (1999), affirming an opinion and award entered by the North Carolina Industrial Commission on 9 June 1998. Heard in the Supreme Court 14 February 2000.

Jonathan S. Williams, P.C., by Jonathan S. Williams, for plaintiff-appellee.

Teague Campbell Dennis & Gorham, by Dayle A. Flammia and Tracey L. Jones, for defendant-appellants.

MARTIN, Justice.

On 8 March 1994 plaintiff Carl L. Perkins was injured in the course and scope of his employment with Arkansas Trucking Services, Inc. (Arkansas Trucking). The accident occurred while plaintiff was operating a tractor-trailer in Florence, South Carolina. Thereafter, Arkansas Trucking commenced payment of workers' compensation benefits under Arkansas law. *See generally* Ark. Code Ann. ch. 9 (1996 & Supp. 1999). On 4 October 1994 plaintiff filed a Form 18 notice of accident with his employer and the North

Carolina Industrial Commission (Commission or full Commission). Plaintiff also filed a Form 33 request for hearing to determine whether the Commission had jurisdiction over his workers' compensation claim.

On 8 May 1996, after a hearing limited to the jurisdictional question, the deputy commissioner entered an interlocutory opinion and order concluding that plaintiff's principal place of employment was within North Carolina and, therefore, that the Commission had jurisdiction over his claim under N.C.G.S. § 97-36.

On 30 October 1996 the deputy commissioner held a second hearing to determine the amount of plaintiff's award. On 30 April 1997 the deputy commissioner filed an opinion and award in which he concluded that plaintiff was totally disabled and was, therefore, entitled to compensation at a rate of $417.75 per week from the date of the accident. Defendants Arkansas Trucking and Guardian National Insurance Company appealed.

On 9 June 1998 the full Commission affirmed and adopted, with minor modifications, the deputy commissioner's 8 May 1996 interlocutory opinion and order and 30 April 1997 opinion and award. On appeal, the Court of Appeals affirmed the opinion and award of the full Commission. *Perkins v. Arkansas Trucking Servs., Inc.*, 134 N.C. App. 490, 518 S.E.2d 36 (1999). On 4 November 1999 we allowed defendants' petition for discretionary review.

Prior to 1991 the Commission exercised jurisdiction over work-related accidents occurring outside of North Carolina only if the contract of employment was made in this State or if the employer's principal place of business was in this State. *See* N.C.G.S. § 97-36 (1985) (amended 1991); *Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 96, 398 S.E.2d 921, 925 (1990), *disc. rev. denied*, 328 N.C. 576, 403 S.E.2d 522 (1991). In 1991, however, the General Assembly ratified "An Act to Assure that the North Carolina Workers' Compensation Act Extends to Injuries Outside the State for Employees Whose Principal Place of Employment is in North Carolina." Ch. 284, 1991 N.C. Sess. Laws 528.

The statute, as amended, provides in pertinent part:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents

> or next of kin shall be entitled to compensation (i) if the contract of employment was made in this State, (ii) if the employer's principal place of business is in this State, or *(iii) if the employee's principal place of employment is within this State* . . . .

N.C.G.S. § 97-36 (1999) (emphasis added).

The Court of Appeals affirmed the Commission's determination that plaintiff's principal place of employment was within North Carolina and, therefore, upheld the Commission's exercise of jurisdiction over plaintiff's claim under section 97-36(iii). *Perkins*, 134 N.C. App. at 493, 518 S.E.2d at 38.

[1] Defendants first contend the Court of Appeals applied an erroneous standard of review to the Commission's jurisdictional determination under section 97-36(iii). We agree.

As a general rule, the Commission's findings of fact are conclusive on appeal if supported by any competent evidence. *See* N.C.G.S. § 97-86 (1999); *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). It is well settled, however, that the Commission's findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence. *See Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976); *Askew v. Leonard Tire Co.*, 264 N.C. 168, 174, 141 S.E.2d 280, 284 (1965); *Aycock v. Cooper*, 202 N.C. 500, 505, 163 S.E. 569, 571 (1932). "The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261.

In the present case the Court of Appeals characterized the question for review as "whether there [was] any competent evidence supporting the Commission's finding that plaintiff's principal place of employment [was] within North Carolina." *Perkins*, 134 N.C. App. at 492, 518 S.E.2d at 37. When, as here, the appellate court reviews findings of jurisdictional fact entered by the Commission, our decision in *Lucas* requires the reviewing court "to make its own independent findings of . . . jurisdictional fact[] from its consideration of all the evidence in the record." *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261. Accordingly, the Court of Appeals erred in applying the "any competent evidence" standard of review to the jurisdictional question raised by the present case.

[2] Defendants next contend the Court of Appeals erred in affirming the Commission's determination that plaintiff's principal place of employment was within North Carolina. We disagree.

At the outset, we note that section 97-36 does not define "principal place of employment." "Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning." *In re McLean Trucking Co.*, 281 N.C. 242, 252, 188 S.E.2d 452, 458 (1972). In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute. *See Black v. Littlejohn*, 312 N.C. 626, 638, 325 S.E.2d 469, 478 (1985); *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). "Principal" has been defined as "most important, consequential, or influential." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 926 (10th ed. 1993). Therefore, we consider all the evidence of record to determine whether North Carolina was plaintiff's "principal" place of employment as "principal" is used in its natural and ordinary meaning.

In the instant case, plaintiff was assigned to operate a tractor-trailer in Arkansas Trucking's southeastern territory, an area consisting of twelve to thirteen southern states, including North Carolina. Arkansas Trucking employs more than three, but less than ten, truck drivers in North Carolina. Because Arkansas Trucking does not maintain a terminal in this State, plaintiff was dispatched from his residence in Dudley, North Carolina, by a dispatcher in the employer's Doraville, Georgia, terminal. Plaintiff's first pick-ups and last deliveries, including stops in Durham, Charlotte, Kinston, Raleigh, and Roseboro, were scheduled as close to his residence in Dudley as possible to prevent plaintiff from driving with an empty truck. Approximately eighteen to twenty percent of plaintiff's stops were in North Carolina. When he was off the road, plaintiff kept his employer's vehicle at his residence in Dudley. Finally, plaintiff received his paychecks at his residence in Dudley.

After careful review of the evidence of record, we hold that North Carolina constituted plaintiff's principal place of employment under section 97-36(iii). Not surprisingly, as a truck driver, plaintiff did not perform the majority of his job duties in any *one* state. The record reflects, however, that no state, standing alone, had the same degree of significant contacts to plaintiff's employment as North Carolina. We believe our construction of section 97-36, as amended, best promotes the legislative intent behind addition of subsection (iii). *See*

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) ("The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent."). Accordingly, the Court of Appeals did not err in concluding that the Commission had jurisdiction over the instant workers' compensation claim.

[3] We likewise agree with the Court of Appeals that the "Policies, Procedures and Agreement" form signed by plaintiff upon being hired is an invalid attempt to limit plaintiff's rights to those enumerated under Arkansas workers' compensation law. This agreement conflicts with N.C.G.S. § 97-36 and specifically violates N.C.G.S. § 97-6, which invalidates agreements that operate to relieve an employer of any obligation under the North Carolina Workers' Compensation Act.

Accordingly, the decision of the Court of Appeals is affirmed as modified.

MODIFIED AND AFFIRMED.

AKINS v. CITY OF THOMASVILLE

No. 429P99

Case below: 134 N.C.App. 731

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 November 1999. Justice Martin recused.

CLARK v. VISITING HEALTH PROF'LS, INC.

No. 117P00

Case below: 136 N.C.App. 505

Petition by third party defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

DEPARTMENT OF TRANSP. v. TILLEY

No. 75P00

Case below: 136 N.C.App. 370

Petition by defendants pro se for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

FELMET v. REYNOLDS METALS CO.

No. 150P00

Case below: 136 N.C.App. 847

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

FIELDS v. NORFOLK S. RY. CO.

No. 113P00

Case below: 136 N.C.App. 667

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 April 2000.

HATCHER v. SUPERIOR COURT OF ROBESON COUNTY

No. 39P00-2

Case below: Robeson County Superior Court

Motion by defendant pro se to appoint Judge Weeks dismissed 4 May 2000.

INMAN v. INMAN

No. 166P00

Case below: 134 N.C.App. 719

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 2000.

IN RE APPEAL OF YOUNG

No. 58P00

Case below: 136 N.C.App. 442

Petition by petitioners (Youngs) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 2000.

IN RE SMITH

No. 102P00

Case below: 136 N.C.App. 442

Petition by respondent for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

JOHNSTON HEALTH CARE CTR., LLC v.
N.C. DEP'T OF HUMAN RES.

No. 81P00

Case below: 136 N.C.App. 307

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000. Conditional petition by respondent-intervenor for discretionary review pursuant to G.S. 7A-31 dismissed as moot 4 May 2000.

LEXINGTON INS. CO. v. TIRES INTO
RECYCLED ENERGY & SUPPLIES, INC.

No. 42P00

Case below: 136 N.C.App. 223

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

MYERS v. TOWN OF PLYMOUTH

No. 17PA00

Case below: 135 N.C.App. 707

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 May 2000.

NORTHFIELD DEV. CO. v. CITY OF BURLINGTON

No. 63A00

Case below: 136 N.C.App. 272

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 4 May 2000. 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 4 May 2000.

STATE v. ALLEN

No. 27P00

Case below: 134 N.C.App. 733

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 2000.

STATE v. BODIE

No. 142P00

Case below: 137 N.C.App. 177

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

STATE v. BROWN

No. 155P00

Case below: 136 N.C.App. 848

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

STATE v. COBLE

No. 446PA99

Case below: 351 N.C. 448

Motion by defendant for entry of the Court's mandate allowed 17 April 2000.

STATE v. DREW

No. 169P00

Case below: 131 N.C.App. 701

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 2000.

STATE v. EVANS

No. 141A00

Case below: 137 N.C.App. 177

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 4 May 2000. Petition by Attorney General for discretionary review pursuant to G.S. 7a-31 denied 4 May 2000.

STATE v. FULMORE

No. 114P00

Case below: 136 N.C.App. 668

Defendant's notice of appeal based upon a dissent treated as a petition for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 2000. 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 4 May 2000.

STATE v. GRIFFIN

No. 122P00

Case below: 136 N.C.App. 531

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 May 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

STATE v. HARRIS

No. 85P99-2

Case below: 132 N.C.App. 134

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 May 2000. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

STATE v. HUGHES

No. 47P00

Case below: 136 N.C.App. 92

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

STATE v. JARMAN

No. 69P00

Case below: 132 N.C.App. 398

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 2000.

STATE v. LEAZER

No. 175P00

Case below: 137 N.C.App. 385

Motion by Attorney General for temporary stay allowed 24 April 2000 pending determination of the Attorney General's petition for discretionary review.

STATE v. LEGRANDE

No. 215A96-7

Case below: Stanly County Superior Court

Motion by defendant pro se for judicial notice dismissed 4 May 2000.

STATE v. LLOYD

No. 43P00

Case below: 136 N.C.App. 232

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 4 May 2000. Petition by defendant for discretionary review pursuant to G.S. 7A31 denied 4 May 2000.

STATE v. LLOYD

No. 124P00

Case below: Alamance County Superior Court

Motion by defendant pro se for stenographic transcript and trial records denied 4 May 2000.

STATE v. LYNCH

No. 242A93-4

Case below: Gaston County Superior Court

Petition by Attorney General for writ of supersedeas and motion for temporary stay of the judgment of the Superior Court, Gaston County, denied 27 April 2000. Petition by Attorney General for writ of mandamus denied 27 April 2000. Petition by Attorney General for a writ of certiorari to review the order of the Superior Court, Gaston County, denied 27 April 2000.

STATE v. MCCLAIN

No. 588P99

Case below: 132 N.C.App. 135

Petition by defendant pro se for a writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 2000.

STATE v. WALLACE

No. 241A97

Case below: Mecklenburg County Superior Court

Motion by defendant for appropriate relief denied 4 May 2000.

STATE v. WARD

No. 158A92-4

Case below: Pitt County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Pitt County allowed 4 May 2000 for the purpose of reversing the Superior Court's order denying discovery and remanding the case with instructions for the Superior Court to order the State to provide Ward with all discovery pursuant to G.S. 15A-1415(f).

STEPHENSON v. WARREN

No. 157P00

Case below: 136 N.C.App. 768

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

TAYLOR v. VENCOR, INC.

No. 108P00

Case below: 136 N.C.App. 528

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

TREXLER v. POLLOCK

No. 581P99

Case below: 351 N.C. 480

Petition by plaintiff for rehearing of the decision of this Court denying petition for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 2000. Motion by defendants to strike plaintiff's petition to rehear dismissed 4 May 2000.

TRUCK & TRAILER SALES, INC. v.
PETERBILT OF KNOXVILLE, INC.

No. 74P00

Case below: 136 N.C.App. 234

Petition by defendant (Peterbilt of Knoxville, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

TYSINGER v. BILLINGS FREIGHT SYS.

No. 11P00

Case below: 135 N.C.App. 792

Petition by appellant (Wallace and Graham, P.A.) for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000.

WELLS v. CONSOLIDATED JUD'L RET. SYS. OF N.C.

No. 156A00

Case below: 136 N.C.App. 671

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 4 May 2000. Motion by defendant to dismiss plaintiff's petition for discretionary review denied 4 May 2000.

WHITING v. PRICE

No. 8P00

Case below: 136 N.C.App. 234

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 May 2000. Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 May 2000.

PETITION TO REHEAR

JOHNSON v. FIRST UNION CORP.

No. 485PA98

Case below: 351 N.C. 339

Petition by plaintiff to rehear pursuant to Rule 31 denied 4 May 2000.

STATE v. WILLIAMS

No. 264A90-5

Case below: 351 N.C. 465

Motion by defendant to reconsider the opinion reversing the Superior Court order dismissed 4 May 2000.

APPENDIXES

PRESENTATION OF
JUSTICE HARRY C. MARTIN
PORTRAIT

ORDER ADOPTING AMENDMENT TO
RULE 26 OF THE RULES OF
APPELLATE PROCEDURE

ORDER ADOPTING RULES IMPLEMENTING
THE YEAR 2000 PRELITIGATION
MEDIATION PROGRAM

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
RELATING TO THE APPOINTMENT
OF COUNSEL FOR
INDIGENT DEFENDANTS

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING FEE DISPUTE RESOLUTION

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING TRUST ACCOUNTS

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING INTEREST ON
TRUST ACCOUNTS

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING DISCIPLINE AND DISABILITY

Presentation of the Portrait

of

HARRY C. MARTIN

Associate Justice
Supreme Court of North Carolina
1982 - 1992

December 6, 2000

OPENING REMARKS
and
RECOGNITION OF JAMES G. EXUM, JR.
BY
CHIEF JUSTICE HENRY E. FRYE

Chief Justice Henry E. Frye made the following opening remarks:

> On behalf of the members of the Court, I would like to welcome each of you to the ceremony today. We honor a man who has served our great state for over thirty-eight years, as a superior court judge, a North Carolina Court of Appeals judge, and an associate justice of this Court. I knew him as an excellent trial judge and as a respected appellate judge on the Court of Appeals prior to his appointment to the Supreme Court, and I had the personal pleasure of working with him for nine years as a member of this Court. He continues to serve his state and country as the current Chief Justice of the Eastern Band of the Cherokee Nation.

Chief Justice Frye welcomed official and personal guests of the Court. The Chief Justice then recognized the Martin family and James G. Exum, Jr., former Chief Justice of the Supreme Court, who would make the presentation address to the Court:

> At this time, I would like to recognize former Chief Justice James G. Exum, Jr., who will present the portrait to this Court. Chief Justice Exum joined this Court in 1975 and retired from the bench in 1995. He had the pleasure of serving with Justice Martin for half of those twenty years. We are looking forward to his remarks and his unique perspective on our honoree today.

PRESENTATION ADDRESS
BY
JAMES G. EXUM, JR.

Mr. Chief Justice and Associate Justices: May it please the Court.

It is indeed a privilege for me to participate in the presentation to this Honorable Court of the portrait of my friend and colleague of long-standing, the Honorable Harry C. Martin, who served with distinction as an Associate Justice of the Court from 1982 through 1992.

Justice Martin's remarkably productive life began in the horse and buggy days of the early part of the 20th century and, as I speak, continues with considerable vigor into the space and cyberspace age

of the early 21st century. He was born on 13 January 1920 in Lenoir, Caldwell County, North Carolina, in the home of his paternal grandparents, the third child of Hal C. and Johnsie Harshaw Martin. He grew up in Lenoir, attended the Lenoir public schools, graduating from Lenoir High School where he was an accomplished trombonist in the Lenoir High School band. Justice Martin, like three of his siblings, Virginia, Jacob, and Charles, was influenced and inspired by their band instructor, Captain James C. Harper.

Justice Martin earned a music scholarship at both Davidson College and the University of North Carolina. With only $48 in his pocket and still undecided which school to attend, trombonist Martin began hitchhiking east from Lenoir. At Statesville, he came to a propitious fork in the road. One way went south through Mooresville, Troutman and on to Davidson. The other continued east through Mocksville, Winston-Salem, Greensboro and on to Chapel Hill. As the young musician paused at the intersection to read the road signs, a car stopped and the driver asked him if he was going to Chapel Hill. He said yes, got in the car and traveled to Chapel Hill where he enrolled at the University of North Carolina, causing the Davidson music department to wonder for three weeks what had happened to him. After graduating from the University of North Carolina in 1942, Justice Martin volunteered for the U. S. Army. He soldiered for our country in Guadalcanal, the Solomon Islands, Saipan, and the Mariana Islands before he was honorably discharged in September 1945 in time for him to enroll at Harvard Law School.

After receiving his law degree from Harvard in 1948, he returned to Asheville to practice law. From 1951 until 1962, he was a partner with Lamar Gudger and Bruce Elmore in the Asheville firm of Gudger Elmore & Martin, a "GEM" of a law firm, as he describes it.

In 1962, lawyer Martin began life as a North Carolina judge, a position he would hold for the next 30 years. No less than three different governors recognized his judicial abilities. Governor Terry Sanford appointed him a Special Superior Court Judge in 1962. Governor Dan K. Moore appointed him the Resident Superior Court Judge for Buncombe County, then the 28th Judicial District, in 1967; and Governor James B. Hunt, Jr. appointed him to the North Carolina Court of Appeals in 1978 and to the North Carolina Supreme Court in 1982.

Following my own appointment to the Superior Court bench in 1967, also by Governor Dan K. Moore, Judge Martin and I became both friends and colleagues and members of the North Carolina Conference of Superior Court Judges. The Conference met several times

a year to discuss and act on matters of mutual interest and concern to the Superior Court bench. Not infrequently, discussions at the business sessions of the conference would grow tense, if not heated, as the judges were not bashful about speaking their minds and disagreeing on issues important to them. Judge Martin frequently came to the rescue on these occasions with his own brand of mountain humor and sagacity. He spoke with the calm voice of reason; and his colleagues usually listened and were guided accordingly.

While he was a member of the Court of Appeals, his wit, at least, did not desert him. In *State v. Wallace*, 49 N.C. App. 475, 271 S.E.2d 760 (1980), defendant was accused of violating a statute which prohibited hunting deer with dogs. Defendant challenged the constitutionality of the law. The Court of Appeals' panel, composed of Judges Harry Martin, Robert Martin, and Fred Hedrick, did not reach the constitutional issue, concluding instead that the case should be dismissed because the charge, set out on a uniform traffic citation form, failed adequately to allege a crime. Judge Harry Martin, author of the panel's opinion, before reaching the merits of the case, wrote eloquently for eight pages on the social and legal history of the dog. He began his opinion with: "This is a case about dogs. As dogs do not often appear in the courts, it is perhaps not inappropriate to write a few words about them." 49 N.C. App. at 475. Judges Robert Martin and Hedrick concurred only in the result. Judge Hedrick noted his "opposition to using the North Carolina Court of Appeals Reports to publish my colleague's totally irrelevant, however learned, dissertation on dogs." 49 N.C. App. at 488.

As you might imagine, this case got some attention in the press, which, as I recall, speculated about the cost of printing Judge Harry Martin's dissertation on dogs in the official North Carolina Court of Appeals Reports. My brothers, Joe and Ashe Exum, were then principals in Happy Jack, Inc., a manufacturer of various medicinal remedies for dogs. They privately advised me that if there was a problem in getting this opinion printed because of cost concerns, Happy Jack would be glad to foot the bill!

Actually, the "dog case," as it came to be known, illustrated Justice Martin's deep interest in and scholarly knowledge of history generally, and particularly political and legal history. In his ten years on this Court as an associate justice, his opinions in the significant, more difficult cases, demonstrate his clear preference for the historical approach to resolution of the issues rather than strict syllogistic logic or a public policy, consequentialist analysis. For example, in *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989), the issue was whether an employee at will had a claim for wrongful ter-

mination when he was fired for his refusal to engage in certain conduct violative of the state's public policy. Justice Martin, writing for the Court, began his examination of the issue with "a brief look at the history of the employee at will doctrine," which he then traced from Blackstone's Commentaries through the law as it developed during the Industrial Revolution, and on to the more modern cases.

Writing for the Court in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), Justice Martin again relied on legal history to support the Court's conclusion that the violation of one's state constitutional rights gave rise to a direct cause of action against state agents, which was not barred by the doctrine of sovereign immunity. Justice Martin relied on the historical development in our state constitution of the Freedom of Speech Clause. He noted cases dating from the late 18th and early 19th centuries. He also discussed the historical origins of the doctrine of sovereign immunity as an early feudal concept which achieved judicial recognition in the 1788 English case of *Russell v. Men of Devon.*

The historian in him prompted him to write, after he left this Court in 1992, a short piece which he called, "A Historical Review of the Supreme Court of North Carolina, 1919-1994." It is published in Volume 335 of the Court's Official Reports at page 785.

The North Carolina Constitution occupied a special place in Justice Martin's legal universe. He well understood its primary role in protecting those individual rights and liberties which make our democracy so successful and this Court's duty to breathe life into those provisions. In *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988), Justice Martin led a majority of a closely divided Court to conclude that there was no "good faith exception" to the exclusion of evidence obtained illegally under the North Carolina Constitution's prohibition against unreasonable searches notwithstanding that such an exception had been recognized in the United States Supreme Court's Fourth Amendment jurisprudence.

In 1992, as part of the North Carolina Law Review's Symposium on the North Carolina Constitution, Justice Martin published a scholarly piece titled, "The State as a 'Font of Individual Liberties': North Carolina Accepts the Challenge." In it he wrote, and proceeded to demonstrate, that "During the past decade, North Carolina has been at the head of the movement to energize state constitutional law." 70 N.C. Law Rev. 1749, 1751 (1992).

Justice Martin was not prone to dissent, but two of his dissenting opinions are memorable, one for its passion and the other for its per-

suasive force which ultimately gained the support of a majority of the Court. He dissented with great vigor in *State v. Norman*, 324 N.C. 253, 378 S.E.2d 8 (1989), where the issue was whether a woman who had long been physically and mentally abused by her husband and who suffered from "the battered wife syndrome" was entitled to an instruction on self-defense when she shot her husband in the head while he was sleeping. The Court thought not and reversed a contrary decision of the North Carolina Court of Appeals. Justice Martin, standing alone but with his blood up, noted his disagreement with eloquent conviction. He wrote, "Where torture appears interminable and escape impossible, the belief that only the death of the oppressor can provide relief is reasonable in the mind of a person of ordinary firmness, let alone in the mind of the defendant, who, like a prisoner of war of some years, has been deprived of her humanity and is held hostage by fear." 324 N.C. at 270. Later in the opinion he drove home his point again, writing, "By his barbaric conduct over the course of 20 years, J. T. Norman reduced the quality of the defendant's life to such an abysmal state that, given the opportunity to do so, the jury might well have found that she was justified in acting in self-defense for the preservation of her tragic life." 324 N.C. at 275.

Alford v. Shaw was one of the Court's more significant cases in the area of corporate law. The question was the limitation on judicial review of a special litigation committee's decision regarding the pursuit of minority shareholder derivative claims against members of the corporate board for alleged fraud and self-dealing. The Court's first decision, 318 N.C. 289, 349 S.E.2d 41 (1986) concluded that judicial review was significantly limited by the so-called "business judgment rule" to inquiring only whether the committee was in fact disinterested, independent and acted in good faith and whether its investigative procedures were sufficient. Justices Martin and Frye filed separate dissents, arguing that North Carolina's Business Corporation Act required more extensive court review of a litigation committee's determinations. Justice Martin accused the majority of having placed "the corporate fox in charge of the shareholders' henhouse." 318 N.C. at 318.

On rehearing, 320 N.C. 465, 358 S.E.2d 323 (1987), the Court withdrew its prior decision and decided that courts should not be so limited as it had first held in their review of decisions of special litigation committees. This time Justice Martin found himself writing for the majority that "the Court must make a fair assessment of the report of the special committee, along with all the other facts and circumstances in the case, in order to determine whether the defend-

ants will be able to show that the transaction complained of was just and reasonable to the corporation." 320 N.C. at 473.

The Court's second *Alford* decision caused Duke University corporate law professor James D. Cox to add Justice Martin and the Court itself to his short list of heroes in the law. "Observation: Heroes in the Law: *Alford v. Shaw*," 66 N.C.L. Rev. 565. Professor Cox wrote, "*Alford II* is a significant decision. It has already generated national interest because it shows so clearly the way for others to follow." *Id.* at 574.

The late Justice Louis Meyer was fond of inquiring of members of the Court, "Are you happy in your work?" From my perspective, no member of the Court seemed happier in his or her work than Justices Meyer and Martin. They even enjoyed their occasional disagreements over the cases. Justice Martin enjoyed himself so much that, as he approached the mandatory retirement age of 72, he filed a lawsuit seeking to have the statute mandating retirement at that age declared unconstitutional. *Martin v. State of North Carolina*, 330 N.C. 412, 410 S.E.2d 474 (1991). It gave the Court no pleasure to do it, but, Martin himself recusing, the other six justices unanimously disagreed with his position. I am sure Justice Martin will recall that I happened to write that opinion.

Life after the Court, however, for retired Justice Martin continued and continues to be active, interesting and productive. He immediately joined the law firm of his two sons, Matthew and John Martin, in Hillsborough and practiced with them from 1982 until 1994. In that year, then Chief Judge Sam Ervin III of the United States Court of Appeals for the Fourth Circuit appointed Justice Martin to be the Court's Chief Circuit Mediator. He ran that Court's mediation program for five years, retiring in 1999. He also occupied the position of Dan K. Moore Distinguished Visiting Professor of Law and Ethics at the University of North Carolina Law School from 1992 through 1995, having already had extensive teaching experience as an adjunct professor at the University of North Carolina Law School from 1982 through 1992 and as adjunct professor at the Sanford Institute of Public Policy at Duke University in 1990 and 1991.

Just a few months after turning 80, the ever young Harry Martin accepted a new challenge, a challenge for which he is truly born and bred and for which his years at the bench and bar make him uniquely qualified. His new job is a natural progression from all the judicial positions he has previously held, and I believe may be his best job yet, possibly his own personal favorite. On May 10, 2000, he began a

six year term as Chief Justice of the Eastern Band of the Cherokee Nation. In this capacity, he has worked with his usual diligence for most of this year designing and organizing the Cherokee Nation's judicial system. So, congratulations again, Chief Justice Harry Martin. He is, of course, here with us on this occasion, with his wife Nancy Dallam Martin, whom he married in 1955, and two of their children, John and Matthew; Matthew's wife, Catherine; and Matthew and Catherine's daughter, Clarke, who will unveil the portrait.

Harry Martin is living proof that liking what you do in life and those with whom you do it can keep us active and vigorous for a very long time. He loved this Court and the people here with whom he worked. He closed his 1994 Historical Review of the Court by writing this:

> This grand old Court has stood the test of time for 175 years bringing blessings upon the people of our great state. So shall it continue in the future. I look forward to being with you in spirit, if not in person, in the year 2019 when this Court shall celebrate its 200th anniversary.

Let me close by saying to you, Chief Justice Martin, thank you for your service to your State as one of its truly distinguished judges. I won't be at all surprised if you are, indeed, here in person when the Court celebrates its 200th anniversary. It's only 19 years hence.

ACCEPTANCE OF JUSTICE MARTIN'S PORTRAIT

BY

CHIEF JUSTICE HENRY E. FRYE

Thank you Chief Justice Exum for sharing your special memories of Justice Martin and reminding us of the significant contributions he has made and continues to make to the judiciary in North Carolina.

At this point, I would like to call upon Miss Clarke Martin, the only granddaughter of Justice Martin, to come forward and unveil her grandfather's portrait.

It is with pleasure that I, on behalf of the Court, accept this wonderful portrait of Justice Harry C. Martin. I instruct the Clerk to have the portrait hung, as quickly as possible, upon the hallways of the Supreme Court. I would also instruct Ralph White, our Reporter, to have the entire contents of this proceeding, including the full presentation of Chief Justice Exum, reprinted in the next published volume of the North Carolina Reports.

Order Adopting Amendment to Rule 26 of the Rules of Appellate Procedure

Rule 26 of the Rules of Appellate Procedure is hereby amended to read as follows:

Rule 26

FILING AND SERVICE

(a) ***Filing.*** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. *Filing may be accomplished by mail or by electronic means as set forth in this Rule.*

(1) ***Filing by Mail:*** Filing may be accomplished by mail addressed to the clerk, but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

(2) ***Filing by Electronic Means:*** Filing in the appellate courts may be accomplished by electronic means *by the use of the electronic filing site at www.ncappellatecourts.org. All documents may be filed electronically through the use of this site. A document filed by use of the official electronic web site is deemed filed as of the time that the document is received electronically.*

Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court. ~~only as hereinafter provided.~~

~~In any case, responses and motions may be filed by electronic means, but only if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court upon a showing of good cause.~~

In all cases where a document has been filed by ~~electronic means~~ *facsimile machine* pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the orig-

inal signed document, the electronic transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission and neither they nor the electronic transmission fee may be recovered as costs of the appeal. *When a document is filed to the electronic filing site at www.ncappellatecourts.org, counsel may either have their account drafted electronically by following the procedures described at the electronic filing site, or they must forward the applicable filing fee for their document by first class mail, contemporaneously with the transmission.*

~~"Electronic means" means any method of transmission of information between two machines designed for the purpose of sending and receiving such transmissions, and which results in the fixation of the information transmitted in a tangible medium of expression.~~

(b) ***Service of All Papers Required.*** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) ***Manner of Service.*** Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper was filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. *When a document is filed electronically to the official web site, service also may be accomplished electronically by use of the other counsel(s)'s correct and current electronic mail address(es) or service may be accomplished in the manner described previously in this subsection.*

(d) ***Proof of Service.*** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of serv-

ice in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) ***Joint Appellants and Appellees.*** Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) ***Numerous Parties to Appeal Proceeding Separately.*** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) ***Form of Papers; Copies.*** Papers presented to either appellate court for filing shall be letter size (8-½ x 11") with the exception of wills and exhibits. ~~Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8-½ x 14").~~ All printed matter must appear in at least 11 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. *If the document has been filed electronically by use of the official web site at www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.*

Adopted by the Court in Conference this the 4th day of November, 1999. This amendment shall become effective on the 15th of November, 1999, and it 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).

Freeman, J
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING RULES IMPLEMENTING THE YEAR 2000 PRELITIGATION MEDIATION PROGRAM

WHEREAS, section 66-298 of the North Carolina General Statutes establishes a program to provide for mediation of Year 2000 disputes as defined by the statute, and

WHEREAS, N.C.G.S. § 66-298(b) provides for this Court to implement section 66-283 by adopting rules

NOW, THEREFORE, pursuant to N.C.G.S. § 66-298(b), Rules Implementing The Year 2000 Prelitigation Mediation Program are hereby adopted. These rules shall be effective on the 1st day of January, 2000.

Adopted by the Court in conference the 2nd day of December, 1999. The Appellate Division Reporter shall publish the Rules Implementing The Year 2000 Prelitigation Mediation Program in their entirety in the Advance Sheets of the Supreme Court and the Court of Appeals, at the earliest practicable date.

Freeman, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE YEAR 2000 PRELITIGATION MEDIATION PROGRAM

RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION YEAR 2000 MEDIATION.

A. A person with a claim for damages allegedly resulting from a Year 2000 problem may initiate mediation by filing a Request for Prelitigation Mediation of Year 2000 Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

RULE 2. SELECTION OF MEDIATOR.

A. Time Period for Selection. The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file their Notice of Selection of Certified Mediator by Agreement.

B. Selection of Certified Mediator by Agreement. The clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate Year 2000 disputes in the judicial district encompassing the county in which the Request was filed. If the parties are able to agree on a certified mediator to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement (Notice). Such Notice shall state the name, address, and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. Nomination of Non-Certified Mediator by Agreement. The parties may by agreement select a mediator who is not certified but who, in the opinion of the parties, is otherwise qualified by training

or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator (Nomination) and shall simultaneously deliver a copy of the Nomination to the senior resident superior court judge. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the said Nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The Nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. Court Appointment of Mediator. If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator (Motion) and simultaneously deliver a copy to the senior resident superior court judge who shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The Motion shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The Motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court 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. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator. The Clerk shall notify the mediator and the parties of the appointment of the mediator.

E. Mediator Information Directory. To assist parties in learning more about the qualifications and experience of certified mediators, the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation Year 2000 disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

RULE 3. THE PRELITIGATION YEAR 2000 MEDIATION.

A. When Mediation Is to be Completed. The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. Extensions. A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. Where the Conference Is to be Held. Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time, and location of the mediation to all parties named in the Request or their attorneys.

D. Recesses. The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a thirty day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. Duties of Parties, Attorneys and Other Participants. Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference to the extent it is consistent with prelitigation disputes.

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.

F. Sanctions for Failure to Attend. Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

Comment to Rule 4.E.

N. C. Gen. Stat. §7A-38.1(l) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached dur-

ing a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

RULE 4. AUTHORITY AND DUTIES OF THE MEDIATOR.

A. Authority of Mediator.

(1) Control of Mediation. The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient for 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 mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) That the mediation is not a trial, the mediator is not a judge and the parties may pursue their dispute in court if mediation is not successful and they so choose.

(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(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) 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 the mediator to determine timely that an impasse exists and that the mediation should end.

(4) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 3 above. Rule 3 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

(5) Certification. The mediator has a duty to timely file a Certification as required by Rule 8.

RULE 5. COMPENSATION OF THE MEDIATOR.

A. By Agreement. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees, fees for services or other fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session.

B. By Court Order. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $125, except that no administrative fees, fees for services or other fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session.

C. Indigent Cases. No party found to be indigent by the court for the purposes of their 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 indigence 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 dispute, subsequent to the trial of the action. In ruling on 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. 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 shall be due upon completion of the mediation.

E. Postponement Fees. As used herein, the term "postponement" shall mean rescheduling or not proceeding with a mediated settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney/party. If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be $250, except that no postponement fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business days prior to the occurrence of an initial mediation session. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 5.B.

F. Sanctions for Failure to Pay Mediator's Fee. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent statues to promptly move the senior resident superior court judge for a finding of indigence, shall constitute contempt of court and may result, following notice, in a hearing and findings and the imposition of any and all lawful sanctions by a resident or presiding superior court judge.

RULE 6. WAIVER OF MEDIATION.

All parties to a Year 2000 dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation (Waiver) shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The disputant who requested mediation shall file the Waiver with the clerk and mail a copy to the mediator and all parties named in the Request. No costs shall be assessed any party if all parties waive mediation at least seven (7) business days prior to the occurrence of an initial mediation session.

RULE 7. AFFIRMATIVE DEFENSE.

If a party to the dispute is entitled to an affirmative defense pursuant to G.S. 1-539.26, that party may refuse to participate in the mediation. A party refusing mediation, shall advise the mediator in writing of his or her refusal. The Refusal of Prelitigation Mediation (Refusal) shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The party refusing to participate shall file the Refusal with the clerk and mail a copy to the mediator and to all parties. No costs shall be assessed any party if a party with an affirmative defense advises the mediator in writing of his or her refusal to participate in mediation at least seven (7) business days prior to the occurrence of an initial mediation session.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED.

A. Contents of Certification. Following the conclusion of mediation, the receipt of a waiver of mediation signed by all parties to the Year 2000 dispute, or the receipt of a refusal of a party with an affirmative defense under G.S.1-539.26 to participate in mediation, the mediator shall prepare a Mediator's Certification in Prelitigation Year 2000 Dispute (Certification) on a form prescribed by the Administrative Office of the Courts and available through the clerk. If a mediation were held, the Certification shall state the date on which

the mediation was concluded and report the general results. If a mediation were not held, the Certification shall state that all parties waived mediation in writing pursuant to Rule 7 above, that a party with an affirmative defense under G.S. 1-539.26 refused to participate with good cause, or that the mediation was not held for other, specified reasons. The mediator shall identify any parties named in the Request who failed, without good cause, to attend or participate in mediation.

B. Deadline for Filing Mediator's Certification. The mediator shall file the completed Certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation or a refusal to participate. The mediator shall serve a copy of the Certification on each of the parties named in the request.

RULE 9. CERTIFICATION AND DECERTIFICATION OF MEDIATORS OF YEAR 2000 DISPUTES.

Mediators certified to conduct prelitigation mediation of Year 2000 disputes shall be subject to all rules and regulations regarding certification, conduct, discipline, and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of Year 2000 disputes.

RULE 10. CERTIFICATION OF MEDIATION TRAINING PROGRAMS.

The Dispute Resolution Commission may specify a curriculum for a Year 2000 mediation training program and may set qualifications for trainers.

RULE 11. RESPONSIBILITY FOR ENFORCEMENT.

The Senior Resident Superior Court Judge or his/her designee shall be responsible for enforcing these rules and shall enter appropriate court orders as necessary to enforce these rules.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 14, 2000.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning Appointment of Counsel for Indigent Defendants in Certain Criminal Cases, as set forth in 27 N.C.A.C. 1D, be amended as follows (additions underlined, deletions interlined):

Section .0400 Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases

Rule .0406 Procedure for Payment of Compensation

. . . .

(b) Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate. This rule does not prohibit payment of interim fees pending final determination of any appeal.

. . . .

Section .0500 Model Plan for Appointment of Counsel for Indigent Defendants in Certain Criminal Cases

Rule .0503 List of Attorneys

. . . .

(b) Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies classified as ~~Class I or Class J~~ Class H or Class I.

. . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 14, 2000.

Given over my hand and the Seal of the North Carolina State Bar, this the 1st day of May, 2000.

S/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of May, 2000.

S/Henry E. Frye
Henry E. Frye
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 4th day of May, 2000.

S/Freeman
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING FEE DISPUTE RESOLUTION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 21, 2000.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar relating to fee dispute arbitration, as particularly set forth in 27 N.C.A.C. 1D, and 27 N.C.A.C. 2 (the Revised Rules of Professional Conduct), be amended as follows:

27 N.C.A.C. 1D, Section .0700

[The entire section is being replaced by the following.]

Procedures for Fee Dispute Resolution

.0701 Purpose and Implementation

The purpose of the Fee Dispute Resolution Program shall be to determine the appropriate fee for legal services rendered. The State Bar shall implement a fee dispute resolution program under the auspices of the Client Assistance Committee (the committee), which shall be offered to clients and their lawyers at no cost.

.0702 Jurisdiction

The committee shall have jurisdiction over all disagreements concerning the fees and expenses charged or incurred for legal services provided by an attorney licensed to practice law in North Carolina arising out of a client-lawyer relationship. Jurisdiction shall also extend to any person, other than the client, who pays the fee of such an attorney.

The committee shall not have jurisdiction over the following:

1) disputes concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;

2) disputes involving services that are the subject of a pending grievance complaint alleging the violation of the Revised Rules of Professional Conduct;

3) fee disputes that are or were the subject of litigation;

4) fee disputes between lawyers and service providers, such as court reporters and expert witnesses;

5) fee disputes between lawyers and individuals with whom the lawyer had no client-lawyer relationship, except in those case where the fee has been paid by a person other than the client; and

6) disputes concerning fees charged for ancillary services provided by the lawyer not involving the practice of law.

The committee shall encourage mediated settlement of fee disputes falling within its jurisdiction pursuant to Rule .0706 of this subchapter.

.0703 Coordinator of Fee Dispute Resolution

The secretary-treasurer of the North Carolina State Bar shall designate a member of the staff to serve as coordinator of the fee dispute program. The coordinator shall develop forms, maintain records, and provide statistics on the fee dispute resolution program. The coordinator shall also assist the chairperson of the committee in developing an annual report to the council.

.0704 Reserved

.0705 Selection of Mediators

The State Bar will select a pool of qualified mediators. Selected mediators shall be certified by the North Carolina Dispute Resolution Commission or have a minimum of three (3) years experience as a mediator.

.0706 Processing Requests for Fee Dispute Resolution

(a) Requests for fee dispute resolution shall be timely submitted in writing to the coordinator of fee dispute resolution addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The attorney must allow at least 30 days after the client shall have received written notice of the fee dispute resolution program before filing a lawsuit. An attorney may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client if such is necessary to preserve a claim. However, the attorney must not take any further steps to pursue the litigation until he/she complies with the provision of the fee dispute resolution rules. Clients may request fee dispute resolution at any time prior to the filing of a lawsuit. No filing fee shall be required. The request should state with clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that, prior to

requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement, the matter has not been adjudicated, and the matter is not presently the subject of litigation.

(b) The coordinator of fee dispute resolution or his/her designee shall investigate the request to determine its suitability for fee dispute resolution. If it is determined that the matter is not suitable for fee dispute resolution, the coordinator shall prepare a brief written report setting forth the facts and a recommendation for dismissal. Grounds for dismissal include, but are not limited to, the following:

(1) the request is frivolous or moot;

(2) the absence of jurisdiction; or

(3) the facts as stated support the conclusion that the fee was earned and is not excessive.

The report shall be forwarded to the chairperson of the committee. If the chairperson of the Client Assistance Committee of the State Bar concurs with the recommendation, the matter shall be dismissed and the parties notified.

(c) If the chairperson disagrees with the recommendation for dismissal, or the fee dispute coordinator concludes that a matter is suitable for fee dispute resolution, an attempt will be made through informal means to resolve the issue. If informal methods are not successful, the parties will be notified and the case scheduled for mediation.

.0707 Mediation Proceedings

(a) The coordinator shall assign the case to a mediator who shall conduct a mediated settlement conference. The fee dispute coordinator or mediator shall be responsible for reserving a place and making arrangements for the conference at a time and place convenient to all parties.

(b) The attorney against whom a request for fee arbitration is filed must attend the mediated settlement conference in person and may not send another representative of his or her law firm. If a party fails to attend a mediated settlement conference without good cause, the mediator may either reschedule the conference or recommend dismissal.

(c) The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator may communicate privately with any participant prior to and during the conference.

Any private communication with a participant shall be disclosed to all other participants at the beginning of the conference. The mediator shall define and describe the following at the beginning of the conference:

(1) the process of mediation;

(2) the differences between mediation and other forms of conflict resolution;

(3) 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;

(4) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(5) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(6) The duties and responsibilities of the mediator and the participants; and

(7) That any agreement reached will be reached by mutual consent, reduced to writing and signed by all parties.

The mediator has a duty to be impartial and advise all participants of any circumstance bearing on possible bias, prejudice, or partiality. It is the duty of the mediator timely to determine and declare that an impasse exists and that the conference should end.

.0708 Finalizing the 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, if any, prior to leaving the conference.

.0709 Record Keeping

The coordinator of fee dispute resolution shall keep a record of each request for fee dispute resolution. The record must contain the following information:

(1) the client's name;

(2) date of the request;

(3) the lawyer's name;

(4) the district in which the lawyer resides or maintains a place of business;

(5) how the dispute was resolved (dismissed for non-merit, mediated agreement, arbitration, etc.); and

(6) the time necessary to resolve the dispute.

.0710 District Bar Fee Dispute Resolution

For the purpose of resolving disputes involving attorneys residing or doing business in the district, any district bar may adopt a fee dispute resolution program, subject to the approval of the council, which shall operate in lieu of the program described herein. Although such programs may be tailored to accommodate local conditions, they must be offered without cost, comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter, and be consistent with the provisions of Rules .0706 and .0707.

* *

[additions are underlined, deletions are interlined]

27 N.C.A.C. 1D, Section .0800
~~Model Plan for District Bar Fee Arbitration~~ Reserved
[The rules in this section are being deleted and the entire section reserved for future rule making.]

27 N.C.A.C. 2 (The Revised Rules of Professional Conduct)

Rule 1.5, Fees

. . .

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution ~~non-binding fee arbitration~~ at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process ~~non-binding arbitration of the fee dispute if such is subject to the jurisdiction of any duly constituted fee arbitration committee of the North Carolina State Bar or any of its constituent district bars~~ if the client submits a proper request ~~for fee arbitration~~.

Comment

. . . .

Disputes over Fees and Expenses

[6] Participation in the fee dispute resolution ~~arbitration~~ program of the North Carolina State Bar is mandatory when a client requests resolution ~~arbitration~~ of a disputed fee. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution ~~arbitration~~ program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed, and notification of the client is not required. In making reasonable efforts to advise the client of the existence of the fee dispute resolution ~~arbitration~~ program, it is preferable to address a written communication to the client at the client's last known address. If the address of the client is unknown, the lawyer should use reasonable efforts to acquire the current address of the client. Notification is not required in those instances where the State Bar does not have jurisdiction over the fee dispute as set forth in 27 N.C.A.C. 1D, .0702.

[7] If fee dispute resolution ~~arbitration~~ is requested by a client, the lawyer must participate in the resolution ~~arbitration~~ process in good faith. ~~Although the program requires only non-binding arbitration, the arbitration can be made binding with the consent of both parties. Whether the arbitration is binding or not,~~ The State Bar program of fee dispute resolution uses mediation to resolve fee disputes as an alternative to litigation. The lawyer must cooperate with the person who is charged with investigating the dispute and with the person(s) appointed to mediate ~~panel that hears~~ the dispute. Further information on the fee dispute resolution program can be found at 27 N.C.A.C. 1D, .0700, et. seq. The lawyer should fully set forth his or her position and support that position by appropriate documentation. ~~The lawyer is strongly encouraged to abide by the decision of the panel even if the decision is non-binding.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations and Certificate of Organization and the Revised Rules of Professional Conduct of the North Carolina State

Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 21, 2000.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2000.

S/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations and Certificate of Organization and the Revised Rules of Professional Conduct of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of May, 2000.

S/Henry E. Frye
Henry E. Frye
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations and Certificate of Organization and the Revised Rules of Professional Conduct of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 4th day of May, 2000.

S/Freeman, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING TRUST ACCOUNTS

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 21, 2000.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Revised Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, Rule 1.15 regarding the maintenance of trust accounts, be amended as follows:

27 N.C.A.C. Chap. 2, Revised Rules of Professional Conduct

RULE 1.15 PRESERVING THE PROPERTY OF OTHERS

[Existing Rules 1.15-1 and 1.15-2 and the associated official comments are deleted and replaced by the following. Existing Rule 1.15-3 is renumbered as Rule 1.15-4.]

Rule 1.15-1Definitions

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank, savings and loan association, or credit union chartered under North Carolina or federal law.

(b) "Client" denotes a person, firm, or other entity for whom a lawyer performs, or is engaged to perform, any legal services.

(c) "Dedicated trust account" denotes a trust account that is maintained for the sole benefit of a single client or with respect to a single transaction or series of integrated transactions.

(d) "Entrusted property" denotes trust funds, fiduciary funds and other property belonging to someone other than the lawyer which is in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services.

(e) "Fiduciary account" denotes an account, designated as such, maintained by a lawyer solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity.

(f) "Fiduciary funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of professional fiduciary services.

(g) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund transfers.

(h) "General trust account" denotes any trust account other than a dedicated trust account.

(i) "Instrument" denotes an instrument under the Uniform Commercial Code, a payment item or advice accepted for credit by a bank, or a requisition or order for the electronic transfer of funds.

(j) "Legal services" denotes services rendered by a lawyer in a client-lawyer relationship.

(k) "Professional fiduciary services" denotes compensated services (other than legal services) rendered by a lawyer as a trustee, guardian, personal representative of an estate, attorney-in-fact, or escrow agent, or in any other fiduciary role customary to the practice of law.

(l) "Trust account" denotes an account, designated as such, maintained by a lawyer for the deposit of trust funds.

(m) "Trust funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of legal services.

Rule 1.15-2 General Rules

(a) Entrusted Property. All entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, disbursed, and distributed only in accordance with this Rule 1.15.

(b) Deposit of Trust Funds. All trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer.

(c) Deposit of Fiduciary Funds. All fiduciary funds received by or placed under the control of a lawyer shall be promptly deposited in a fiduciary account or a general trust account of the lawyer.

(d) Safekeeping of Other Entrusted Property. A lawyer may also hold entrusted property other than fiduciary funds (such as securities) in a fiduciary account. All entrusted property received by a lawyer that is not deposited in a trust account or fiduciary account (such as a stock certificate) shall be promptly identified, labeled as property of the person or entity for whom it is to be held, and placed

in a safe deposit box or other suitable place of safekeeping. The lawyer shall disclose the location of the property to the client or other person for whom it is held. Any safe deposit box or other place of safekeeping shall be located in this state, unless the lawyer has been otherwise authorized in writing by the client or other person for whom it is held.

(e) Location of Accounts. All trust accounts shall be maintained at a bank in North Carolina except that, with the written consent of the client, a dedicated trust account may be maintained at a bank outside of North Carolina or in a financial institution other than a bank in or outside of North Carolina. A lawyer may maintain a fiduciary account at any bank or other financial institution in or outside of North Carolina selected by the lawyer in the exercise of the lawyer's fiduciary responsibility.

(f) Segregation of Lawyer's Funds. No funds belonging to a lawyer shall be deposited in a trust account or fiduciary account of the lawyer except:

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or

(2) funds belonging in part to a client or other third party and in currently or conditionally to the lawyer.

(g) Mixed Funds Deposited Intact. When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer may withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) Instruments Payable to Lawyer. An instrument drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate the client balance on which instrument is drawn.

(i) No Bearer Instruments. No instrument shall be drawn on a trust account or fiduciary account made payable to cash or bearer.

(j) No Personal Benefit. A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the

lawyer or any person other than the legal or beneficial owner of that property.

(k) Bank Directive. Every lawyer maintaining a trust account or fiduciary account at a bank shall file with the bank a written directive requiring the bank to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in a bank that does not agree to make such reports.

(l) Notification of Receipt. A lawyer shall promptly notify his or her client of the receipt of any entrusted property belonging in whole or in part to the client.

(m) Delivery of Client Property. A lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled.

(n) Property Received as Security. Any entrusted property or document of title delivered to a lawyer as security for the payment of a fee or other obligation to the lawyer shall be held in trust in accordance with this Rule 1.15 and shall be clearly identified as property held as security and not as a completed transfer of beneficial ownership to the lawyer. This provision does not apply to property received by a lawyer on account of fees or other amounts owed to the lawyer at the time of receipt; however, such transfers are subject to the rules governing legal fees or business transactions between a lawyer and client.

(o) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar.

(p) Interest on Deposited Funds. Except as authorized by Rule 1.15-4, any interest earned on a trust account or fiduciary account, less any amounts deducted for bank service charges and taxes, shall belong to the client or other person or entity entitled to the corresponding principal amount. Under no circumstances shall the lawyer be entitled to any interest earned on funds deposited in a trust account or fiduciary account.

(q) Abandoned Property. If entrusted property is unclaimed, the lawyer shall make due inquiry of his or her personnel, records and other sources of information in an effort to determine the identity

and location of the owner of the property. If that effort is successful, the entrusted property shall be promptly transferred to the person or entity to whom it belongs. If the effort is unsuccessful and the provisions of G.S. 116B-18 are satisfied, the property shall be deemed abandoned, and the lawyer shall comply with the requirements of Chapter 116B of the General Statutes concerning the escheat of abandoned property.

Rule 1.15-3 Records and Accountings

(a) Minimum Records for Accounts at Banks. The minimum records required for general trust accounts, dedicated trust accounts and fiduciary accounts maintained at a bank shall consist of the following:

(1) all bank receipts or deposit slips listing the source and date of receipt of all funds deposited in the account, and, in the case of a general trust account, also the name of the client or other person to whom the funds belong;

(2) all canceled checks or other instruments drawn on the account, or printed digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client balance against which each instrument is drawn, provided, that:

(i) digital images must be legible reproductions of the front and back of the original instruments with no more than six instruments per page and no images smaller than 1⅜ x 3 inches; and

(ii) the bank must maintain, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original instruments upon request within a reasonable time;

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account;

(4) all bank statements and other documents received from the bank with respect to the trust account, including, but not limited to notices of return or dishonor of any instrument drawn on the account against insufficient funds;

(5) in the case of a general trust account, a ledger containing a record of receipts and disbursements for each person or entity from whom and for whom funds are received and showing the current balance of funds held in the trust account for each such person or entity; and

(6) any other records required by law to be maintained for the trust account.

(b) Minimum Records for Accounts at Other Financial Institutions. The minimum records required for dedicated trust accounts and fiduciary accounts at financial institutions other than a bank shall consist of the following:

(1) all depository receipts or deposit slips listing the source and date of receipt of all property deposited in the account;

(2) a copy of all checks or other instruments drawn on the account, or printed digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(b)(2);

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the account;

(4) all statements and other documents received from the depository with respect to the account, including, but not limited to notices of return or dishonor of any instrument drawn on the account for insufficient funds; and

(5) any other records required by law to be maintained for the account.

(c) Quarterly Reconciliations of General Trust Accounts. At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank balance for the trust account as a whole.

(d) Accountings for Trust Funds. The lawyer shall render to the client a written accounting of the receipts and disbursements of all trust funds (i) upon the complete disbursement of the trust funds, (ii) at such other times as may be reasonably requested by the client, and (iii) at least annually if the funds are retained for a period of more than one year.

(e) Accountings for Fiduciary Property. Inventories and accountings of fiduciary funds and other entrusted property received in connection with professional fiduciary services shall be rendered to judicial officials or other persons as required by law. If an annual or more frequent accounting is not required by law, a written accounting of all transactions concerning the fiduciary funds and other entrusted property shall be rendered to the beneficial owners,

or their representatives, at least annually and upon the termination of the lawyer's professional fiduciary services.

(f) Minimum Record Keeping Period. A lawyer shall maintain, in accordance with this Rule 1.15, complete and accurate records of all entrusted property received by the lawyer, which records shall be maintained for a period of at least six (6) years from the last transaction to which the records pertain.

(g) Audit by State Bar. The financial records required by this Rule 1.15 shall be subject to audit for cause and to random audit by the North Carolina State Bar; and such records shall be produced for inspection and copying upon request by the State Bar.

Comment

[1] The purpose of a lawyer's trust account or fiduciary account is to segregate the funds belonging to others from those belonging to the lawyer. Money received by a lawyer while providing legal services or otherwise serving as a fiduciary should never be used for personal purposes. Failure to place the funds of others in a trust or fiduciary account can subject the funds to claims of the lawyer's creditors or place the funds in the lawyer's estate in the event of the lawyer's death or disability.

Property Subject to these Rules

[2] Any property belonging to a client or other person or entity that is received by or placed under the control of a lawyer in connection with the lawyer's furnishing of legal services or professional fiduciary services must be handled and maintained in accordance with this Rule 1.15. The minimum records to be maintained for accounts in banks differ from the minimum records to be maintained for accounts in other financial institutions (where permitted), to accommodate brokerage accounts and other accounts with differing reporting practices.

Client Property

[3] Every lawyer who receives funds belonging to a client must maintain a trust account. The general rule is that every receipt of money from a client or for a client, which will be used or delivered on the client's behalf, is held in trust and should be placed in the trust account. All client money received by a lawyer, except that to which the lawyer is immediately entitled, must be deposited in a trust account, including funds for payment of future fees and

expenses. Funds delivered to the lawyer by the client for payment of future fees or expenses should never be used by the lawyer for personal purposes or subjected to the potential claims of the lawyer's creditors.

[4] This rule does not prohibit a lawyer who receives an instrument belonging wholly to a client or a third party from delivering the instrument to the appropriate recipient without first depositing the instrument in the lawyer's trust account.

Property from Professional Fiduciary Service

[5] The phrase "professional fiduciary service," as used in this rule, is service by a lawyer in any one of the various fiduciary roles undertaken by a lawyer that is not, of itself, the practice of law, but is frequently undertaken in conjunction with the practice of law. This includes service as a trustee, guardian, personal representative of an estate, attorney-in-fact, and escrow agent, as well as service in other fiduciary roles "customary to the practice of law."

[6] Property held by a lawyer performing a professional fiduciary service must also be segregated from the lawyer's personal property, properly labeled, and maintained in accordance with the applicable provisions of this rule.

[7] When property is entrusted to a lawyer in connection with a lawyer's representation of a client, this rule applies whether or not the lawyer is compensated for the representation. However, the rule does not apply to property received in connection with a lawyer's uncompensated service as a fiduciary such as a trustee or personal representative of an estate. (Of course, the lawyer's conduct may be governed by the law applicable to fiduciary obligations in general, including a fiduciary's obligation to keep the principal's funds or property separate from the fiduciary's personal funds or property, to avoid self-dealing, and to account for the funds or property accurately and promptly).

[8] Compensation distinguishes professional fiduciary service from a fiduciary role that a lawyer undertakes as a family responsibility, as a courtesy to friends, or for charitable, religious or civic purposes. As used in this rule, "compensated services" means services for which the lawyer obtains or expects to obtain money or any other valuable consideration.

The term does not refer to or include reimbursement for actual out-of-pocket expenses.

Property Excluded from Coverage of Rules

[9] This rule also does not apply when a lawyer is handling money for a business or for a religious, civic, or charitable organization as an officer, employee, or other official regardless of whether the lawyer is compensated for this service. Handling funds while serving in one of these roles does not constitute "professional fiduciary service," and such service is not "customary to the practice of law."

Burden of Proof

[10] When a lawyer is entrusted with property belonging to others and does not comply with these rules, the burden of proof is on the lawyer to establish the capacity in which the lawyer holds the funds and to demonstrate why these rules should not apply.

Prepaid Legal Fees

[11] Whether a fee that is prepaid by the client should be placed in the trust account depends upon the fee arrangement with the client. A retainer fee in its truest sense is a payment by the client for the reservation of the exclusive services of the lawyer, which is not used to pay for the legal services provided by the lawyer and, by agreement of the parties, is nonrefundable upon discharge of the lawyer. It is a payment to which the lawyer is immediately entitled and, therefore, should not be placed in the trust account. A "retainer," which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly or some other basis, is not a payment to which the lawyer is immediately entitled. This is really a security deposit and should be placed in the trust account. As the lawyer earns the fee or bills against the deposit, the funds should be withdrawn from the account. Rule 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated.

Abandoned Property

[12] Should a lawyer need technical assistance concerning the escheat of property to the State of North Carolina, the lawyer should contact the escheat officer at the Office of the North Carolina State Treasurer in Raleigh, North Carolina.

Responsibility for Records and Accountings

[13] It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of entrusted property are maintained in accordance with this rule.

[14] The lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. Therefore, it is essential that the lawyer regularly reconcile a general trust account. This means that, at least once a quarter, the lawyer must reconcile the balance shown for the account in the lawyer's records with the current bank balance. The current bank balance is the balance obtained when subtracting outstanding checks and other withdrawals from the bank statement balance and adding outstanding deposits to the bank statement balance. With regard to trust funds held in any trust account, there is also an affirmative duty to produce a written accounting for the client and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least annually or at more frequent intervals if reasonably requested by the client.

Bank Notice of Overdrafts

[15] A properly maintained trust account should not have any instruments presented against insufficient funds. However, even the best-maintained accounts are subject to inadvertent errors by the bank or the lawyer, which may be easily explained. The reporting requirement should not be burdensome and may help avoid a more serious problem.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 21, 2000.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2000.

S/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of May, 2000.

S/Henry E. Frye
Henry E. Frye
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 4th day of May, 2000.

S/Freeman, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 21, 2000.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, be amended by adding the following section providing for a specialty in workers' compensation law.

27 N.C.A.C. 1D

Section .2700 Certification Standards for the Workers' Compensation Law Specialty

.2701 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates workers' compensation as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

.2702 Definition of Specialty

The specialty of workers' compensation is the practice of law involving the analysis of problems or controversies arising under the North Carolina Workers' Compensation Act (Chapter 97, North Carolina General Statutes) and the litigation of those matters before the North Carolina Industrial Commission.

.2703 Recognition as a Specialist in Workers' Compensation Law

If a lawyer qualifies as a specialist in workers' compensation law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Workers' Compensation Law."

.2704 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in workers' compensation law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

.2705 Standards for Certification as a Specialist in Workers' Compensation Law

Each applicant for certification as a specialist in workers' compensation law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in workers' compensation law:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of workers' compensation law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of workers' compensation law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of workers' compensation law for one year or more may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2705(b)(1) above;

(B) Service as a mediator of workers' compensation cases may be included in the hours necessary to satisfy the requirement set forth in Rule .2705(b)(1) above;

(C) Service as a deputy commissioner or commissioner of the North Carolina Industrial Commission may be substituted for the substantial involvement requirements in Rule .2705(b)(1) above provided

(i) the applicant was a full time deputy commissioner or commissioner throughout the five years prior to application, or

(ii) the applicant was engaged in the private representation of clients for at least one year during the five years immediately preceding the application; and, during this year, the applicant devoted not less than 400 hours to the practice of workers' compensation law. During the remaining four years, the applicant was either engaged in the private representation of clients and devoted an average of at least 500 hours a year to the practice of workers' compensation law, but not less than 400 hours in any one year, or served as a full time deputy commissioner or commissioner of the North Carolina Industrial Commission.

(3) The board may require an applicant to show substantial involvement in workers' compensation law by providing information regarding the applicant's participation, during the five years immediately preceding the date of the application, in activities such as those listed below:

(i) representation as principal counsel of record in complex cases tried to an opinion and award of the North Carolina Industrial Commission;

(ii) representation in occupational disease cases tried to an opinion and award of the North Carolina Industrial Commission; and

(iii) representation in appeals of decisions to the North Carolina Court of Appeals or the North Carolina Supreme Court.

(c) Continuing Legal Education—An applicant must earn no less than thirty-six hours of accredited continuing legal education (CLE) credits in workers' compensation law during the three years preceding application, with not less than six credits earned in any one year. Of the thirty-six hours of CLE, at least eighteen hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evi-

dence; mediation; medical injuries, medicine or anatomy; labor and employment law; and Social Security disability law.

(d) Peer Review—An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers, commissioners or deputy commissioners of the North Carolina Industrial Commission, or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina and have substantial practice or judicial experience in workers' compensation law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned directly to the specialty committee.

(e) Examination—An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of workers' compensation law to justify the representation of special competence to the legal profession and the public. The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

.2706 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2706(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific require-

ments set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2705(b) of this subchapter, provided, however, that a specialist who served on the Industrial Commission as a full time commissioner or deputy commissioner during the five years preceding application may substitute each year of service on the Industrial Commission for one year of practice.

(b) Continuing Legal Education—The specialist must earn no less than sixty hours of accredited continuing legal education credits in workers' compensation law during the five years preceding application. Not less than six credits may be earned in any one year. Of the sixty hours of CLE, at least thirty hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; mediation; medical injuries, medicine or anatomy; labor and employment law; and Social Security disability law.

(c) Peer Review—The specialist must comply with the requirements of Rule .2705(d) of this subchapter.

(d) Time for Application—Application for continued certification shall be made not more than 180 days nor less than ninety days prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2705 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2705 of this subchapter.

.2707 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in workers' compensation law are subject to any general require-

ment, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 21, 2000.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2000.

S/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 4th day of May, 2000.

S/Henry E. Frye
Henry E. Frye
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 4th day of May, 2000.

S/Freeman, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING INTEREST ON TRUST ACCOUNTS

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 21, 2000.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Revised Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, regarding the Interest on Lawyers' Trust Accounts program be amended as follows (additions underlined, deletions interlined):

27 NUCIAICI 2, Revised Rules of Professional Conduct Rule 1.15-~~3~~4—Interest On Lawyers' Trust Accounts

(a) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest-bearing general trust account for those funds of clients which, in the lawyer's good-faith judgment, are nominal in amount or are expected to be held for a short period of time. Funds deposited in a permitted interest bearing general trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a bank. The North Carolina State Bar shall furnish to each lawyer or firm ~~which~~ that elects to participate in the Interest on Lawyers' Trust Account ~~Program~~ (IOLTA) plan, a suitable plaque or scroll indicating participation in the program, which plaque or scroll shall be exhibited in the offlce of the participating lawyer or firm. ~~Such scroll or plaque will contain language substantially as follows:~~

> ~~THIS OFFICE PARTICIPATES IN THE NORTH CAROLINA STATE BAR'S INTEREST ON LAWYERS' TRUST ACCOUNT PROGRAM. Under this program funds received on behalf of a client which are nominal in amount or are expected to be held for a short period of time will be deposited with other similar funds in a joint interest bearing trust account. The interest generated on all funds so deposited will be remitted to the North Carolina State Bar to fund programs for the public's benefit.~~

(b) Lawyers or law firms electing to deposit client funds in a general trust account under the plan shall direct the depository institution:

(1) to remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository insti-

tution, and ~~intangible~~ taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(2) to transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and the rate of interest applied in computing the remittance; and

(3) to transmit to the depository lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance.

(c) The North Carolina State Bar shall periodically deliver to each nonparticipating lawyer a form whereby the lawyer may elect~~, by the ensuing January 31,~~ not to participate in the IOLTA plan. If a lawyer does not so elect within the time provided, the lawyer shall be deemed to have opted to participate in the plan~~as of that date~~ and shall provide to the North Carolina State Bar such information as is required to participate in IOLTA.

(d) A lawyer or law firm participating in the IOLTA plan may terminate participation at any time by notifying the North Carolina State Bar or the IOLTA Board of Trustees. Participation will be terminated as soon as practicable after receipt of written notification from a participating lawyer or firm.

~~(e) Upon being directed to do so by the client, a lawyer may be compelled to invest on behalf of a client in accordance with Rule 1.15-1 those funds not nominal in amount or not expected to be held for a short period of time. Certificates of deposit may be obtained by a lawyer or law firm on some or all of the deposited funds of clients, so long as there is no impairment of the right to withdraw or transfer principal immediately.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 21, 2000.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of August, 2000.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 24th day of August, 2000.

s/Henry E. Frye
Henry E. Frye
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Revised Rules of Professional Conduct of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 24th day of August, 2000.

s/Freeman, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 21, 2000.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions underlined, deletions interlined):

27 N.C.A.C. IB, Section .0 100, Discipline and Disability of Attorneys Rule .0125 Reinstatement

. . .

(b) After suspension

(1) No attorney who has been suspended may have his or her license restored but upon order of the commission or the secretary after the filing of a verified petition as provided herein.

(2) No attorney who has been suspended for a period of 120 days or less is eligible for reinstatement until the expiration of the period of suspension and, in no event, until ~~30~~ 10 days have elapsed from the date of filing the petition for reinstatement. ~~Petitions for reinstatement may be filed no sooner than 90 days prior to the expiration of the period of suspension.~~ No attorney whose license has been suspended for a period of more than 120 days is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 30 days have elapsed from the date of the filing of the petition for reinstatement.

. . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 21, 2000.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of August, 2000.

s/Thomas L. Lunsford II
Thomas L. Lunsford II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 24th day of August, 2000.

s/Henry E. Frye
Henry E. Frye
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 24th day of August, 2000.

s/Freeman, J.
For the Court

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Prosecutor's argument—capital sentencing—accomplice's life sentence—opposition to catchall mitigating circumstance—The prosecutor did not improperly imply in his closing argument in a capital sentencing proceeding that an accomplice's life sentence for the same murder could be treated as a nonstatutory aggravating circumstance because he properly argued in opposition to the "cathchall" mitigating circumstance that the jury should not give any mitigating value to the fact that the accomplice was not sentenced to death. **State v. Roseboro, 536.**

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Prosecutor's argument—capital sentencing—biblical reference—not gross impropriety—The prosecutor's closing argument in a capital sentencing proceeding that it is stated in Deuteronomy that "Cursed is the man who kills his neighbor secretly and all the people shall say amen" and that it was time to sentence defendant to die "and let the people of Bertie County say amen" fell within the permissible practice of urging the jury to act as the voice of the community and was not grossly improper. **State v. Gell, 192.**

Prosecutor's argument—capital sentencing—biblical reference—not impropriety—The prosecutor's closing argument in a capital sentencing proceeding that "From the Old Testament and the Book of Numbers anyone who kills a person is to be put to death as a murderer upon the testimony of witnesses" and that the jury had heard testimony from witnesses supporting its verdict of guilty was not an improper use of religious sentiment. **State v. Gell, 192.**

Prosecutor's argument—capital sentencing—imagining emotions and fear—The trial court did not err by overruling defendant's objection to the prosecutor's statements during the sentencing phase closing argument to "think about

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of determining damages did not affect a substantial right of defendants, and defendants were thus not required to immediately appeal the order before proceeding to the damages trial and did not waive their right to appeal after the final judgment by foregoing an interlocutory appeal. **Dep't of Transp. v. Rowe, 172.**

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Attorney-client privilege—prior inconsistent statement—The trial court did not improperly permit a State's witness to assert her attorney-client privilege with regard to a prior inconsistent statement she made in conference with her attorney where the record reveals that defendant was specifically allowed to question the witness on the subject matter of her previous statement, her assertion of the attorney-client privilege did not prevent defendant from cross-examining the witness to ask her whether she had made the prior inconsistent statement, and there is no indication in the record that defendant desired to pursue any other aspect of the prior statement. **State v. Gell, 192.**

Bad character—failure to object—not plain error—Testimony that defendant told a witness that he used to drown puppies and kittens in a peanut sack and that he saw a farmer's dog eat peanuts contaminated with a pesticide and that it did not take much to make the dog sick was not improperly admitted in a prosecution of defendant for first-degree murder by poisoning of his six-year-old daughter and attempted murder of his ex-girlfriend and other two children, even if the testimony was used to show defendant's bad character, where defendant failed to object to this testimony at trial and failed to show plain error in light of the overwhelming evidence of defendant's guilt. **State v. Smith, 251.**

Corroboration—prior statements—slight variations—The trial court did not err by allowing an SBI agent to read two statements given to him by a State's witness for the purpose of corroborating the trial testimony of the witness, although the statements contained slight variations and some additional information, where the statements were substantially similar to and tended to strengthen and confirm the trial testimony of the witness. **State v. Gell, 192.**

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First-degree murder—second-degree instruction not required—A Court of Appeals decision that the trial court erred in a first-degree murder prosecution by failing to instruct the jury on the lesser-included offense of second-degree murder is reversed for the reason stated in the dissenting opinion in the Court of Appeals that there was no evidence to support a finding by the jury that the murder was not premeditated and deliberate. **State v. Cintron, 39.**

First-degree murder—voluntary intoxication—instruction not warranted—The trial court did not err by refusing to give defendant's requested instruction on "drugged condition," or voluntary intoxication, with regard to a first-degree murder charge in that defendant failed to present sufficient evidence from which a jury could conclude that defendant was so intoxicated that he was "utterly incapable" of forming the specific intent to commit first-degree murder. **State v. Cheek, 48.**

First-degree murder by poison—attempted first-degree murder by poison—involuntary manslaughter instruction not warranted—Defendant was not entitled to an instruction on the lesser-included offense of involuntary manslaughter in a prosecution for first-degree murder by means of poison and attempted first-degree murder by means of poison. **State v. Smith, 251.**

Instructions—malice—deliberately bent on mischief—The trial court did not err in its definition of "deliberately bent on mischief" as used in its instruction on malice in a prosecution for second-degree murders arising from an automobile accident by failing to convey the appropriate concepts of deliberateness and intention. **State v. Rich, 386.**

Instructions—malice—deliberately bent on mischief—The trial court's instruction on the meaning of "deliberately bent on mischief" in a prosecution for second-degree murders arising from an automobile accident could not have caused the jury to confuse malice with culpable negligence where the instructions clearly required a finding of malice sufficient to support second-degree murder if the jury concluded that defendant's actions were such as to be inherently dangerous to human life and were done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. **State v. Rich, 386.**

Instructions—malice—recklessness of consequences—The trial court's instruction allowing the jury in a second-degree murder case to find malice based on "recklessness of consequences" did not lower the culpability level required to convict a defendant of second-degree murder to a level of culpable negligence. **State v. Rich, 386.**

Instructions—malice—second-degree murder—automobile accident—attitudinal circumstances—The trial court did not err in a prosecution for second-degree murder by instructing the jury that malice may be present if only one of the attitudinal circumstances constituting malice—wickedness of disposition,

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menced on 21 June 1992 when a pressure vessel ruptured and a chemical used in the production process leaked into the dye and that the leakage continued until discovery on 31 August 1992, the rupture of the pressure vessel caused all of the ensuing property damage and there was but one "occurrence" that took place when the leak commenced on 21 June for purposes of comprehensive general liability policies insuring the designer-seller and the fabricator of the pressure vessel. **Gaston County Dyeing Machine Co. v. Northfield Ins. Co., 293.**

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Censure—conducting business outside of court—A district court judge was censured for knowingly convicting a defendant of careless and reckless driving even though defendant had not been charged with that offense and for taking a guilty plea in a hallway. The judge should have known that careless and reckless driving is not a lesser included offense of DWI and conducting business outside of open court will not be condoned. Respondent overstepped his authority, engaged in misconduct, and brought disrepute to the judiciary. **In re Brown, 601.**

JURY

Defendant's conviction of another murder—knowledge by prospective jurors—refusal to excuse—The trial court did not abuse its discretion in refusing to excuse five prospective jurors for cause in this first-degree murder prosecution because they had some knowledge, through news media accounts, of defendant's conviction of another murder which was connected to the murder of this victim by a common plan or scheme where each of the five jurors said that he or she could set aside knowledge of defendant's prior murder conviction and decide guilt or innocence based solely on the evidence presented at trial. **State v. Sokolowski, 137.**

Selection—capital sentencing—challenge for cause—failure to preserve issue—The trial court did not err in a capital sentencing proceeding by failing to excuse for cause a prospective juror who expressed strong concerns that the court system was failing but also stated those opinions would not keep him from being fair and impartial, because although defendant's request for additional peremptory challenges was denied, he did not expressly renew his earlier challenge for cause of this juror as required by N.C.G.S. § 15A-1214(h). **State v. Roseboro, 536.**

Selection—capital sentencing—challenge for cause—failure to preserve issue—The trial court did not err in a capital sentencing proceeding by failing to excuse for cause four prospective jurors who were allegedly tainted by the remarks of two pro-death penalty prospective jurors during voir dire because although defendant renewed his challenges to the jurors at a later time, he failed to renew them at a time when he had exhausted his peremptory challenges and failed to renew each of his previously denied challenges for cause as required by N.C.G.S. § 15A-1214(h). **State v. Roseboro, 536.**

Selection—capital sentencing—meaning of life imprisonment—The trial court did not err in a capital resentencing proceeding by instructing a prospective juror in the presence of other jurors that life imprisonment means imprison-

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Driving while impaired—checkpoint avoidance—criminal activity—reasonable and articulable suspicion—An officer may monitor a checkpoint's entrance for vehicles whose drivers may be attempting to avoid the checkpoint and may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away. **State v. Foreman, 627.**

Driving while impaired—checkpoint avoidance—investigatory stop—minimal intrusion—Even though the Court of Appeals incorrectly concluded that a legal turn away from a DWI checkpoint upon entering the checkpoint's perimeters cannot justify an investigatory stop, the Court of Appeals did not err in upholding defendant's DWI conviction based on the evidence derived from the police officer's observations. **State v. Foreman, 627.**

SENTENCING

Capital—aggravating circumstances—course of robbery and kidnapping—The trial court did not err in submitting two separate (e)(5) aggravating circumstances, that the murder was committed during the course of a robbery and that it was committed during the course of a kidnapping. **State v. Cheek, 48.**

Capital—aggravating circumstances—evidence overlapping—considered separately—The trial court did not commit plain error in a capital sentencing proceeding by instructing the jury that it could consider as separate aggravating circumstances whether the murder was committed in the course of a burglary and whether the murder was committed in the course of a rape as set forth in N.C.G.S. § 15A-2000(e)(5). **State v. Roseboro, 536.**

Capital—aggravating circumstances—heinous, atrocious, or cruel—Medical evidence supported the trial court's submission of the (e)(9) aggravating circumstance that the murder of a cab drive was especially heinous, atrocious, or cruel where the cause of death was carbon monoxide poisoning from a fire, and the victim was alive when her taxicab was set on fire and was aware of her impending death. **State v. Cheek, 48.**

Capital—aggravating circumstances—pecuniary gain—pattern jury instruction—Even though defendant failed to object at trial, the trial court did not commit plain error in its instruction on the N.C.G.S. § 15A-2000(e)(6) pecuniary gain aggravating circumstance as to three victims in a capital sentencing proceeding involving defendant's convictions for nine counts of first-degree murder. **State v. Wallace, 481.**

Capital—aggravating circumstances—pecuniary gain—sufficiency of evidence—The trial court did not err by submitting the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance, that the capital felony was committed for pecuniary gain, for the murder of one of the victims. **State v. Wallace, 481.**

Capital—constitutionality of statute—The North Carolina death penalty statute, N.C.G.S. § 15A-2000, is constitutional. **State v. Gell, 192.**

Capital—death penalty not disproportionate—A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant was convicted on the basis of premeditation and deliberation,

SENTENCING—Continued

SENTENCING—Continued

SENTENCING—Continued

Capital—peremptory instructions—statutory mitigating circumstances—controverted evidence—The trial court did not err in a capital sentencing proceeding by failing to give a peremptory instruction on the N.C.G.S. § 15A-2000(f)(6) 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, because the record contains conflicting evidence. **State v. Roseboro, 536.**

Capital—peremptory instructions—statutory mitigating circumstances—controverted evidence—The trial court did not err by denying defendant's motion for a peremptory instruction regarding the two statutory mitigating circumstances of N.C.G.S. § 15A-2000(f)(2), a capital felony committed while defendant was under the influence of mental or emotional disturbance, and N.C.G.S. § 15A-2000(f)(6), the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, in a capital sentencing proceeding involving defendant's convictions for nine counts of first-degree murder because the expert testimony upon which defendant relies was controverted. **State v. Wallace, 481.**

Capital—refusal to declare hung jury—failure to give statutory instruction—The trial court did not err by refusing to declare the jury deadlocked or "hung" on a sentencing recommendation in a capital sentencing proceeding after the jury had deliberated nine hours without reaching a decision on Issue Three. Nor did the trial court commit plain error by failing to instruct the jury on the failure to reach a verdict or on each juror's individual responsibility as set out in N.C.G.S. § 15A-1235. **State v. Cheek, 48.**

Capital—requested instructions—mitigating circumstances—mental impairments—combined instruction—The trial court did not err in a capital sentencing proceeding by denying defendant's request for separate instructions on each of his three alleged mental impairments and by giving a single instruction combining each of the mental impairments into a single mitigating circumstance. **State v. Roseboro, 536.**

Capital—requested instructions—nonstatutory mitigating circumstances—controverted evidence—The trial court did not err in a capital sentencing proceeding by failing to give an instruction on the nonstatutory mitigating circumstance that defendant's criminal conduct was the result of circumstances unlikely to recur. **State v. Roseboro, 536.**

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